IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

COALITION FOR WORKFORCE INNOVATION, *et al.*,	)	
	)	**Case No. 22-40316**
Plaintiffs-Appellees,	)	
	)	
vs.	)	
	)	
JULIE SU, *et al.*,	)	
	)	
Defendants-Appellants,	)	

PLAINTIFFS-APPELLEES' RESPONSE IN OPPOSITION TO DEFENDANTS-APPELLANTS' MOTION FOR *MUNSINGWEAR* VACATUR OF THE DISTRICT COURT'S FINAL JUDGMENT

Plaintiffs-Appellees the Coalition for Workforce Innovation ("CWI"), Associated Builders and Contractors of Southeast Texas, Inc. ("ABCST"), Associated Builders and Contractors, Inc. ("ABC"), and the Financial Services Institute, Inc. ("FSI") (collectively the "Associations") hereby oppose the government's motion to vacate the final judgment of the United States District Court for the Eastern District of Texas, Beaumont Division ("District Court") in this case for purported mootness. ECF 60.

Vacatur of a court decision is an extraordinary measure, narrowly permitted in the *Munsingwear* case only under circumstances that are not present here. By contrast, remand is customary in the present circumstances, *Biden v. Texas*, 142 S.

Ct. 2528 (2022); and the Department has *conceded* the Court "has discretion to remand." ECF 63 at 2. The Court should therefore grant the Associations' pending motion to remand (ECF 59), and should deny the Department's misplaced effort to expunge the District Court decision (ECF 60).

STATEMENT OF FACTS

The facts of this matter are fully set forth in the Associations' motion for remand, ECF No. 59, and will only be briefly summarized here to avoid unnecessary repetition.

The Associations initiated their action in the District Court in order to challenge the Department's unlawful effort to delay and then withdraw the rule entitled "Employee or Independent Contractor Classification Under the Fair Labor Standards Act" (the "2021 Independent Contractor Rule"), 86 Fed. Reg. 1,168 (Jan. 7, 2021). *See Coalition for Workforce Innovation v. Walsh*, 2022 U.S. Dist. LEXIS 68401, at *5-6 (E.D. Tex. Mar. 14, 2022) [hereinafter *CWI*]. In a 40+ page opinion, the District Court subsequently held that the Department indeed violated the APA in issuing the Delay Rule, *see id.* at *24-30, and the Withdrawal Rule, *see id.* at *31-49. Specifically, the District Court faulted the Department for failing to consider and address "the lack of clarity of the economic realities test and the need for regulatory certainty" when it withdrew the 2021 Independent Contractor Rule. *See id.* at *46. As a remedy, the District Court vacated the Delay Rule and the Withdrawal Rule

and concluded that the 2021 Independent Contractor Rule went into effect March 8, 2021 and remained in effect thereafter. *See id.* at *49.

The Department appealed to this Court on May 16, 2022. On June 10, 2022, this Court granted in part the Department's unopposed motion to stay proceedings in the case pending the completion of a rulemaking, which it claimed would address matters at issue in this appeal, and stayed proceedings for 180 days. (*See* ECF No. 27, Order Dated June 10, 2022). At the request of the Department, the Court has subsequently extended this stay on several occasions, most recently through February 6, 2024.

On October 13, 2022, the Department issued a new proposed rule entitled "Employee or Independent Contractor Classification Under the Fair Labor Standards Act," 87 Fed. Reg. 62,218. In the proposed rule, the Department announced its renewed intent to withdraw the 2021 Independent Contractor Rule, while purporting to comply with the District Court's order to properly justify such a withdrawal.

On January 10, 2024, the Department published the 2024 Rule. Like the Withdrawal Rule that currently is before this Court, the 2024 Rule purports to rescind the 2021 Independent Contractor Rule—and for essentially the same reasons that the District Court found to be insufficient previously. *See* 89 Fed. Reg. 1,639. Just as in the unlawful 2021 Withdrawal Rule, the Department's 2024 Rule has again "concluded that the [2021] Independent Contractor Rule did not provide clarity to

the economic realities test." *CWI*, 2022 U.S. Dist. LEXIS 68401, at *44. Indeed, the Department has acknowledged in the 2024 Rule that its claimed justification for withdrawing the 2021 Independent Contractor Rule overlaps with the previous Withdrawal Rule, using the same reasoning which was declared invalid by the District Court. *Id.; compare CWI* at *44 with 89 Fed. Reg. at 1,647 and 1,654.

On January 11, 2024, the Associations filed their pending Motion to Lift Stay and Remand Case for Further Proceedings, in which the Associations have asked this Court to remand this matter to the District Court and instruct that court to determine whether the Department violated the APA by withdrawing the 2021 Rule and promulgating the 2024 Rule in its place. ECF 59.

