No. 17-10448

In The United States Court Of Appeals For The Ninth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH M. ARPAIO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA, NO. 2:16-CR-01012

BRIEF FOR THE UNITED STATES

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JURISDICTIONAL STATEMENT AND BAIL STATUS

Defendant-appellant Joseph M. Arpaio appeals from a decision not to vacate all orders ("vacatur denial") in his case, in which he was adjudged guilty of criminal contempt and then received a presidential pardon. DE 251.[1] The district court (Bolton, J.) had jurisdiction under 18 U.S.C. § 3231. The district court entered the vacatur denial on October 19, 2017; Arpaio filed a timely notice of appeal the same day. ER 680-81. Arpaio is not in custody.

On October 30, 2017, this Court issued an order directing Arpaio to dismiss the appeal or explain why this Court has appellate jurisdiction. ECF 4. To the extent that the vacatur denial would not otherwise be appealable, the collateral-order doctrine would apply. Under *Midland Asphalt Corp. v. United States*, 489 U.S. 794 (1989), an appellate court may exercise jurisdiction over a collateral, non-final order where the order in question (1) "conclusively determine[s] the disputed question," (2) "resolve[s] an important issue completely separate from the merits of the action," and (3) is "effectively unreviewable on appeal from a final judgment." *Id.* at 799 (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). The vacatur denial meets these criteria. It conclusively resolves the legal disposition of the district court's verdict and other

[1] "DE" refers to a docket entry in the district court; unless otherwise indicated, all DE citations refer to docket entries in *United States v. Arpaio*, No. 2:16-cr-01012 (D. Ariz. 2016). "GX" refers to a government trial exhibit; "Tr." refers to the court reporter's trial transcript; "ER" refers to Arpaio's excerpts of records; "ECF" refers to a docket entry in this Court; and "Br." refers to Arpaio's opening brief. Where appropriate, a citation to page number(s) follows. Other abbreviations are defined in the text.

orders following the presidential pardon. That question, which is distinct from the merits of the underlying criminal contempt prosecution, raises an important issue concerning the effect of a presidential pardon granted after a guilty verdict but before sentencing or appellate review. The vacatur denial is not reviewable on appeal from final judgment because the pardon mooted the prosecution. Accordingly, this Court has jurisdiction under the collateral order doctrine and under 28 U.S.C. § 2106. *See U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership*, 513 U.S. 18, 21-22 (1994) (Section 2106 "supplies the power of vacatur" even where the case has otherwise become moot).

STATEMENT OF THE ISSUE

At the district court's request, the United States prosecuted Arpaio for criminal contempt of court, in violation of 18 U.S.C. § 401(3), and secured a guilty verdict. Arpaio then obtained a presidential pardon, which issued before sentencing or appellate review. The district court thereafter dismissed the prosecution with prejudice but declined to vacate the verdict. Did the district court err by not vacating the guilty verdict after the pardon mooted the case?

STATEMENT OF THE CASE

Following a bench trial in the United States District Court for the District of Arizona, the district court adjudicated Arpaio guilty of criminal contempt, in violation of 18 U.S.C. § 401(3). Before the court imposed sentence, the President pardoned Arpaio. The district court denied Arpaio's motion to vacate the factual finding of guilt, and he appealed.

A. Statement of the facts

1. From 1993 until 2016, Arpaio was the sheriff of Maricopa County, Arizona. ER 242. Beginning in February 2007, certain officers at the Maricopa County Sheriff's Office ("MCSO") were granted the authority to enforce federal civil immigration law under 8 U.S.C. § 1357(g), which Arpaio and MCSO officers commonly referred to (based on the pertinent Immigration and Nationality Act provision) as "Section 287(g)" authority. *See Melendres v. Arpaio*, No. 2:07-cv-02513 (D. Ariz. 2007), DE 579 at 10. In December 2007, a group of private plaintiffs filed a class-action lawsuit alleging that Arpaio and MCSO were engaged in "illegal, discriminatory and unauthorized enforcement of federal immigration laws against Hispanic persons in Maricopa County, Arizona." *Melendres*, DE 1 at 2. In October 2009, the federal government removed MCSO's Section 287(g) authority to enforce federal civil immigration law as to any individual not already in prison. *Melendres*, DE 494 at 2.

On December 23, 2011, the district court (Snow, J.) presiding over the *Melendres* litigation entered a preliminary injunction enjoining "MCSO and all of its officers from detaining any person based on knowledge, without more, that the person is unlawfully present within the United States." *Melendres*, DE 494 at 38. The injunction further directed that MCSO "may not enforce civil federal immigration law." *Id.* at 39; *accord id.* at 40 (enjoining MCSO and all its officers from detaining any person "based only on knowledge or reasonable belief, without more, that the person is unlawfully present within the United States, because as a matter of law such knowledge does not amount

to a reasonable belief that the person either violated or conspired to violate the Arizona smuggling statute, or any other state or federal criminal law"). This Court upheld the preliminary injunction on appeal. *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). On May 22, 2013, the district court issued a permanent injunction that precluded the MCSO from, among other things, "[d]etaining, holding, or arresting Latino occupants of vehicles in Maricopa County based on a reasonable belief, without more, that such persons were in the country without authorization." ER 247-48 (citation omitted).

