No. 11-788

In the Supreme Court of the United States

ALI HIJAZI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
SCOTT A.C. MEISLER
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals erred in declining to vacate the district court's interlocutory order and opinion denying petitioner's motions to dismiss indictments against him, when petitioner's appeal and request for mandamus relief from that order became moot during the pendency of the appeal as a result of the government's unopposed motion to dismiss the indictments with prejudice.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes and rule:

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OPINIONS BELOW

The orders of the court of appeals (Pet. App. 1a-2a, 3a-4a) denying petitioner's motion to vacate the district court order and denying his motion for reconsideration are unreported. The district court's order denying petitioner's motions to dismiss the indictments (Pet. App. 5a-41a) is not published in the *Federal Supplement*, but is available at 2011 WL 2838172.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 2011. The petition for a writ of certiorari was filed on December 16, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After the United States District Court for the Central District of Illinois issued an order and opinion denying petitioner's motions to dismiss the indictments against him, petitioner filed a notice of appeal and sought a writ of mandamus from the court of appeals. While the appeal was pending, the district court dismissed the indictments with prejudice on the government's motion. The court of appeals then dismissed as moot petitioner's appeal and request for mandamus relief. Pet. App. 1a-2a. The court of appeals denied petitioner's motion to vacate the district court's earlier order denying his motions to dismiss. *Id.* at 2a. It also denied his subsequent motion for reconsideration. *Id.* at 3a-4a.

1. Petitioner is a citizen of Lebanon who resides in Kuwait. Pet. App. 8a n.2. In March 2005, petitioner and Jeff Alex Mazon (a U.S. citizen) were charged in the Central District of Illinois with committing major fraud against the United States, in violation of 18 U.S.C. 1031(a) and 2; and wire fraud, in violation 18 U.S.C. 1343 and 2. Pet. App. 6a. The indictment alleged that petitioner and Mazon devised a scheme to defraud the United States of more than $3.5 million by falsely inflating the cost of supplying fuel tankers to the United States in support of military operations in Kuwait. See Indictment ¶ 1 (filed Mar. 16, 2005).

According to the indictment (as it was superseded in 2006), the scheme worked as follows. Mazon was the procurement manager in Kuwait for Kellogg Brown & Root Services (KBR), an American company contracted to provide services to the United States Army. Second Superseding Indictment ¶¶ 5, 11-12 (filed Aug. 3, 2006). In 2003, based on the Army's need for fuel tankers and

related services at a Kuwaiti airport, Mazon solicited bids from two companies, including LaNouvelle General Trading & Contracting Co. (LaNouvelle), a Kuwaiti company for which petitioner was the managing partner. Mazon inflated both bids by approximately $4 million and awarded the subcontract to LaNouvelle, which had the lowest bid ($1.673 million before the fraudulent increase and $5.521 million after it). Mazon made the award with the understanding that petitioner would reward Mazon for his efforts. *Id.* ¶¶ 13, 16, 20-23. To finalize the arrangement, petitioner and Mazon signed the subcontract with the inflated price, *id.* ¶ 23, and Mazon sent four emails to his supervisors in the United States to secure the necessary approvals. *Id.* at pp. 13-14 (chart). Between March and August 2003, LaNouvelle submitted six inflated invoices to KBR, which paid LaNouvelle and billed the United States for reimbursement, which, in turn, paid KBR in September and December 2003. *Id.* ¶¶ 26-27.

In September 2003, Mazon received his award for the fraudulent subcontract, when petitioner paid him $1 million. Although petitioner executed a promissory note to make the payment look like a loan, he made clear in a separate email that the money was Mazon's free and clear. Second Superseding Indictment ¶¶ 28-29. The following month, when a financial institution refused to deposit the money, petitioner instructed Mazon by email to open three different offshore accounts to complete the deposit. On October 28, 2003, however, Mazon tried to deposit all of the money at another bank in the United States. *Id.* ¶¶ 30-32. Two weeks later, and after a KBR investigator had interviewed him about the fraudulent subcontract, petitioner sent Mazon (who was by then back in the United States) an email imploring him to "be

very careful" when speaking to his "ex-friends" in Kuwait. *Id.* ¶ 33.

2. After his federal indictment, petitioner surrendered to Kuwaiti authorities and was released on bond. Pet. App. 10a. In September 2005, the United States formally requested that the government of Kuwait—with which it does not have an extradition treaty—release petitioner to the United States to stand trial. *Id.* at 10a n.3; *In re Hijazi*, 589 F.3d 401, 403, 405 (7th Cir. 2009). The Kuwaiti government refused to extradite petitioner and later reiterated its unwillingness to do so. 589 F.3d at 405.

