IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

COALITION FOR WORKFORCE INNOVATION; ASSOCIATED BUILDERS AND CONTRACTORS OF SOUTHEAST TEXAS; ASSOCIATED BUILDERS AND CONTRACTORS, INCORPORATED; and FINANCIAL SERVICES INSTITUTE, INCORPORATED,

Plaintiffs-Appellees,

v.

JULIE A. SU, Acting Secretary, U.S. Department of Labor, in her official capacity as Secretary of Labor, United States Department of Labor; JESSICA LOOMAN, in her official capacity as Administrator, Division of Wage and Hour; and UNITED STATES DEPARTMENT OF LABOR,

Defendants-Appellants.

No. 22-40316

REPLY IN SUPPORT OF MOTION FOR *MUNSINGWEAR* VACATUR OF THE DISTRICT COURT'S FINAL JUDGMENT

Plaintiffs' response rests on a misunderstanding of Supreme Court precedent. Vacatur pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), is not an exception rarely and grudgingly given. *See*

Opp'n 1. It is the "well settled," *Acheson Hotels, LLC v. Laufer*, 144 S. Ct. 18, 22 (2023), "ordinary practice," *Alvarez v. Smith*, 558 U.S. 87, 94, 97 (2009), and "normal rule," *Camreta v. Greene*, 563 U.S. 692, 713 (2011). The Supreme Court in *Acheson* expressly declined Justice Jackson's suggestion to reconsider the practice of "automatic vacatur." *Acheson*, 144 S. Ct. at 28 (Jackson, J., concurring). Plaintiffs identify no basis to deviate from that practice here.

1. In opposing vacatur, plaintiffs emphasize their desire for remand so that they can seek leave in district court to amend their complaint to challenge the new rule. *See* Opp'n 2, 7-9, 14. The Supreme Court cases discussed in our motion and the Supreme Court cases that plaintiffs cite in their response make clear that an appellate court has discretion to grant such a remand—but only *after* the appellate court vacates the lower court's judgment regarding prior claims against a prior enactment. *See New York State Rifle & Pistol Ass'n, Inc. v. City of New York, New York*, 140 S. Ct. 1525, 1527 (2020) ("The judgment of the Court of Appeals is vacated, and the case is remanded" for consideration of whether to allow amendment of the complaint to challenge new statute); *Lewis v. Continental Bank Corp.*, 494 U.S. 472,

482 (1990) (directing the court of appeals, in light of a "change in the legal framework governing the case" during appeal, to "vacate the judgment and remand for further proceedings in which the parties may, if necessary, amend their pleadings"); *Diffenderfer v. Cent. Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412 (1972) (per curiam) ("[W]e vacate the judgment of the District Court and remand the case to the District Court with leave to the appellants to amend their pleadings."); *Bryan v. Austin*, 354 U.S. 933 (1957) (same).

Biden v. Texas, 597 U.S. 785 (2022), on which plaintiffs rely, is inapposite. There, the Supreme Court was not presented with a suggestion of mootness. The Supreme Court thus adjudicated the merits of the government's arguments and reversed the judgment of this Court. *Id.* at 801-14. Only then did the Supreme Court remand the matter for plaintiffs to potentially amend their complaint to challenge a new administrative action. *Id.* at 814.

By contrast, plaintiffs here (correctly) do not urge this Court to adjudicate the merits of the government's appeal in this case. The issues addressed by the district court have been overtaken by events. And plaintiffs identify no case taking the novel position they advocate

here: that an appellate court should remand a case to district court *without* first vacating the district court judgment (because the dispute is moot) or adjudicating the merits of the appeal regarding that judgment (if the dispute were not moot and if the appeal were to proceed).