On January 12, 2024, the Department filed its motion claiming that this appeal has become moot, and asking this Court to vacate the District Court's prior ruling invalidating the Department's rescission of the 2021 Independent Contractor Rule. ECF 60. The Department relies almost exclusively on the inapposite Supreme Court decision in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). The Associations oppose the Department's effort to vacate the reasoned decision of the District Court, as well as the Department's unsupported claim of mootness.

ARGUMENT

The Department's motion to vacate suffers from two related, fatal flaws. First, under well-settled Supreme Court and Fifth Circuit precedent, this case is not moot, because it results from the agency's voluntary action and does not prevent the agency's unlawful action from re-occurring. Indeed, as described in the Associations' Motion to Remand (ECF 59), the 2024 Rule attempts to repeal the 2021 Rule, just like the Withdrawal Rule, and repeats the errors that led the District Court to hold that the Department had violated the APA.

Second, even if the case were moot, vacatur is an extraordinary remedy that the Supreme Court has been clear should not be wielded lightly. In particular, vacatur is inappropriate because the case did not become moot through "happenstance" or for reasons outside the Department's control. *Munsingwear*, 340 U.S. at 40; *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 24-25 (1984). Rather, any claimed mootness is the direct result of the Department's own concerted, voluntary action, precluding vacatur as contrary to the public interest. *Id*.

I. Vacatur is Inappropriate Because This Case is Not Moot.

At the outset, the Department is mistaken in claiming that its adoption of the 2024 Rule has rendered the Associations' challenge to the Department's earlier attempted rescission of the 2021 Rule moot. Under well-established Supreme Court and Fifth Circuit precedent, this is simply not the case.

It is “well settled” that “a defendant’s voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.” *Northeastern Florida Contractors v. Jacksonville*, 508 U.S. 656, 662 (1993) (citing *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 289 (1982)). In *Northeastern Florida*, plaintiff contractors challenged the City of Jacksonville’s set-aside of certain city contracts for minority-owned enterprises. *See id.* at 659. The district court in that case granted summary judgment to the contractors; the Court of Appeals vacated the lower court’s judgment, and the Supreme Court granted certiorari. *See id.* at 660. Prior to the Court hearing the case, the City of Jacksonville repealed and replaced the challenged ordinance with a modified ordinance which “differ[ed] in certain respects” from the original, and moved to dismiss the case as moot. *Id.* at 661-662.

Relying on *City of Mesquite*, the Supreme Court held that the repeal of the challenged ordinance did not render the case moot because “repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court’s judgement were vacated.” *Id.* at 662 (citing *City of Mesquite*, 455 U.S. at 289). As the Court explained, it did not “matter that the new ordinance differs in certain respects from the old one. *City of Mesquite* does not stand for the proposition that it is only the possibility that the selfsame statute will be enacted that prevents a case from being moot; if that were the rule, a defendant could

moot a case by repealing the challenged statute and replacing it with one that differs only in some insignificant respect." *Id.*

This Court has likewise rejected the proposition that repeal of a challenged rule and its replacement with an equally troublesome one does not render the original challenge moot. *See Opulent Life Church v. City of Holly Springs*, 697 F.3d 279 (5th Cir. 2012). In that case the City repealed a challenged zoning ordinance limiting location of churches in the town square and replaced it with a new ordinance banning churches outright. This Court found that substitution of the new ordinance to accomplish the same unlawful objective ("doubling down" in this Court's words) did not moot statutory and constitutional challenges to the original ordinance and remanded to the district court to make further determinations. 697 F.3d at 286.

The same result should occur here. After the Department's first effort to rescind the 2021 Rule was invalidated by the District Court, the Department promulgated the 2024 Rule to do the very same thing, differing only insofar as the 2024 Rule purports to adopt a different method of analysis. The Court should reject the Department's effort to "re-do" that which the District Court said it was not lawfully allowed to do in the first instance.

Indeed, as the Associations more fully set forth in their Motion to Remand, when an agency rescinds a prior rule without complying with the APA, and then tries a second time to rescind the same prior rule, remand to the district court is called

for to determine whether the second attempt at rescission complies with the APA. *See Biden*, 142 S. Ct. at 2548; *see also Newton-Nations v. Betlach*, 660 F.3d 370, 383 (9th Cir. 2011) (after new agency actions, "remand[ing] this issue to the district court for a determination of whether there is an ongoing basis for this claim.").