Without appearing for arraignment, petitioner moved, through counsel, to dismiss the initial and superseding indictments. Pet. App. 10a-11a. He argued that the statutes under which he had been charged did not apply extraterritorially; that applying those statutes to him would violate due process and international law; that the delay in bringing the case to trial violated his speedy-trial rights; that his prosecution was barred by a Defense Cooperation Agreement between the United States and Kuwait; and that the charges should be dismissed for want of prosecution. *Ibid.*; *In re Hijazi*, 589 F.3d at 403.

In July 2005, the district court entered an order holding petitioner's motion to dismiss in abeyance until his arraignment. The court determined that it had discretion as to whether to rule on the motion to dismiss "prior to the arraignment." 7/20/2005 Order 2 (quoting *Hughes* v. *Thompson*, 415 U.S. 1301, 1302 (1974) (Douglas, J., in chambers)). The court concluded that the fugitive-disentitlement doctrine—which authorizes dismissal of a fugitive's appeal, see *Molinaro* v. *New Jersey*, 396 U.S. 365 (1970)—was technically inapplica-

ble, but that the doctrine's underlying rationale counseled against resolving petitioner's motion before his appearance. 7/20/2005 Order 3-4. In particular, the court observed that a ruling would be contrary to "the desire for mutuality in litigation," because petitioner had "everything to gain" and "little to lose—if anything—from an unfavorable ruling on his motion." *Id.* at 3, 4. When petitioner renewed his motion to dismiss following the return of the superseding indictment, the district court again held the motion in abeyance for similar reasons. 9/4/2008 Order 5-7; see also Pet. App. 11a.[1]

3. a. In August 2008, petitioner sought a writ of mandamus from the court of appeals that would direct the district court either to rule on his motions to dismiss the indictments or, in the alternative, to grant those motions. The court of appeals granted the writ and ordered the district court—which was "in a better position to address the merits in the first instance"—"promptly to rule on [petitioner's] motions to dismiss the indictment." *In re Hijazi*, 589 F.3d at 403, 414. The court of appeals determined that mandamus was warranted because it concluded that petitioner's motions "raise[d] serious questions about the reach of U.S. law" and "delicate foreign relations issues," that he had a clear and indisputable right to a prompt ruling on his motions "[u]nder the unusual circumstances of this case," and that he had no other adequate mechanism for vindicating that right. *Id.* at 406-414.

b. On remand, the district court referred petitioner's motions to dismiss to a magistrate judge, who

[1] In the meantime, Mazon was tried twice in 2008, with both trials resulting in hung juries. In March 2009, Mazon pleaded guilty, pursuant to a plea agreement, to a misdemeanor false-statement charge. Pet. App. 11a n.5.

issued a report recommending that the motions be denied. *United States* v. *Hijazi*, No. 05-cr-40024, 2010 WL 7139227 (C.D. Ill. May 7, 2010). Petitioner filed objections to the magistrate judge's report. When the district court had not ruled on those objections by June 2011, petitioner sought a writ of mandamus from the court of appeals ordering the district court to dismiss the indictments. On July 1, 2011, the court of appeals granted the writ to a limited extent, requiring the district court to rule on petitioner's motions to dismiss "within 30 days." Pet. App. 42a-43a.

c. On July 18, 2011, the district court issued an order and opinion overruling petitioner's objections to the magistrate judge's report and recommendation and denying his motions to dismiss the indictments. Pet. App. 5a-41a. The court concluded that prosecuting petitioner for fraudulent acts that had substantial and foreseeable effects on the United States would be consistent with principles of due process and international law, *id.* at 13a-21a; that jurisdiction was proper because "part of the alleged scheme to defraud * * * took place in the United States" and because the statutes under which petitioner was charged apply extraterritorially, *id.* at 21a-26a; that the prosecution was not barred by the Defense Cooperation Agreement between the United States and Kuwait, *id.* at 26a-30a; and that the lengthy pre-trial delay did not support dismissal either on speedy-trial grounds or under Rule 48 of the Federal Rules of Criminal Procedure, Pet. App. 30a-41a.