2. Plaintiffs are clearly wrong to assert that the new rule "do[es] the very same thing" as the 2021 rules and that this 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." Opp'n 7. As our response to plaintiffs' remand motion explained, the district court declared that the 2021 rules delaying and withdrawing the earlier independent contractor rule were impermissible for reasons specific to the administrative proceedings in those rulemakings. *See* Gov. Remand Response 4. For example, the district court concluded that the Department of Labor should have considered alternatives to withdrawing the independent contractor rule. *See Coal. for Workforce Innovation v. Walsh*, No. 1:21-cv-130, 2022 WL 1073346, at *13-*19 (E.D. Tex. Mar. 14, 2022) (ECF No. 32). That issue is academic now because the Department did consider alternatives to withdrawal in the

new rulemaking proceedings. Indeed, the Department issued a new final rule that replaces the 2021 independent contractor rule with a new rule. In light of the new final rule, there is thus no longer any live dispute regarding the propriety of the 2021 delay and withdrawal rules. *Cf. National Ass'n of Manufacturers. v. Department of Defense*, 583 U.S. 109, 120 n.5 (2018) (holding that a *proposed* rule to delay the effective date of a challenged rule did not moot that case "[b]ecause the [challenged rule] remains on the books" and the "proposed rule does not purport to rescind the [challenged rule]"). Suits under the Administrative Procedure Act (APA) challenge "specific agency action[s]" that rest on their own specific administrative records. *Biden*, 597 U.S. at 809.

Accordingly, this is not a case in which the government has "doubled down" by reenacting a requirement that had previously been declared to have been substantively unlawful. *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 286 (5th Cir. 2012) (citing cases). The new rule did not merely withdraw the 2021 independent contractor rule; it replaced it with a different rule with different provisions, and it justified that choice by presenting a new analysis of

the various features of the new rule in comparison with the old rule and other alternatives. *See* 89 Fed. Reg. 1638, 1646-64 (Jan. 10, 2024). As in any APA case challenging a new rule, plaintiffs' assertion that the agency did not adequately consider certain issues (*see* Opp'n 2-3), will be adjudicated on the basis of the administrative record underlying the new rule.

3. The Supreme Court has rejected the position taken by plaintiffs here, *see* Opp'n 10-12, that vacatur is categorically unavailable if the mooting event was attributable in part to action by the party seeking vacatur. Our *Munsingwear* motion cited recent examples involving the rescission of vaccination requirements. *See* Mot. 5. The Supreme Court's earlier review of this Court's decision in *New Left Education Project v. Board of Regents of University of Texas System*, 472 F.2d 218 (5th Cir. 1973), is also illustrative. There, this Court had recognized that "the repeal of the old rules" by a state entity "mooted the appeal" of the challenge to the old rules, *id.* at 219, but this Court denied *Munsingwear* vacatur because the appeal became moot "not because of 'happenstance,' but through action of the appellant" state entity by repealing and replacing the old rules, *id.* at 221. The Supreme Court, by

contrast, vacated this Court's judgment and remanded with instructions that the case be dismissed as moot. *See Board of Regents of the Univ. of Texas Sys. v. New Left Educ. Project*, 414 U.S. 807 (1973).

The Supreme Court's recent *Munsingwear* vacatur orders undermine plaintiffs' reliance on *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1984), which simply held that "mootness by reason of settlement d[id] not justify vacatur" in the circumstances of that case. *Id.* at 29. This case did not become moot by reason of settlement, and there is no basis to depart here from the Supreme Court's *Munsingwear* practice. The government published the new rule because, among other reasons, it determined that the new rule would better reflect longstanding case law about the proper interpretation of the statute. *See* 87 Fed. Reg. 62,218, 62,219 (Oct. 13, 2022) (notice of proposed rulemaking). Vacating the district court's judgment in these circumstances advances the public interest in ensuring that the government, when deciding what to do after an adverse judgment in district court, is not put to the improper choice of rescinding a rule it no longer supports and continuing to contest an adverse judgment with which it disagrees.

CONCLUSION

Pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), this Court should vacate as moot the district court's final judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify this reply complies with the requirements of Fifth Circuit Local Rule 27.4 and Federal Rule of Appellate Procedure 27(d)(1)(E) because it has been prepared in 14-point Century Schoolbook, a proportionally spaced font, and that it complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 1,286 words, according to the count of Microsoft Word.

/s/ *Joseph F. Busa*
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CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2024, I electronically filed the foregoing with the U.S. Court of Appeals for the Fifth Circuit using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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