No. 22-31

In the Supreme Court of the United States

STATE OF ARIZONA,

Petitioner,

v.

BRIAN MECINAS; ET AL. AND KATIE HOBBS, THE ARIZONA SECRETARY OF STATE,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF TO ARIZONA SECRETARY OF STATE KATIE HOBBS'S OPPOSITION

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INTRODUCTION

After the Ninth Circuit issued its opinion in *Mecinas v. Hobbs,* 30 F. 4th 890 (9th Cir. 2022) (the "Opinion"), the State—viewing the Opinion as bad law and bad for the State—moved to intervene to seek en banc review of the Opinion and, if necessary, this Court's review. Ten days later, Secretary Hobbs entered into a secret agreement with the Democratic National Committee ("DNC") in which they agreed to dismiss the district court case—but without prejudice—and she explicitly agreed not to seek vacatur of or otherwise challenge the adverse Opinion.

Secretary Hobbs (currently, governor-elect Hobbs) now argues that the agreement to dismiss the district court case made the case moot and that the Opinion is thus "locked in." This Court, the Secretary argues, *lacks the power* to undo what she and the DNC collusively achieved: namely, entrenching an unfavorable Ninth Circuit Opinion and making it impossible for the State to challenge that Opinion.

It would be extraordinary if private parties could engineer such a result without this Court having a say in the matter, and in fact the law is otherwise. Specifically, 28 U.S.C. § 2106 gives this Court the express power to vacate the Opinion. Yet the Secretary's lengthy brief in opposition fails to even mention this statute.

In *Arizonans for Official English v. Arizona,* 520 U.S. 43 (1997), the State—in language that applies equally here—urged that its plea for vacatur in that

case was "compelling" given the "extraordinary course" of the litigation. As the State there said:

"It would certainly be a strange doctrine that would permit a plaintiff to obtain a favorable judgment, take voluntary action [that] moot[s] the dispute, and then retain the [benefit of the] judgment." 520 U.S. at 75.

To which this Court, after quoting the statement, gave a two-word response: "We agree." *Id.* The Court then ordered vacatur of the Ninth Circuit's opinion. The Court should do the same here.

The Secretary's brief in opposition (the "Hobbs BIO") claims that the State's petition for certiorari wants to resurrect a "dead suit" for the sole purpose of killing it "differently." Hobbs BIO at 2. In the Secretary's view, the State "simply has no concrete interest that has been left unvindicated" in the matter. *Id.* at 3. But the underlying lawsuit is not "dead"; it was merely dismissed "without prejudice," so the DNC can resurrect the case at will.

Moreover, the Ninth Circuit Opinion the "dead" case spawned—holding that the DNC's challenge to the State's Ballot Order statute is justiciable and that the DNC has standing to challenge it—lives on, so if the DNC does refile the suit, the DNC will in essence start on second base.

And contrary to the Hobbs BIO, the facts here don't present "an enormously complex jurisdictional morass" to the Court. The case instead fits a well-known pattern: when a case becomes moot while on

appeal, the "established practice" is to "reverse or vacate the judgment below and remand with a direction to dismiss." *Munsingwear*, 340 U.S. at 39.

The Hobbs BIO's main argument for rejecting review is that the Court lacks jurisdiction to deal with a moot case. That argument misses the mark, though, because as the Court has said many times, when a suit "becomes moot pending appeal," 28 U.S.C. § 2106 gives the Court authority to vacate the judgment below. *Camreta v. Greene,* 563 U.S. 692, 712 (2011). And the equitable remedy of vacatur ensures that where, as here, "those who have been prevented from obtaining the review to which they are entitled [are] not … treated as if there had been a review." *Id.* (quoting *Munsingwear,* 340 U.S. at 40).

