Nos. 20-35030 & 20-35064

In the United States Court of Appeals
for the Ninth Circuit

State of Washington, et al.
Plaintiffs - Appellees,
v.
Defense Distributed, Second Amendment Foundation, Inc.; Conn Williamson
Defendants - Appellants,
and
U.S. Department of State, et al.,
Defendants.

Appeal from the United States District Court for the
Western District of Washington; No. 2:18-cv-01115-RSL

Appellants' Response to Appellees' Motion to Dismiss

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Corporate Disclosure Statement

No appellant has a parent corporation or publicly held corporation that owns 10% or more of its stock.

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Procedural Posture

Cause numbers 20-35030 and 20-35064 are companion appeals. The appellees in both are a group of states and the District of Columbia, called the States. The two appeals have distinct appellants. The appellant in 20-35030 is Defense Distributed. The appellants in 20-35064 are Second Amendment Foundation, Inc., and Conn Williamson, called SAF. The States filed identical motions to dismiss both appeals. The appellants jointly file this response to both motions.

Argument

The States "request that this appeal be dismissed as moot." Mot. at 16. The motion should be denied because it fails to carry the heavy burden of clearly establishing mootness. This case is not moot. The appeal should carry on.

The burden of showing mootness is always heavy for good reason. *Knox v. Serv. Emps. Intern. Union, Local 1000*, 567 U.S. 298, 307 (2012). Additional skepticism is warranted where, as here, the prevailing party below uses procedural gamesmanship "to insulate a decision from review by this Court." *Id.*

Take, for example, the States' leading (presumably best) mootness argument. It concerns a supposed "rescission." *See supra* Part I.C.1. The "rescission" that supposedly mooted the case happened all the way back in July 2018, at week *one* of the litigation. Nothing hid the supposed "rescission." Its facts were spelled out in a letter sent by Department of Justice lawyers to the States' lawyers. *See* Mot. at 5. But the States *never* made their leading mootness argument below—not when they became aware of the argument in 2018, not when they approached critical junctures like a preliminary injunction hearing later that year, and not during the slow-paced summary judgment proceedings of 2019. The States opted instead to litigate the case as long as it took to obtain a judgment from their court of choice. Only now, with briefs inbound and the judgment ripe for reversal, do they deploy the mootness argument about "rescission" that has been available all along.

In light of such tactics, it should come as no surprise that this controversy remains very much alive. The judgment obtained below needs to be corrected for a litany of consequential reasons. It causes very real harm, beginning first and foremost with a wrongful exercise of subject-matter jurisdiction that renders every part of the judgment void.

The case is not moot. The States just want it to be, hoping to both have their judgment and avoid the appeal too. Gamesmanship lurks there as well—in the request to have the appeal dismissed *without saying a word about the underlying judgment*. If the Court were to deem the case moot, black-letter procedural law (*Munsingwear*) dictates that the district court's judgment must be vacated and the States' complaint dismissed. The States know this full well because they took that very position in another appeal. Their furtive retreat here is telling.

I. The motion should be denied.

A. The States bear a heavy burden of establishing mootness.

All sides agree that this case was *not* moot when the district court took jurisdiction originally. Hence, the States bear the burden of establishing mootness on appeal. *See, e.g.*, *L.A. Cty. v. Davis*, 440 U.S. 625, 631 (1979). That burden is "heavy." *Id.* Mootness on appeal must be made "absolutely clear." *E.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000).

B. The motion should be denied because it asserts only mootness of the "appeal" and not mootness of the "case."

The motion asserts mootness of the "appeal" without taking a position about mootness of the "case."[1] But mootness of the "case" is all that really matters. The standalone assertion of a moot "appeal" is a *non sequitur*. It warrants no relief.

The States' framing error stems from mootness's doctrinal foundations. Mootness is a largely function of the "case or controversy" requirement. *See Friends of the Earth, Inc.*, 528 U.S. at 189–94; 13C Charles A. Wright & Arthur R. Miller et al., Federal Practice & Procedure §§ 3533–3533.11 (3d ed. West 2020) (hereinafter "Wright & Miller"). Because of this, mootness can attach only to the entire "case or controversy"—not just to a particular ingredient of the litigation, such as a deposition or a hearing or a trial or an appeal. *See id.* Either the entire case is moot or not. There is no such thing as a moot appeal within a not-moot case.