4. Petitioner filed a notice of appeal and a petition for a writ of mandamus from the court of appeals. At petitioner's request, the court of appeals consolidated the two proceedings and ordered expedited briefing to address, *inter alia*, the doctrine of practical finality and

appellate jurisdiction under the collateral-order doctrine. See 8/5/2011 C.A. Order 1-2. Before petitioner filed his opening brief, however, the government informed the court of appeals that it had "concluded that termination of its effort to prosecute [petitioner would] best serve the interest of the United States" and that the government would therefore "promptly move the district court * * * to dismiss the indictment * * * with prejudice." Gov't Emergency Mot. to Suspend Briefing Schedule 2 (filed Aug. 25, 2011).

The government filed its unopposed motion to dismiss in the district court the next day. That motion explained that even a favorable ruling on appeal would "not bring [petitioner] any closer to arraignment" and that, as long as petitioner remained in Kuwait, the prosecution would simply "linger on th[e] Court's docket," with "the government and the judiciary [continuing] to devote time and resources to the prosecution of a defendant who, in all likelihood, will never appear in court." Gov't Unopposed Mot. to Dismiss Indictment 4-5 (filed Aug. 26, 2011). "Given those unique circumstances," the motion stated, "the interests of judicial economy and the efficient use of limited judicial and executive resources support the dismissal of the indictments against [petitioner] with prejudice." *Id.* at 5. On August 29, 2011, the district court granted the government's motion and dismissed with prejudice the original and superseding indictments.

b. Following the dismissal of the indictments, petitioner filed in the court of appeals a suggestion of mootness and a motion to vacate the district court's earlier order and opinion denying his motions to dismiss the indictment. He argued that, under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), and *U.S. Ban-*

corp Mortgage Co. v. *Bonner Mall Partnership*, 513 U.S. 18 (1994), the court of appeals was required to vacate the district court's order because the government had "caused th[e] case to become moot while [petitioner] was seeking" appellate review. Suggestion of Mootness and Mot. to Vacate D. Ct. Order 1 (filed Aug. 30, 2011). The government opposed vacatur, arguing that, under this Court's precedents, petitioner bore the burden of demonstrating an equitable entitlement to that extraordinary remedy and that he could not carry that burden because the district court's interlocutory decision carried no legal consequences following the dismissal with prejudice of all charges against him. Gov't Resp. to Suggestion of Mootness and Mot. to Vacate D. Ct. Order 4-14 (filed Sept. 15, 2011).

c. On September 21, 2011, the court of appeals issued an unpublished order dismissing the appeal as moot and denying petitioner's motion to vacate the district court order. Pet. App. 1a-2a. Petitioner moved for reconsideration of the denial of his request for vacatur. The court of appeals denied that motion in another unpublished order. *Id.* at 3a-4a.

ARGUMENT

Petitioner contends (Pet. 10-21) that the court of appeals erred in denying his motion to vacate the order and opinion of the district court denying his motions to dismiss the indictments. That contention lacks merit. No decision of this Court requires vacatur under the circumstances of this case. Nor does the court of appeals' unpublished order give rise to a circuit conflict or otherwise warrant this Court's review or summary action.

1. The judicial power of the federal courts extends only to "Cases" and "Controversies." U.S. Const. Art. III, § 2. As this Court has explained, "[t]o qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997) (quoting *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975)). An appeal should be dismissed as moot when, "by virtue of an intervening event, a court of appeals cannot grant any effectual relief whatever in favor of the appellant." *Calderon* v. *Moore*, 518 U.S. 149, 150 (1996) (per curiam) (citation and internal quotation marks omitted).

The court of appeals correctly concluded, and petitioner agrees (Pet. 3), that his appeal and petition for a writ of mandamus became moot when the district court dismissed the indictments against him with prejudice, thereby affording him all of the relief that he sought.

2. Relying on *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), and its progeny, petitioner contends (Pet. 10-13, 16-17) that the court of appeals, having found his appeal and mandamus petition to be moot, was further required to vacate the district court's earlier order and opinion denying his motion to dismiss. He asks this Court (Pet. 24) to grant certiorari, vacate the court of appeals' judgment in relevant part, and remand (GVR) with instructions to vacate the district court's earlier order and opinion. That result is not required by this Court's precedents.

a. *Munsingwear* stated that "[t]he established practice of th[is] 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 our decision on the merits is to reverse or vacate the judgment below and remand

with a direction to dismiss." 340 U.S. at 39. Such a procedure, the Court explained, "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance," and preserves the rights of all parties and ensures against prejudice to them. *Id.* at 40. The Court further explained that such a procedure is commonly used "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *Id.* at 41. But the "established practice" described in *Munsingwear* has not been absolute or generally applied to interlocutory orders, much less to those in criminal cases.