Moreover, when a case become moot while on appeal, the Court can grant certiorari and direct vacatur without "definitively resolv[ing] whether the party seeking certiorari has Standing under Article III to pursue appellate review." *Arizonans,* 520 U.S. at 66 (ordering vacatur without resolving "grave doubts" about petitioners' appellate standing).

Vacatur is an equitable remedy, and the "point of vacatur" is to "prevent an unreviewable decision" from "spawning any legal consequences," so that no party is harmed by what the Court has called a "preliminary adjudication." *Camreta,* 563 U.S. at 713 (citing *Munsingwear*).

Because the unreviewed and unreviewable Ninth Circuit Opinion is now established precedent that

binds the State both in the Arizona district court and in the Ninth Circuit, the State has suffered a concrete, ongoing, injury. The Court should allow the State to intervene as a party, then follow the Court's "established practice" in these circumstances of ordering vacatur of the Opinion. *See, U.S. v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

ARGUMENT

I. The Court Has Jurisdiction to Grant Certiorari and Direct Vacatur of the Opinion.

The Secretary argues that, because the State lacks "appellate standing" to challenge the Opinion, "this Court lacks jurisdiction to consider the State's request to vacate it." Hobbs BIO at 14. The Secretary further argues that "the Court independently lacks jurisdiction to review the denial of the State's intervention motion because that motion is moot." *Id.* The Secretary is wrong on both points.

A. Under 28 U.S.C. § 2106, the Court has the power to vacate a lower court's judgment, and there are no Constitutional limitations on such power.

As set forth in 28 U.S.C. § 2106, the "Supreme Court … may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review," and may also remand the case and "direct the entry of such

appropriate judgment, decree, or order … to be had as may be just under the circumstances." When a case has become moot while on appeal, as well as in other circumstances, the Court has used that power to grant certiorari, vacate the judgment below, and remand—sometimes known as a "GVR." *See Lawrence on Behalf of Lawrence v. Chater,* 516 U.S. 163, 166 (1996). The Court has interpreted that statute to give the Court a "broad power to GVR." *Id.*

Moreover, the Court has used that power regardless of a petitioner's Article III standing. As the Court has held, neither the Constitution nor federal laws impose any limitations on its power to GVR. *Id.* While Article III limits the Court's appellate jurisdiction to issues of "[federal] Law and Fact," Article III, § 1 leaves to Congress the power to "ordain and establish … inferior courts" and to make "Exceptions" and "regulations" "limiting and controlling" the Court's appellate jurisdiction. *Id.* And because, in 28 U.S.C. § 2106, "the Congress appears to have authorized such action," this Court has determined it has the power to GVR in "any case raising a federal issue that is properly before us in our appellate capacity." *Id.*

The State having followed the required rules and procedures, this case is properly before the Court. The State first moved in the Ninth Circuit to intervene, and concurrently requested en banc review of the Opinion. Upon learning that Secretary Hobbs and the DNC were trying to dismiss the district court case, the State filed an alternative motion to vacate the Opinion. The Ninth Circuit denied those motions, and—in a curious echo of *Cameron v. EMW Women's*

Surgical Center, P.S.C., 142 S. Ct. 1002 (2022)—refused even to allow the State to file a petition for rehearing en banc. So, just as in *EMW,* the State filed a timely petition for certiorari.

The Court's prior decisions have underscored its authority to vacate a lower court judgment when a case has become moot. As the Court said in *Munsingwear*, it is "the established practice of the Court," when a case has become moot, "to reverse or vacate the judgment below and remand with a direction to dismiss." 340 U.S. at 39. Indeed, that is the "duty of the appellate court," and the Court can do so because, under 28 U.S.C. § 2106, the Court's "supervisory power over the judgment of the lower federal courts is a broad one." *Id.* 340 U.S. at 40.

Moreover, granting vacatur in such circumstances has the salutary effect of eliminating a judgment, "review of which was prevented by happenstance." *Id.* And when that procedure is followed, "the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary." *Id.* The procedure is thus "commonly used" to "prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *Id.,* 340 U.S. at 41.