Thus, to the extent that the motion seeks dismissal of the appeal *without* a determination of whether the case is moot, it should be denied. If the States are unwilling to assert that the "case" is moot, they cannot possibly have carried the "heavy" burden of making that conclusion "absolutely clear."

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[1] Everything about this motion concerns mootness of the "appeal," not the "case." *See* Fed. R. App. P. 27(a)(2)(A). The relief sought is an order that "this appeal be dismissed as moot." Mot. at 16, and all of the grounds and legal argument are about mootness of the "appeal." The motion asserts mootness of the "appeal" eleven times. Mot. at 1, 2, 9, 11, 12. The motion never addresses mootness of the "case."

C. The motion should be denied because the case is not moot.

Framing errors aside, the motion fails to establish any mootness. A case becomes moot "only if 'it is impossible for a court to grant any effectual relief whatever.'" *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019). The motion tries to show this with three arguments. The first concerns rescission. The second concerns supersession. And the third is about there being no underlying claims by or against Defense Distributed and SAF. None establish mootness with the requisite absolute clarity.

1. The rescission argument is wrong.

The rescission argument says that mootness occurred because the "July 2018 deregulatory agency actions at issue below no longer exist (and have not existed since 2018)." Mot. at 9–12. The Court should reject this for three reasons.

a. TRO compliance did not moot the case.

First, the Court should reject the rescission argument because no rescission that could moot the case occurred. No rescinding statute is cited because Congress enacted none. No rescinding rule or regulation is cited because the agencies enacted none. The distinct issue of a *superseding* statute or regulation is addressed later. *See infra* Part I.C.2. As to the issue of a *rescinding* statute or regulation, the motion cites nothing because no such action ever occurred.

Akiachak Native Community v. United States Department of Interior, 827 F.3d 100 (D.C. Cir. 2016), does not support the motion's contrary argument. It is cited to exemplify when challenged rules "no longer exist." Mot. at 11. But its challenged rule was *expressly* deleted *by name* in a new rule that received notice, comment, publication, and all other trappings of final agency action. *See Akiachak Native Cmty.*, 827 F.3d at 104. No such rule or regulation ever rescinded the Temporary Modification and no such rule or regulation ever rescinded the license.

The only supposed "rescission" at issue is the August 2018 letter from the Department of Justice to the States' counsel. *See* Mot. at 5. But the August 2018 letter merely announces compliance with the temporary restraining order issued below, ECF No.23, which as a matter of law does not moot the case.

Treatises identify the governing rule as "well settled": Mere compliance with an order issued in a case does *not* moot the case on appeal unless (1) the parties intended to settle, or unless (2) it is not possible to take any effective action to undo the results of compliance. Wright & Miller § 3533.2.2. The rule applies to all kinds of order compliance, including "obedience to an injunction." *Id.* Neither exception applies here. Settlement is obviously out of the question, and once the district court's judgment is voided, compliance with the order will be undone with ease. This a mere-compliance case that, under the well-settled general rule, creates no mootness.

The face of the Justice Department's letter clearly shows that the supposed "rescission" was nothing more than compliance with the district court's order. The letter came in response to the States' "'request that the federal government advise us of the steps it has taken to achieve' ***compliance*** with the Court's Order granting Plaintiffs' Emergency Motion for Temporary Restraining Order." Declaration of Kristin Beneski Ex. A at 1 (emphasis added). So the letter did just that, explaining how the Federal Defendants had "fully ***complied*** with the Court's Order." *Id.* (emphasis added). Nothing about the letter suggests settlement or any other capitulation. It shows only mere compliance.

The face of the Justice Department's letter also shows the ease of undoing compliance. To comply with the order as to the Temporary Modification, the State Department merely edited its website. *Id.* The page displaying the Temporary Modification was altered to say that "the Directorate of Defense Trade Controls (DDTC) is not implementing or enforcing the 'Temporary Modification of Category I of the United States Munitions List' that was posted to the DDTC website on July 27, 2018, and has since been removed." *Id.* Undoing this aspect of compliance is as simple as undoing the website edits.

Undoing compliance is even simpler vis-à-vis the license. It is automatic. To comply with that part of the TRO, the government merely "informed . . . counsel for Defense Distributed, that the Government considers the aforementioned letter to Mr.