By its terms, *Munsingwear* applied to "civil case[s]," 340 U.S. at 39; accord *Camreta* v. *Greene*, 131 S. Ct. 2020, 2034-2035 (2011); *Arizonans for Official English*, 520 U.S. at 71, although this Court recently cited *Munsingwear* in a criminal case, see *Claiborne* v. *United States*, 551 U.S. 87 (2008) (per curiam) (ordering vacatur of court of appeals' judgment when criminal defendant died after grant of his petition for a writ of certiorari and oral argument in this Court). As a general matter, courts have applied separate doctrines for determining both when a criminal case has become moot and what consequences should follow if mootness occurs while an appeal is pending. See, *e.g.*, *Sibron* v. *New York*, 392 U.S. 40, 57 (1968) (holding that a defendant's appeal of his criminal convictions is moot "only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction"); *Spencer* v. *Kemna*, 523 U.S. 1, 8 (1998) (noting that the Court has "[i]n recent decades, * * * been willing to presume that a wrongful criminal conviction has continuing collateral consequences"); *Durham*

v. *United States*, 401 U.S. 481, 483 (1971) (explaining that, when a criminal defendant dies while an appeal from a conviction or sentence is pending, courts of appeals applying the doctrine of abatement treat the appeal as moot and order the district court to vacate the judgment of conviction), overruled on other grounds, *Dove* v. *United States*, 423 U.S. 325 (1976); *United States* v. *Koblan*, 478 F.3d 1324, 1325 (11th Cir. 2007) (per curiam) (applying abatement doctrine). Petitioner, however, cites no settled practice—or, for that matter, unsettled practice—involving the vacatur of interlocutory orders in criminal cases.

b. Even in civil cases, the Court has made clear that a lower court's judgment should not automatically be vacated whenever a case becomes moot pending appeal. Vacatur is instead an extraordinary remedy, the grant of which is governed by equitable principles. See *U.S. Bancorp Mortgage Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 24-26 (1994). In *U.S. Bancorp*, the Court retreated from dicta in *Munsingwear* and a series of subsequent per curiam opinions that "drew no distinctions between categories of moot cases." 513 U.S. at 23-24. Thus, *U.S. Bancorp* declined to vacate a court of appeals' judgment when a civil case was mooted by the parties' settlement after a petition for certiorari had been granted. In so doing, the Court explained that, "[f]rom the beginning we have disposed of moot cases in the manner most consonant to justice in view of the nature and character of the conditions which have caused the case to become moot." *Id.* at 24 (ellipsis and internal quotation marks omitted); see *Dilley* v. *Gunn*, 64 F.3d 1365, 1370 (9th Cir. 1995) ("*U.S. Bancorp* makes clear that the touchstone of vacatur is equity."); *Humphreys* v. *DEA*, 105 F.3d 112, 114 (3d Cir. 1996) ("*Munsingwear* should not

be applied blindly, but only after a consideration of the equities and the underlying reasons for mootness."). The Court further observed that "[t]he principal condition" bearing on the propriety of vacatur "is whether the party seeking relief from the judgment below caused the mootness by voluntary action," in which case vacatur is ordinarily inappropriate. *U.S. Bancorp*, 513 U.S. at 24. The Court distinguished that situation from one in which mootness arises from "happenstance—that is to say, where a controversy presented for review has become moot due to circumstances unattributable to any of the parties." *Id.* at 23 (internal quotation marks omitted). The Court emphasized that the party seeking relief from the underlying judgment bears the burden of establishing his "equitable entitlement to the extraordinary remedy of vacatur." *Id*. at 26.

As petitioner points out (Pet. 10), the Court in *U.S. Bancorp* distinguished the settlement context before it from one where "mootness results from unilateral action of the party who prevailed below," suggesting that vacatur will ordinarily be appropriate in the latter circumstance. 513 U.S. at 25. But, contrary to petitioners' reading, the Court did not establish a *per se* rule of vacatur in those circumstances.[2] See, *e.g.*, *Khodara Envtl., Inc. ex rel. Eagle Envtl. L.P.* v. *Beckman*, 237 F.3d 186, 195 (3d Cir. 2001) (Alito, J.) (explaining that "*Munsing-*

[2] Petitioner quotes *U.S. Bancorp* as "explaining that 'vacatur *must* be granted where mootness results from the unilateral action of the party who prevailed in the lower court." Pet. 10-11 (quoting *U.S. Bancorp*, 513 U.S. at 23) (emphasis added by petitioner). But the Court stated only that "[t]he parties" in that case "agree[d]" that vacatur must be granted in those circumstances. 513 U.S. at 23. *U.S. Bancorp* actually involved a different question (*i.e.*, "whether courts should vacate where mootness results from a settlement"). *Ibid.*

wear does not set forth a categorical rule," and that *U.S. Bancorp* "clarified that vacatur is an equitable remedy rather than an automatic right"); cf. *Alvarez* v. *Smith*, 130 S. Ct. 576, 581 (2009) (noting that the statute "that enables [the Court] to vacate a lower court judgment when a case becomes moot is flexible") (citing 28 U.S.C. 2106).