As *Munsingwear* indicates—and contrary to the Secretary—a party is unfairly prejudiced when it has no ability to pursue further review of an opinion it believes to be wrong. Looking at the equities, "those who have been prevented from obtaining the review to which they are entitled should not be treated as if

there had been a review." *Munsingwear,* 340 U.S. at 39.

Subsequent cases have underscored the principle. In *Iron Arrow Honor Society v. Heckler,* 464 U.S. 67, 73 (1983), for example, the Court determined that the underlying case had become moot—so the Court couldn't decide its merits—but that didn't prevent the Court from vacating the Fifth Circuit's opinion and remanding to dismiss the case as moot.

In *U.S. Bancorp Mort. Co. v. Bonner Mall Partnership,* 513 U.S. 18, 21 (1994) the Court further discussed 28 U.S.C § 2106, which it called the "statute that supplies the power of vacatur." The Court acknowledged that the statute didn't authorize it to decide the "*merits* of a legal question not posed in an Article III case or controversy." *Id.* (emphasis added). Nonetheless, "reason and authority refute the quite different notion" that the Court "may not take any action" with regard to a case where Article III requirements "no longer are (or indeed never were) met." *Id.* "Article III," the Court emphasized, "does not prescribe such paralysis." *Id.* So when a case has become moot while awaiting review, "this Court may not consider its merits, but may make such disposition of the whole case as justice may require." *Id.*

Similarly, in *Alvarez v. Smith,* 558 U.S. 87, 94 (2009), the Court ordered vacatur of the Court of Appeals opinion, noting that, in applying the "flexible" 28 U.S.C. § 2106, "we normally do vacate the lower court judgment in a moot case because doing so clears the path for future relitigation of the issues between

the parties," without prejudicing anyone "by a decision which "was only preliminary," citing *Munsingwear*. *Id.* (cleaned up).

In *Camreta,* the Court—having determined that the case was moot and citing its power under 28 U.S.C. § 2601—again ordered vacatur of the moot part of the Court of Appeals' opinion. As the Court explained, the "equitable remedy of vacatur ensures that those who have been prevented from obtaining the review to which they are entitled are not … treated as if there had been a review." 563 U.S. at 712 (cleaned up). The "point of vacatur," the Court emphasized, 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.'" 563 U.S. at 713 (cleaned up).

These cases all make clear that the Court has the power to order vacatur, regardless of an alleged lack of Article III standing.

In any event, the State certainly had appellate standing to contest the Ninth Circuit's Opinion rendered against the State's interest—just as the Secretary herself would have had standing to further challenge that Opinion. Suppose, for example, that after the Opinion was issued, the DNC *unilaterally* moved to dismiss the district court action, without prejudice. Under the Secretary's argument, that unilateral act would by itself deprive the Secretary—and the State—of appellate standing, and thus bar them from seeking further review or vacatur of the Opinion. The Secretary cites no case law supporting

such a novel argument, and it's plainly wrong. Federal Rule of Civil Procedure 35 gives a party the right to seek rehearing or rehearing en banc, and 28 U.S.C. § 1254(1) gives a party the right to petition for a writ of certiorari.

The Secretary also improbably suggests that allowing the State's request for vacatur here would "flood the courts of appeals and this Court" with "motions to intervene and petition for rehearing and certiorari." Hobbs BIO at 2. The Court's prior GVRs, however, do not seem to have brought about such a flood. And we doubt there will be many cases involving a secretary of state who secretly enters into an agreement with a plaintiff to dismiss a case without prejudice and agrees not to seek further review or vacatur of the court of appeals' adverse opinion in the matter. "The lady doth protest too much, methinks." *Hamlet,* Act III, Scene II.