Wilson a nullity during the pendency of the Order entered by the Court." *Id.* By its own terms, that act of compliance *has already expired* because the TRO is no longer pendent (and neither is the preliminary injunction). Undoing it requires nothing at all. Or at most it entails a phone call. Either way, the Federal Defendants can "undo the results" of their TRO compliance with ease. The mere act of complying with the TRO therefore did not moot the case. *See* Wright & Miller § 3533.2.2.

b. The federal government must reinstate the Temporary Modification and license if rescinded.

Second, the Court should reject the rescission argument because, even if rescission occurred, evidence shows that the federal government will reinstitute the actions at issue. An administrative agency's decision to rescind an action "does not moot a case if there is reason to believe the agency will reinstitute it." *Akiachak Native Cmty.*, 827 F.3d at 106. The record here proves just that. What the district court had to rule on once already may very well come to pass all over again.

The Federal Defendants' intent to reinstitute (if necessary) the actions at issue is evidenced by the Settlement Agreement. ECF No. 174-1 at 24–31. That contract obligates the Federal Defendants to supply the Temporary Modification and license at issue no matter how many tries it takes. *Id.* at 25–26. Actual performance is required—not just an attempt—and performance must comply with the APA. *Id.* So if (for whatever reason) the first attempt at compliance did not succeed, the Federal Defendants remain obligated to try again. Accordingly, they recently told

another court that "the only reason the [Federal Defendants] cannot fulfill their terms of the settlement agreement is because of the current injunction in the Washington case." Br. for Appellees at 25, *Defense Distributed v. U.S. Dep't of State*, 947 F.3d 870 (5th Cir. 2020) (No. 18-50811), 2019 WL 3776336, at *25.

Especially in light of the presumption of regularity, *see, e.g.*, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), this evidence establishes reason to believe that the Federal Defendants will, indeed, do what the Settlement Agreement requires and reinstitute the Temporary Modification and/or license (assuming that rescission occurred in the first place). Because of this prospect, the case is not moot. *See Akiachak Native Cmty.*, 827 F.3d at 106.

c. The rescission argument proves the need to vacate the district court's judgment.

Finally, the rescission argument proves too much. According to the motion, the acts of rescission that cause mootness occurred in "July 2018." Mot. at 9–10. But if that is true, the case became completely moot two days after it was filed—well *before* the States obtained either the preliminary injunction or the final judgment. If the motion's leadoff argument is correct, the States will have established that the district court's judgment is void for lack of subject-matter jurisdiction and must be vacated.

2. The supersession argument is wrong.

The supersession argument says that mootness occurred because the July 2018 actions "have been superseded by the State and Commerce Departments' final rules, which represent a new federal policy of regulating the subject files." Mot. at 9–12. It is wrong for at least three reasons.

a. The new rules have been preliminarily enjoined.

First, the Court should reject the supersession argument because an injunction deprives the new rules of any superseding legal effects here. Even if the new rules did everything that the motion says, a federal court's injunction is nullifying them.

There is not just a "pending legal challenge" that *might* disrupt the new rules. Mot. at 11. A current federal district court order actually enjoins the Federal Defendants from applying those rules to files at issue. In *Washington v. United States Department of State*, No. 2:20-cv-00111-RAJ (W.D. Wash.), the district court entered the following preliminary injunction on March 6, 2020:

> The federal defendants and their respective officers, agents, servants, employees, and attorneys, and any persons in active concern or participation with them, are ENJOINED from implementing or enforcing the regulation entitled International Traffic In Arms Regulations: U.S. Munitions List Categories I, II, and III, 85 Fed. Reg. 3819 (Jan. 23, 2020) insofar as it alters the status quo restrictions on technical data and software directly related to the production of firearms or firearm parts using a 3D-printer or similar equipment.

Wash. v. U.S. Dep't of State, No. 2:20-CV-00111-RAJ, 2020 WL 1083720 (W.D. Wash. Mar. 6, 2020) (footnotes omitted). It is still in effect today.

Hence, the motion is forced to concede that, so long as that preliminary injunction remains in force, files at issue in this case "remain on the Munitions List and subject to State Department export controls." Mot. at 7–8. And so long as that is so, the Temporary Modification and license will—if the judgment below is reversed—authorize widespread publication of subject files. *See* 22 C.F.R. § 125.4(b)(13); 22 C.F.R. § 126.2. The case is therefore not moot.

b. Under the new rules, the existing license authorizes publication.