The decision in *Biden* applied longstanding principles of judicial review. In prior cases involving a mid-litigation "change in the legal framework governing the case," where "the plaintiff may have some residual claim under the new framework that was understandably not asserted previously," the Supreme Court has repeatedly stated that the best practice is to "remand for further proceedings in which the parties may, if necessary, amend their pleadings or develop the record more fully." *New York State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525, 1526 (2020) (per curiam) (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 482 (1990)). Similarly, this Court has recognized that a government defendant's action "will not moot the case if the 'government repeals the challenged action and replaces it with something substantially similar'" that does not eliminate the gravamen of the complaint. *Franciscan All., Inc. v. Becerra*, 47 F.4th 368, 374 (5th Cir. 2022); *see also Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 286 (5th Cir. 2012) (holding that a city's repeal of a challenged ordinance did not moot the case because it repeated the same injury as the old ordinance).

Here, the Department has acted in a manner remarkably similar to the

government in *Biden* and other prior cases, and the same judicial procedure should apply. Having been found by the District Court to have violated the APA in attempting to withdraw the 2021 Independent Contractor Rule, *see CWI*, 2022 U.S. Dist. LEXIS 68401, at *3-5, *49, the Department has issued a new rule which purports to accomplish the same objective. Under the Supreme Court's holding in *Biden*, the case should be remanded to the District Court for that court to consider on remand whether the Department's new rule complies with the APA. *See Biden*, 142 S. Ct. at 2548.

For all of these reasons, because the pending challenge to the Department's withdrawal rules (new and old) is not moot, there is no need even to reach the question of vacatur. The District Court's decision invalidating the Department's delay and withdrawal of the 2021 Independent Contractor Rule should stand, pending remand to the District Court for determination of whether the Department's promulgation of the 2024 Rule comports with the requirements of the APA as applied by that court.

II. ***Munsingwear*** **Vacatur Does Not Apply Because Any Mootness Would Have Resulted From the Department's Voluntary Actions, and the Public Interest otherwise Disfavors Vacatur**.

In *Munsingwear*, the Supreme Court held that, as a general matter, "*those who have been prevented* from obtaining the [appellate] review to which they are entitled should not be treated as if there had been a review." 340 U.S. at 39 (emphasis added).

As the Court explained, under those narrow circumstances, vacatur of a lower court's decision may be appropriate insofar as it "eliminates a judgment, review of which was *prevented through happenstance.*" *Id.* at 40 (emphasis added). Thus, from its inception, *Munsingwear* has focused on alleviating potential harm to a litigating party when that party has been denied the right to appellate review because of actions utterly outside that party's control. [1]

That is decidedly not the set of facts presented in this case. The Department has not been "prevented" from obtaining appellate review, nor has the lack of appellate review been occasioned by "happenstance"—rather, the Department itself has taken unilateral action (the promulgation of the 2024 Rule) which it now claims renders appellate review moot and justifies vacatur of the District Court's decision against it under *Munsingwear*. Applying the rationale of that case, on its face *Munsingwear* does not support the Department's motion.

In addition, with respect to vacatur, subsequent to its decision in *Munsingwear*, the Supreme Court clarified and narrowed its holding, largely cabining *Munsingwear* to those instances where the mootness of an appeal has been caused by circumstances outside the control of either party. Specifically, in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1984), the Court

[1] To the same effect is *Acheson Hotels, LLC v. Laufer*, 144 S. Ct. 18, 22 (2023), also cited in the Department's Motion at p.4. There the plaintiff was compelled to dismiss her ADA action because a lower court sanctioned her lawyer for filing it.

explicitly recognized that *Munsingwear's* characterization of vacatur as the "established practice" where appellate review has become not possible due to mootness was pure dictum, and that vacatur is, in fact, an "extraordinary remedy." *Id.* at 23, 27.

Next, the *U.S. Bancorp* decision recognized the implicit principle animating the Court's treatment of requests for vacatur where an appeal has been rendered moot: "The principal condition to which we have looked is whether the party seeking relief from the judgment below caused the mootness by voluntary action." *Id.* at 24. In those instances, "[t]he judgment is not unreviewable, but simply unreviewed by [a party's] own choice. *Id.* at 25 (citing *Sanders v. United States*, 373 U.S. 1, 17 (1963)).

Finally, the *Bancorp* Court clarified that the other salient concern in addressing whether to grant vacatur is the public interest. But this, too, counsels against vacatur when the party seeking the remedy because of mootness has in fact tried to make the matter moot through its own actions. *See id.* at 27 ("To allow a party who steps off the statutory path to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would—quite apart from any consideration of fairness to the parties—disturb the orderly operation of the federal judicial system.").