The Court's subsequent decision in *Arizonans for Official English*, *supra*, illustrates the point. There, a public-employee plaintiff who had prevailed in the district court voluntarily left her public employment while the case was on appeal, thus mooting the appeal. 520 U.S. at 68-71. Citing *U.S. Bancorp*, this Court described the "established" *Munsingwear* practice and stated that vacatur "is in order" where the party that prevailed in the court below mooted the case through its unilateral action. *Id.* at 71-72. Yet, before ordering vacatur, the Court considered at length the particular circumstances of the case, deciding that vacatur of the district court's decision was "the equitable solution" "in view of the extraordinary course of th[e] litigation" and a "federalism concern" that the case raised. That analysis would have been unnecessary if, as petitioner insists (Pet. 10-11, 16-17), vacatur is mandatory whenever the prevailing party below voluntarily caused mootness. See *Staley* v. *Harris County*, 485 F.3d 305, 311 (5th Cir.) (en banc) (recognizing that vacatur in *Arizonans for Official English* depended on consideration of the equities even though the appeal had been mooted by the actions of the party that prevailed in district court), cert. denied, 552 U.S. 1038 (2007).

c. Petitioner contends that "this Court's practice is to grant petitions for certiorari and vacatur in cases similar to this one," Pet. 13 (capitalization modified), but the

cases he cites (which were all civil cases) do not support that claim, because none of them involved a decision by this Court that an interlocutory district court order should be vacated.

In the most analogous case that petitioner cites (Pet. 14), this Court required the court of appeals' decision to be vacated—but not the underlying interlocutory order of the district court. In *Selig* v. *Pediatric Speciality Care, Inc.*, 551 U.S. 1142 (2007), the district court had denied a motion for summary judgment filed by two individual defendants on qualified-immunity grounds, and the court of appeals had affirmed that decision on interlocutory appeal. See *Pediatric Specialty Care, Inc.* v. *Arkansas Dep't of Human Servs.*, 443 F.3d 1005, 1009, 1012, 1016 (8th Cir. 2006), vacated and remanded, 551 U.S. 1142 (2007). The individual defendants sought certiorari from this Court and, while their petition was pending, the plaintiffs indicated that they were willing to dismiss with prejudice their damages claims against those defendants. See Resp. Suggestion of Mootness at 3, *Selig*, *supra*, No. 06-415 (filed June 1, 2007). This Court GVR'd "with respect to the individual capacity claims" and "remanded * * * with instructions to *dismiss the appeal* as moot with respect to these claims." 551 U.S. at 1142 (emphasis added). But this Court did not separately order that the relevant part of the district court's decision should also be vacated, even though that order had affirmatively found that the plaintiffs might be able to show that the individual defendants "violated the plaintiffs' Medicaid Act rights" by "manipulat[ing]" a government program's "authorization system in a way that denied children essential medical services solely because they wanted to cut costs." *Pediatric Specialty Care*, 443 F.3d at 1016. Nor, on remand, did

the court of appeals order that the district court's interlocutory decision be vacated; instead, consistent with this Court's order, it simply "ordered that this appeal is dismissed as moot." *Pediatric Specialty Care, Inc.* v. *Arkansas Dep't of Human Servs.*, No. 05-1668 Docket entry (8th Cir. Sept. 17, 2007).