Second, the Court should reject the supersession argument because, even if the new rules take effect for subject files, they will not make Defense Distributed and SAF's existing license a nullity. To the contrary, the new rules grandfather existing State Department licenses, guaranteeing their continued effectiveness. *See* 22 C.F.R. § 120.5(b) ("A license or other approval (see § 120.20) from the Department of State granted in accordance with this subchapter may also authorize the export of items subject to the EAR (see §120.42)."); Revisions to the Export Administration Regulations: Initial Implementation of Export Control Reform; Correction, 78 Fed. Reg. 61750-01, 61752 (Oct. 3, 2013) ("A license or authorization issued by the [State] Department will be effective for up to two years from the effective date of the revised USML category if all the items listed on the license or authorization have transitioned to the export jurisdiction of the Department of Commerce."); *id.* ("A license or authorization issued by the

Department will be valid until its expiration if some of the items listed on the license or authorization have transitioned to the export jurisdiction of the Department of Commerce."); State Transition Guidance for Revisions to Categories I, II, and III (Jan. 23, 2020) (on grandfathering of existing State Department licenses for items transitioned to the Commerce Department), available at https://bit.ly/3fA0n04.

The license that Defense Distributed and SAF received in 2018, as granted by the Directorate of Defense Trade Controls, has no expiration date and approves the files at issue "for public release (i.e., unlimited distribution)." Dkt. 174 at 33-34. It can continue to authorize publication once the new rules take effect.

Thus, under the new rules, Defense Distributed and SAF's existing license will—once the judgment below is vacated—continue to authorize online publication of files at issue. This alone stops any suggestion of mootness.

c. There is no controlling "agreement" about whether and/or how to regulate the speech at issue.

With respect to the suit about the new rules, the motion touts a supposed policy change and "agreement" amongst that case's parties. Mot. at 11. The supposed agreement is "that the subject files should be regulated." *Id.* But that idea is far too generalized to cause mootness. It lacks meaningful specificity.

The notion that "the subject files should be regulated" does not necessarily or even naturally entail any contradiction of the Temporary Modification or license.

After all, the files at issue were quite "regulated" under the State Department's prior regime; but the States still deemed the situation injurious enough to bring this suit.

Mootness turns on *specific* positions—not what a party thinks "in general" about an issue. *Hall v. Beals*, 396 U.S. 45, 48 (1969). The motion's asserted policy change and "agreement" are too general and vague to contribute to mootness.

The supposed agreement in the new rules' litigation is also not authoritatively established. The Plaintiffs States cannot bring it into existence by inference or *fiat*. Even if they had the right to speak in this case on behalf of every plaintiff in the new rules' case (doubtful because the other case has different plaintiffs), the States certainly lack the power to define the federal government's litigating position.

If ever the federal government could moot this case by taking a litigation position about the new rules, the Department of Justice itself would need to state the position expressly and would need to do so in this very case. The motion's second-hand references to generalizations from another case do not suffice.

3. The judgment's collateral consequences prevent mootness.

"If 'a party can demonstrate that a lower court's decision, if allowed to stand, may have collateral consequences adverse to its interests,' the party can avoid dismissal for mootness." *Fritsch v. Swift Transp. Co. of Ariz., LLC*, 899 F.3d 785, 791 (9th Cir. 2018). The judgment below will have adverse collateral consequences in future litigation about the Settlement Agreement between Defense Distributed,

SAF, and the Federal Defendants. The district court expressly stated this in the order making Defense Distributed and SAF "necessary parties":

> Defendants accurately state that this litigation focuses on the procedural correctness of the federal government's actions in issuing the temporary modification and the July 27, 2018, letter. That does not, however, mean that they have no interest in the action. . . . The Court's findings will bind all of the interested parties and preclude collateral challenges to the APA determination (such as an action for specific performance of the settlement agreement) that would raise the possibility of inconsistent rulings and obligations for the parties.

ECF No.130 at 3-4. Right or wrong, this express holding below is precisely the kind of adverse "collateral consequence" that prevents mootness.

Amazingly, though, the motion's third argument says that the case is moot "because appellants did not assert any claims for relief below, and no claims were asserted against them—meaning there is no live controversy between the parties for this Court to adjudicate" Mot. at 12–14. In making this argument, the States are completely contradicting the position that they successfully took below to obtain the holding just quoted. Their flip-flop demonstrates only that the district court's judgment should be reversed—not that the case is moot.