B. The Court has the power to allow intervention for the purpose of vacating the Opinion.

Contrary to the Hobbs BIO, the Secretary's agreement with the DNC to dismiss the district court suit—made *after* the State moved to intervene—did not moot the intervention motion. The State still retained a vital interest in either challenging the Ninth Circuit Opinion or seeking vacatur of that Opinion. And the Secretary cites no authority from this Court supporting her argument.

Moreover, the Secretary admits that the Courts of Appeal differ on the issue, with the Ninth Circuit permitting such intervention. *DBSI/TRI IV Ltd. P'ship v. United States,* 465 F.3d 1031, 1037 (9th Cir. 2006). As that court explained, although the district court entered final judgment in the underlying case during the pendency of the appeal, "the intervention controversy is still alive because, if it were concluded on appeal that the district court had erred in denying the intervention motion," then "the applicant would have standing to appeal the district court's judgment." *Id.*

The Secretary's further argument that the dismissal of the district court case was a "win" that provided the relief sought by the State is absurd. To accept the argument that the State's objectives were really to dismiss the underlying case without prejudice and to preserve the Ninth Circuit's adverse Opinion would require the Court "to exhibit a naivete from which ordinary citizens are free." *Dep't of Commerce v. New York,* 139 S. Ct. 2551, 2575 (2019). The State's petition here makes clear those were not the State's goals.

In any event, as discussed above, the Court has power to order vacatur under 28 U.S.C. § 2106 regardless of the outcome of the intervention motion or other factors.

II. The Court Should Follow Its Established Practice and Order Vacatur.

The Secretary also argues that the Court should deny review because the petition supposedly "raises complex threshold questions" that, in the Secretary's view, a grant of certiorari "would either implicitly resolve or require the Court to explicitly address." Hobbs BIO at 23. But the State's petition raises no such complex issues, and can be quite simply addressed with the Court's "established practice" of vacating an appellate opinion when—through no fault of the petitioner—the underlying case became moot while on appeal, thus frustrating the State's opportunity to challenge that Opinion. The Court can accomplish such with a simple GVR order stating that the State's petition is granted, the Ninth Circuit Opinion is vacated, and the case is remanded to the Ninth Circuit with instructions to dismiss as moot.

For all the reasons discussed above, the Court has authority under 28 U.S.C. § 2601 to order vacatur of the Opinion, and there are no constitutional limitations to that authority. The Court need not resolve the other issues discussed in the Hobbs BIO.

The Secretary also argues that the Ninth Circuit's denial of intervention was correct and not in violation of precedent from the Ninth Circuit or this Court. Because the State has adequately addressed that argument in its reply to the DNC's BIO, we will not burden the Court with a repeat of those arguments.

III. Vacatur Is The Proper Remedy.

Finally, the Secretary argues that "there is no basis" for *Munsingwear* vacatur." Hobbs BIO at 31. As discussed above, the established practice of the Court is to grant vacatur when a case becomes moot while on appeal and the mootness was not caused by the acts of the party seeking vacatur.

The BIO's argument that vacatur is "inappropriate in these circumstances," wholly ignores the repeated statements by this Court that vacatur is generally the "established practice." Even the *Bancorp Mortgage* case acknowledges that "mootness by happenstance provides sufficient reason to vacate." 513 U.S. 25, n. 3. Despite the Secretary's protests, doing so would hardly be "sorely unfair" to the Secretary and the DNC.

Respondents colluded to make this case moot. And under long established precedent, the State, "in fairness," should not be "forced to acquiesce" in the adverse Opinion of which the State sought review but was "frustrated" in that quest when Respondents' actions mooted the case.

CONCLUSION

Respondents' deliberate attempt to make the case moot harmed the State by depriving the State of its right to seek full appellate review of the Opinion and instead entrenched adverse precedent that the DNC can exploit again at will. And because the case became moot while on appeal, this Court's established practice

is to vacate the judgment below. The State should be allowed to intervene as a party, and the Court should vacate the Opinion.

November 21, 2022

Respectfully submitted,

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