Three other cases cited by petitioner to illustrate this Court's practice (Pet. 12-14) also involved the vacatur of only court of appeals decisions, not district court decisions. In *EISAI Co.* v. *Teva Pharmaceuticals USA, Inc. ex rel. Gate Pharmaceuticals Division*, 131 S. Ct. 2991 (2011), this Court vacated a Federal Circuit decision and remanded "with instructions to dismiss the case as moot." *Ibid.* On remand, the Federal Circuit further remanded the case "to the district court with instructions to dismiss the complaint as moot," but it did not disturb the district court's earlier order dismissing the case for lack of subject-matter jurisdiction. *Teva Pharms. USA, Inc. ex rel. Gate Pharms. Div.* v. *EISAI Co.*, 426 Fed. Appx. 904, 904 (2011). Similarly, in *al-Marri* v. *Spagone*, 555 U.S. 1220 (2009), this Court vacated the en banc Fourth Circuit's decision and remanded "with instructions to dismiss the appeal as moot." *Ibid.* On remand, the Fourth Circuit dismissed the appeal, without disturbing the district court's underlying decision dismissing the petitioner's habeas petition. See *al-Marri* v. *Pucciarelli*, No. 06-7427 Docket entry No. 250 (Apr. 16, 2009). And in *Radian Guaranty, Inc.* v. *Whitfield*, 553 U.S. 1091 (2008), this Court vacated a Third Circuit decision. *Ibid.* And the Third Circuit on remand "dismiss[ed] the case as moot," but it did not disturb the district court's earlier entry of summary judgment for the defendant. *Whitfield* v. *Radian Guar., Inc.*, 539 F.3d 165, 166 (2008).

In only one case that petitioner cites (Pet. 11-12) did this Court conclude that a district court decision should be vacated. See *Great W. Sugar Co.* v. *Nelson*, 442 U.S. 92 (1979) (per curiam). But, unlike the order in this case, which simply refused to dismiss indictments (that have now been dismissed with prejudice), the underlying district court decision in *Great Western Sugar Co.* had both granted "the plaintiff's motion for summary judgment" and ordered the defendant to "proceed forthwith to arbitration of the plaintiff's discharge" under the terms of a collective bargaining agreement. *Nelson* v. *Great W. Sugar Co.*, 440 F. Supp. 928, 930 (D. Colo. 1977). In other words, that case involved a final judgment (and injunction), which the court of appeals had expressly "allowed to stand." 442 U.S. at 93. Here, by contrast, the district court's denial of petitioner's motions to dismiss the indictments was not a final judgment, and it has already been overtaken by the subsequent order from that district court dismissing those indictments. In any event, the Court has previously recognized *Great Western Sugar Co.* as one of a series of per curiam opinions that rested on an overly broad reading of dicta in *Munsingwear*. See *U.S. Bancorp*, 513 U.S. at 23-24.

d. The court of appeals' unpublished order denying vacatur of the interlocutory district court decision in this case is not inconsistent with the above principles. As this Court recently reaffirmed, "[t]he point of vacatur" in civil cases "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." *Camreta*, 131 S. Ct. at 2035 (quoting *Munsingwear*, 340 U.S. at 40-41). Vacatur in this criminal case would not have served that purpose because the decision

at issue—the district court's order and opinion denying petitioner's motions to dismiss the indictments—was already rendered incapable of "spawning any legal consequences" when the district court dismissed the original and superseding indictments with prejudice. After that point, the government could never again bring the charges in those indictments against petitioner, which meant that "subsequent events [could not] rekindle their controversy," *Deakins* v. *Monaghan*, 484 U.S. 193, 201 n.5 (1988), and the court had no need to use vacatur to "clear[] the path for future relitigation," *Munsingwear*, 340 U.S. at 40.

Moreover, the district court's earlier order and opinion have no preclusive or precedential effect that needs to be (or could be) obviated by vacatur. The district court's decision cannot be "strip[ped] * * * of its binding effect," *Camreta*, 131 S. Ct. at 2035 (quoting *Deakins*, 484 U.S. at 200), because that decision has no such effect, see *id.* at 2033 n.7 (noting that district court decisions are "not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case") (citation omitted). Indeed, the district court's interlocutory order denying the motion to dismiss was of a class that is normally not subject to immediate appellate review at all, see *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 798-799 (1989), a circumstance that the court of appeals recognized in ordering the parties to brief the question of appellate jurisdiction under the collateral-order and practical-finality doctrines. See 8/5/2011 C.A. Order 1-2.