The motion's lack-of-claims argument is a hijacked one. It was made below as part of the "necessary party" dispute *by Defense Distributed and SAF*. Back then, the States *wanted* to have this case's judgment bind Defense Distributed and SAF. They posited that Defense Distributed and SAF not only *could* be bound by this case's judgment but *had to be*. *See* ECF No. 29 at 10–11. So Defense Distributed

and SAF argued just what the current motion does—that Defense Distributed and SAF ought *not* be subject to the judgment because the case entailed no claims either by or against them. *See* ECF No. 114 at 3.

Critically, then, the States below *opposed* dismissal by arguing that Defense Distributed and SAF *did* have a justiciable interest in the case. ECF No. 119. Because it suited their aims at the time, the States posited that the judgment *must* bind Defense Distributed and SAF because of their justiciable "stake in these proceedings." *Id.* at 7. The States told the district court that Defense Distributed and SAF "should remain as parties to this case so that their claimed interests can be litigated here, without the risk that pursuing them elsewhere could result in inconsistent legal obligations on the other parties." *Id.* at 8.

Thus, the States succeeded in convincing the court to hold that Defense Distributed and SAF are Rule 19 "necessary parties" that must be bound by the judgment and subject to preclusion. ECF No.130. Because the judgment on appeal renders that erroneous holding, it should be reversed—not dismissed as moot.

D. The Federal Defendants' absence from the appeal is irrelevant.

The motion implies that mootness turns on whether *all* parties to the district court's judgment chose to appeal. But the law requires no such coordination. *See* Wright & Miller § 3533.2 ("Surrender by only one party does not moot an action if another party remains interested in the same relief.").

Defense Distributed and SAF's appeals bring the district court's judgment within this Court's appellate jurisdiction, *see* 28 U.S.C. §§ 1291, 2107, and will establish that the district court lacked subject matter jurisdiction of the action, *see, e.g.*, ECF No. 174 at 4–8. That will render the district court's judgment void and obligate the Court to vacate it completely, as to all matters and all parties. *See, e.g.*, *U.S. Catholic Conf. v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76–78 (1988); *Pozez v. Clean Energy Capital, LLC*, 593 F. App'x 631, 632 (9th Cir. 2015).

Organized Village of Kake v. U.S. Department of Agriculture, 795 F.3d 956 (9th Cir. 2015) (en banc), is instructive. A federal agency that lost that APA case at trial did *not* appeal, but an intervening defendant *did* appeal. The Court held that the intervening defendant could sustain the appeal without the federal agency. *Id.* at 963–65. Those same principles apply where, as here, the appellant joins the case not as a willing intervenor but as an unwilling necessary party. In both instances, the appeal can be sustained so long as the appellant's "interests have been adversely affected by the judgment," *id.* at 963, which Defense Distributed and SAF's have.

E. The continuing dispute about subject-matter jurisdiction below prevents mootness.

This appeal's forthcoming dispute about whether the district court had subject-matter jurisdiction bears further emphasis. Under authorities such as *Brown v. Board of Bar Examiners*, 623 F.2d 605 (9th Cir. 1980), *United States ex rel. Cobell v. Cobell*, 503 F.2d 790 (9th Cir. 1974), and *United States v. Trans-Missouri Freight*

Association, 166 U.S. 290 (1897), this Court has concluded that "a continuing dispute as to jurisdiction is sufficient to prevent a finding of mootness." *Williams v. I.N.S.*, 795 F.2d 738, 742 (9th Cir. 1986). That rule defeats mootness here.

F. The case is capable of repetition yet evading review.

Apart from all of the preceding arguments, the Court should deny the motion because this case "falls classically into that category of cases that survive mootness challenges because they are 'capable of repetition, yet evading review.'" *Padilla v. Lever*, 463 F.3d 1046, 1049 (9th Cir. 2006) (en banc). That rule applies where "(1) the duration of the challenged action is too short to allow full litigation before it ceases, and (2) there is a reasonable expectation that the plaintiffs will be subjected to it again." *Id.* The dispute regarding Temporary Modification meets this test.

Element one is satisfied because the Temporary Modification's duration is "inherently brief." *Id.* By definition, the Temporary Modification is to last only so long as the Settlement Agreement's "referenced final rule is in development." *See* ECF No. 174-1 at 24–31. Yet as this case's timeline shows, that development period was "too short to allow full litigation" of the Temporary Modification.