This Court in turn has expressly recognized the Supreme Court's limitation of

Munsingwear by way of *Bancorp*: "It is *U.S. Bancorp*, not the earlier case of *Munsingwear*, that controls our decision today." *Staley v. Harris County*, 485 F.3d 305, 312 (5th Cir. 2007) (en banc); *see also Murphy v. Fort Worth Independent Sch. Dist.*, 334 F.3d 470, 471 (5th Cir. 2003) (citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997)) ("Vacatur of the lower court's judgment is warranted only where mootness has occurred through happenstance, rather than through voluntary actions of the losing party."). This Court has also recognized the *Bancorp's* direction that federal courts contemplating equitable relief must take into account the public interest. *See Hall v. Louisiana*, 884 F.3d 546, 553 (5th Cir. 2018).

Applying *Bancorp*, this Court should deny the Department's request for the "extraordinary remedy of vacatur." There is no dispute that the pending appeal was not purportedly made moot by "happenstance." If in fact the appeal had been mooted at all, which the Associations have refuted above, that mootness would have occurred solely through the unilateral action of the Department in promulgating the 2024 Rule.

The cases cited by the Department in support of its request for vacatur do not counsel otherwise, and indeed, support the Associations' position. For example, in *United States v. Microsoft*, the Supreme Court directed vacatur of the court of appeals' decision, and directed it in turn to vacate the district court's decision, where the case was made moot not by the action of either party, but rather by a change in

the underlying law made by Congress. *See* 138 S. Ct. 1,186, 1,187 (2018). In contrast, in this case, it is the Department, not Congress, that has attempted to change the legal framework underlying the Associations' challenge. And the question of whether this Court should vacate its opinion in *Feds for Medical Freedom v. Biden*, and allow the government to "erase" its "unreviewed loss" in that case following its repeal of the Executive Order mandating COVID-19 vaccination for most executive branch employees which was the subject of the appeal, remains pending before this Court. *See Feds for Medical Freedom v. Biden*, Appeal No. 22-40043 (5th Cir.). In any event the repeal of the Executive Order in that case arguably resulted from a factor outside the control of the parties, *i.e.*, the end of the pandemic state of emergency.

Nor does the public interest counsel for vacating the District Court's prior decision, notwithstanding the Department's desire to "erase" its loss in the lower court. *See Hall*, 864 F.3d at 553 (quoting *Bancorp*, 513 U.S. at 25: "Judgment 'should stand,' the Court concluded, 'unless a court concludes that the public interest would be served by vacatur,' because '[j]udicial precedents are presumptively correct and valuable to the legal community as a whole' and '[t]hey are not merely the property of private litigants.'" (citations omitted)).

The Department cites nothing to suggest that in this case vacatur of the District Court's decision is in the public interest, relying solely on its assertion that the

balance of equities tip in favor of vacatur simply because the Department's promulgation of the 2024 Rule was not "temporary" or "last-minute" and it has kept the Court apprised of the status of its rulemaking while seeking to continue the stay. Defendants-Appellees' Motion at 6. The Department's mere compliance with the Court's order does nothing to suggest that the extraordinary step of vacating the reasoned decision of the District Court is in the public interest.

In sum, *Munsingwear* has no application to this case, and the Department's motion for vacatur should be denied on this ground.

CONCLUSION

This Court should deny the Department's motion for vacatur because the District Court's judgment is not moot, and the Department's only basis for claiming otherwise rests on its own unilateral actions. Either way, the Court should remand this matter for further proceedings to the District Court, as the Department concedes to be proper procedure (ECF 63 at 2), with instructions for the District Court to determine whether the Department acted lawfully in withdrawing the 2021 Rule and promulgating the 2024 Rule in its place.

Respectfully submitted,

/s/ Maurice Baskin
Maurice Baskin
LITTLER MENDELSON, P.C.
815 Connecticut Ave., N.W.
Washington, D.C. 20006
(202) 202-772-2526
mbaskin@littler.com

ATTORNEY FOR PLAINTIFFS-APPELLEES

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the above-named counsel hereby certifies that this memorandum complies with the type-volume limitation of the Federal Rules of Appellate Procedure. As measured by the word processing system used to prepare it, this memorandum contains 3144 words.

/s/ Maurice Baskin

Maurice Baskin
Littler Mendelson, P.C.
815 Connecticut Ave., N.W.
Washington, D.C. 20006
202-772-2526
mbaskin@littler.com

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of January, 2024, I electronically filed a true and correct copy of the foregoing using the CM/ECF system, thereby sending notification of such filing to all counsel of record.

/s/Maurice Baskin