Without disputing those considerations, petitioner attempted to carry his "burden" of demonstrating that he had an "equitable entitlement" to vacatur (*U.S. Bancorp*, 513 U.S. at 26) primarily based on his assertion

of a purported bright-line rule that "vacatur *must be granted* where mootness results from the unilateral action of the party who prevailed in the lower court." Pet. Mot. for Reconsideration 4-5 (filed Sept. 22, 2011) (quoting *U.S. Bancorp*, 513 U.S. at 23) (emphasis added by petitioner); see also Pet. Suggestion of Mootness and Mot. to Vacate 4. But, as explained above (see pp. 12-13 & note 2, *supra*), *U.S. Bancorp* did not establish any such rule. Instead, it rejected the *per se* rule urged by the petitioner there (and the United States as amicus curiae) and explained that "the determination is an equitable one" that turns on case-specific considerations such as fault and the public interest. 513 U.S. at 24-28; see *Cammermeyer* v. *Perry*, 97 F.3d 1235, 1239 (9th Cir. 1996) (noting that, in light of *U.S. Bancorp*, "the decision to vacate is not to be made mechanically, but should be based on equitable considerations").

Beyond the fact that the government's action mooted the case, petitioner proffered only his belief that the district court's non-precedential order and opinion was "damaging to his personal and professional reputation" because it recited the allegations in the indictment and some that went beyond that publicly available document. See Pet. Mot. for Reconsideration 5. But those same recitations would continue to exist even if the district court order and opinion at issue were vacated. See, *e.g.*, *National Black Police Ass'n* v. *District of Columbia*, 108 F.3d 346, 354 (D.C. Cir. 1997) (noting that "the district court's opinion will remain 'on the books' even if vacated, albeit without any preclusive effect"); *Gould* v. *Bowyer*, 11 F.3d 82, 84 (7th Cir. 1993) (explaining that vacating a district court's decision on grounds of supervening mootness would not deprive it of precedential effect because "[a] district court decision binds no judge

in any other case" and "[i]ts only significance is information"). While petitioner is correct that the court of appeals in this case previously suggested that an opinion denying his motions to dismiss the indictments would have made it harder for him "to protest that the indictment is legally flawed as a matter of U.S. law," *In re Hijazi*, 589 F.3d at 413, the court deemed the ability to make that "protest" significant precisely because petitioner was then under indictment, which put him at risk of being extradited to the United States if Kuwait changed its position or if he traveled to another country. *Ibid.*

That circumstance, however, has now been eliminated by the dismissal of the indictments with prejudice. Further review at this point would be inconsistent with the established principle that "[t]his Court reviews judgments, not statements in opinions." *Camreta*, 131 S. Ct. at 2030 (citation omitted).

e. Because the district court's interlocutory order declining to dismiss the indictments causes petitioner no harm now that the indictments have been dismissed with prejudice, the court of appeals did not err in implicitly concluding that petitioner has failed to carry his "burden, as the party seeking relief from the status quo * * * , to demonstrate * * * equitable entitlement to the extraordinary remedy of vacatur." *U.S. Bancorp*, 513 U.S. at 26. There is accordingly no basis for this Court to GVR the court of appeals' unpublished order denying petitioner's request for vacatur.

3. Petitioner briefly suggests (Pet. 17) that plenary review is warranted because the court of appeals' decision conflicts with decisions from other courts granting vacatur where the government's actions mooted cases pending appeal. Contrary to petitioner's suggestion,

however, the unpublished one-line order of the court of appeals here does not conflict with any decision of another circuit. Although the court denied petitioner's motion to vacate the district court order and opinion (Pet. App. 2a), it did not hold that vacatur is never appropriate in those circumstances. Nor did it articulate general rules governing the proper treatment of requests to vacate. Indeed, as petitioner emphasizes (Pet. 10), the court of appeals did not explain its reasons for declining to order vacatur.

In any event, none of the cases cited by petitioner (Pet. 17-21) establishes a conflict that warrants this Court's review. The only criminal case that he cites (Pet. 20) involved a presidential pardon that mooted a case after the court of appeals had granted rehearing *en banc* of a panel decision that had reinstated a jury verdict of guilty and led to the imposition of a sentence. See *United States* v. *Schaffer*, 240 F.3d 35, 37-38 (D.C. Cir. 2001) (en banc) (per curiam). That differed from this case in two critical regards: first, because the defendant had been convicted (*i.e.*, found guilty by a jury and sentenced by the district court), *id.* at 37; and second, because mootness was not attributable to the actions of the prosecution (there, an independent counsel) but to "the unpredictable grace of a presidential pardon," *id.* at 38, which strongly implied that the D.C. Circuit was applying the principle that vacatur is warranted when mootness occurs as a result of happenstance rather than the principle that petitioner invokes here.