Element two is met because there is a "reasonable expectation" that another Temporary Modification will be issued. *Padilla*, 463 F.3d at 1049. The Settlement Agreement requires the issuance of a Temporary Modification whenever the Settlement Agreement's "referenced final rule is in development." ECF No. 174-1

at 24–31. Though that process ran its course *once*, there is a substantial likelihood of it having to occur again. Right or wrong, the issuance of a preliminary injunction against the most recent rules makes it reasonable to expect that the Federal Defendants may have to start the process of developing the "referenced final rule" all over again—in which case another Temporary Modification will be issued.

G. Defense Distributed's right to attorney's fees stops mootness.

If the judgment below is reversed, federal law could entitle Defense Distributed and SAF to an award of attorney's fees against the States. Any such prospect of "money changing hands" means that the "suit remains alive." *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019)

The applicable provision would be 24 U.S.C. § 2412, which provides for an award of attorney's fees to the "prevailing party" in "any civil action brought . . . against the United States or any agency or any official of the United States acting in his or her official capacity." 24 U.S.C. § 2412(b). A defendant can "prevail even if the court's final judgment rejects the plaintiff's claim for a nonmerits reason," *CRST Van Expedited, Inc. v. E.E.O.C.*, 136 S. Ct. 1642, 1651 (2016), and Defense Distributed SAF would have done just that vis-à-vis the States here. "[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Exp. & Station Emps.*, 466 U.S. 435, 442 (1984).

II. If the case is moot, the district court's judgment must be vacated.

The motion says that mootness warrants dismissal of the appeal. Mot. at 16. But even if the case is moot, the motion's request for nothing but dismissal is wrong.

Under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), the "established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending [a] decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *United States v. Arpaio*, 951 F.3d 1001, 1005 (9th Cir. 2020) (quoting *Munsingwear*). The rule is "settled" black-letter law. Wright & Miller § 3533.10. It has an exception for cases in which the "party seeking relief from the judgment below caused the mootness by voluntary action." *ACLU of Nev. v. Masto*, 670 F.3d 1046, 1065 (9th Cir. 2012). But this is not an exceptional case because Defense Distributed and SAF did not cause any of the alleged mootness. *See id.*

When the shoe was on the other foot, the States agreed that *Munsingwear* requires vacatur in this kind of scenario. Not long ago, all but two of the States were in another significant APA case. They were defendants on the receiving end of an adverse district court judgment. They said on appeal that the district court had erred by giving the plaintiffs standing. They said on appeal that the judgment below might hamstring them in possible future litigation via preclusion. And so it was that, when federal policy changes triggered a mootness suggestion, the States espoused a

position about how to deal with the underlying judgment that accords perfectly with the one Defense Distributed and SAF take here:

> [I]f this Court concludes . . . that the federal defendants' change in legal position has mooted any original controversy and that no other defendant has standing to appeal, then the most appropriate course would be to vacate the judgment below, to ensure that it cannot have any collateral effect on parties that were, through no fault of their own, denied any opportunity for review.
>
> . . .
>
> Of course, the Court would reach the vacatur question only if it held both that the appeal is moot and that the state defendants lack standing to appeal. And denying the state defendants standing would require the Court to conclude that they are not harmed by the judgment below in any legally cognizable way. A necessary premise of that conclusion would be that, even if the judgment remained in effect, it could not have any preclusive effect on the state defendants in future litigation--such as new affirmative litigation challenging actions taken by the federal defendants to dismantle the ACA. Vacating the judgment below would properly reflect that premise, ensuring that the state defendants could not suffer any "adverse consequences in future litigation from the judgment and findings in this case."[2]

The instant motion should not have silently abandoned the States' prior position.

If the Court deems this case moot, it should not merely dismiss the appeal. It should employ the *Munsingwear* rule as both precedent and the States' own prior positions dictate: the judgment below should be vacated and the complaint should be dismissed. But for all of the reasons set out originally, the case is not moot.

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[2] Suppl. Letter Br. at 1–2, 11–15, *Texas v. United States*, 945 F.3d 355 (5th Cir. 2019), *cert. granted sub nom. California v. Texas*, 140 S. Ct. 1262 (2020), (No. 19-10011), 2019 WL 2914018, at *1–2, 11–15 (citations omitted).

Conclusion

The Court should hold that the case is not moot and deny the motions. Alternatively, to the extent that the Court holds that the case is moot, the Court should have the district court's judgment vacated and the complaint dismissed.

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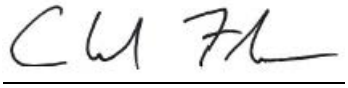
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