Nor does the decision below conflict with any of the eight civil cases that petitioner cites (Pet. 17-21). All of those cases involved an appeal of a final judgment. See *De La Teja* v. *United States*, 321 F.3d 1357, 1359 (11th Cir. 2003) (appeal of district court order denying habeas

petition); *Soliman* v. *United States ex rel. INS*, 296 F.3d 1237, 1241 (11th Cir. 2002) (per curiam) (appeal of district court order denying motion that was construed as a habeas petition); *Boyce* v. *Ashcroft*, 268 F.3d 953, 955 (10th Cir. 2001) (appeal of district court order dismissing habeas petition); *Anastasoff* v. *United States*, 235 F.3d 1054, 1055 (8th Cir. 2000) (en banc) (appeal of district court order dismissing plaintiff's claim for a tax refund as untimely); *United States* v. *Jenks*, 129 F.3d 1348, 1351-1352 (10th Cir. 1997) (appeal of district court order granting government's motion for summary judgment and enjoining defendant from using certain roads without authorization); *Mayfield* v. *Dalton*, 109 F.3d 1423, 1427 (9th Cir. 1997) (appeal of district court order granting government's motion for summary judgment); *Gibralter Indus., Inc.* v. *United States*, 726 F.2d 747, 748 (Fed. Cir. 1984) (per curiam) (appeal of Claims Court decision dismissing plaintiff's complaint for lack of jurisdiction); *United States* v. *Patmon*, 630 F.2d 458, 458-459 (6th Cir. 1980) (per curiam) (appeal of district court order requiring tax preparer to comply with IRS summons and to produce his client's tax records). Accordingly, those cases do not speak to the circumstances here, where the district court's interlocutory decision denying his motions to dismiss resulted in neither a final judgment nor an order that independently commanded him to take any action. Moreover, several of those civil decisions are of limited relevance because they predate *U.S. Bancorp* (see *Gibralter Indus.*, *supra*; *Patmon*, *supra*) or fail to acknowledge its clarification of the principles governing vacatur (see *Boyce*, *supra*; *Anastasoff*, *supra*). Some are also inapposite for other reasons. For instance, in *Gibralter Industries*, the Federal Circuit merely required the district court to "dismiss the com-

plaint for mootness," 726 F.2d at 749, which is akin to what has already happened with the dismissal of the indictments against petitioner. And some make it clear that the courts have not adopted any general rule that vacatur is required whenever the government prevails in the district court and then takes some action that moots an opposing party's appeal. See *Mayfield*, 109 F.3d at 1427 (noting that the general rule of vacatur "is not inflexible").

4. Finally, petitioner contends (Pet. 21-23) that the government's position in the court of appeals is at odds with its position in other cases and that further review is necessary to ensure consistent application of vacatur doctrine "in cases where the government is a party." Those contentions lack merit.

Petitioner cites (Pet. 22) a statement from the government's amicus brief on the question of mootness in *U.S. Bancorp*, which supported a categorical rule that "vacatur is appropriate whenever a case in which appellate review is ongoing becomes moot as a result of external events, the mutual agreement of the parties, or the unilateral conduct of the party that prevailed below." U.S. Amicus Br. at 4-5, *U.S. Bancorp*, *supra*, No. 93-714 (May 12, 1994). But this Court declined to adopt that approach. As explained above, the Court in *U.S. Bancorp* recognized that mootness caused by the unilateral action of the prevailing party below *may* be a sufficient reason for vacatur, 513 U.S. at 24-26 & n.3, but it specifically held that the decision of whether to vacate in a particular case involves "an extraordinary remedy" to which the party seeking relief must show it is entitled, *id.* at 26, 29.

Petitioner also invokes (Pet. 22-23) the government's position in *United States* v. *Weatherhead*, 528 U.S. 1042

(1999), a Freedom of Information Act (FOIA) case that became moot after certiorari had been granted but before oral argument in this Court. But the circumstances in *Weatherhead* were fundamentally different from those in this case. The court of appeals decision that the government sought to vacate had established binding circuit precedent that was uniquely applicable to the government (which is the only possible defendant in FOIA cases). See *Weatherhead* v. *United States*, 157 F.3d 735 (9th Cir. 1998), vacated and remanded, 528 U.S. 1042 (1999). This case, by contrast, involves a non-precedential district court opinion and a criminal defendant who, as a result of the subsequent dismissal of the indictments against him with prejudice, can never again be subject to the charges that were addressed in that opinion. There is no inconsistency in seeking vacatur where a judicial decision would otherwise continue to affect litigants across a class of cases and opposing vacatur where the decision carries no consequences even for the parties to that very case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LANNY A. BREUER
Assistant Attorney General
SCOTT A.C. MEISLER
Attorney

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