2. In May 2016, following 21 days of evidentiary hearings, the district court issued an order holding Arpaio and others at MCSO in civil contempt for, among other things, "intentionally fail[ing] to implement the Court's preliminary injunction in this case." *See Melendres*, DE 1677 at 1. The district court then entered an order referring the matter to another (randomly selected) district judge (Bolton, J.) to determine whether Arpaio and others should be held in criminal contempt of court for willfully violating the preliminary injunction. DE 1 at 1. The primary federal statute governing criminal contempt is 18 U.S.C. § 401. It provides that a federal court may punish "contempt of its authority" that constitutes "[d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command." § 401(3). Under the Federal Rules of Criminal Procedure, the court "must request" that the government prosecute the criminal contempt "unless the interest of justice requires the appointment of another attorney." Fed. R. Crim. P. 42(a)(2). "If the government declines the request, the court must appoint another attorney to prosecute the contempt." *Id.*

Following the district court's request, the government agreed to prosecute Arpaio. DE 27 at 8-9. The case proceeded to a bench trial in June 2017.

3. The facts recounted here come from the district court's factual findings following the bench trial unless otherwise indicated. *See generally* ER 242-48. On December 23, 2011, Judge Snow issued the preliminary injunction that enjoined MCSO officers from detaining any person based only on a knowledge or reasonable belief, without more, that the person was unlawfully present in the country. ER 243. That evening, MCSO attorney Timothy Casey called MCSO Chief Brian Sands to inform him of the preliminary injunction, and, in a follow-up email to Sands and other MCSO officers, Casey provided a "quick summary" explaining the effect of the injunction. *Id.* The same evening, Casey also called to inform Arpaio, who did not use email. *Id.*; *see* GX 3F at 2539 (Arpaio's assistant receives emails for Arpaio).

Three days later, on December 26, 2011, Casey and Arpaio had a more detailed conversation about the injunction. In discussing whether MCSO would appeal, Casey explained to Arpaio that, under the injunction, "[i]f you just believe or you know that [a person] is in the country unlawfully, you cannot detain him based on that alone. You either are to . . . arrest based on state charges or you release. Those are the options." ER 243 (citing Tr. at 88-89). When Casey informed Arpaio that MCSO could no longer turn people over to federal authorities, Arpaio responded that MCSO had already stopped because Immigrations and Customs Enforcement ("ICE") was not accepting such MCSO detainees. ER 243-44. In fact, MCSO turned over 14 individuals not

charged with a criminal offense to ICE between December 23, 2011 and December 30, 2011. ER 248 (citing GX 18).

In January 2012, Chief John MacIntyre, a "trusted member" of Arpaio's executive staff, twice read the preliminary injunction to Arpaio and other executive MCSO staff. ER 244. MacIntyre, who was trained as a lawyer (*see* GX 5 at 1864) and "provided internal legal advice" to Arpaio and others at MCSO, explained that no one asked him any questions when he finished reading. ER 244. In MacIntyre's view, the preliminary injunction "forbade the arrest, detention, or delay or stoppage of individuals merely based on the belief or suspicion, or reality, that they were here in this country illegally." *Id.* (citing GX 5 at 1877). The injunction, MacIntyre concluded, required MCSO to change its policy of "stopping, detaining, or delaying individuals based on mere illegal presence in this country alone." *Id.* (citing GX 5 at 1944).

Notwithstanding the information and legal advice provided by Casey and MacIntyre, Arpaio and MCSO press releases—which Arpaio personally reviewed, *see* Tr. 460-62—through the spring of 2012 continued to tout that MCSO "was still detaining and arresting illegal immigrants." ER 244. In a March 2012 television interview, Arpaio confirmed the ongoing practice, claiming that "if they don't like what I'm doing, get the laws changed in Washington." GX 37B. A MCSO press release later that month indicated that "Arpaio remains adamant" that MCSO "will continue to enforce both state and federal illegal immigration laws." GX 36D. In another television interview the following month, Arpaio claimed he would "never give in to control by

the federal government," suggesting the federal government did not "like me enforcing illegal immigration law." GX 37E. In a television interview in April 2012 just before argument in *Arizona v. United States*, 567 U.S. 387 (2012), in which the Supreme Court considered S.B. 1070, an Arizona law intended to "discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States," *id.* at 392, Arpaio was asked what impact a decision striking down S.B. 1070 would have on MCSO. GX 37H. He responded: "None. . . . I'm still going to arrest illegal aliens coming into this country." *Id.* Similarly, Arpaio stated in a television interview the following month that "I'm not going to give up. I'm going to continue to enforce state laws and federal laws." GX 37C.

With Arpaio's knowledge and support, MCSO continued, after the December 2011 preliminary injunction, to transfer individuals suspected or known to be unlawfully present within the United States to federal authorities. When questioned at some point between July and December 2012 by an MCSO lieutenant on the appropriate policy if ICE refused to accept individuals that MCSO detained but for whom no state charges existed, Arpaio said to "take them to Border Patrol." ER 245; *accord id.* (MCSO Sergeant explaining MCSO's policy of taking detained individuals not accepted by ICE to the United States Border Patrol). Arpaio referred to that approach—taking individuals detained for perceived or known violations of federal civil immigration law to Border Patrol when ICE refused to accept them—as his "backup plan." *See, e.g.*, ER 246 (quoting GX 36G (October 2012 MCSO press release quoting Arpaio: "My back up

plan is still in place and will continue to take these illegal aliens not accepted by ICE to the Border Patrol.")); GX 36E (September 2012 MCSO press release quoting Arpaio: "I expected it would happen eventually, so I had a back up plan in place which was to take these illegal immigrants not accepted by ICE to the Border Patrol."). Altogether, the MCSO turned over 97 individuals not charged with a criminal offense to federal authorities in 2012. ER 248 (citing GX 19CD).

On multiple occasions, Casey, the MCSO attorney, informed Arpaio that Casey was concerned that MCSO was violating the preliminary injunction. At a bench trial in the *Melendres* case during the summer of 2012, Casey heard testimony that "concerned" him, causing him to remind Arpaio that "MCSO could not detain people for federal authorities in the absence of state charges." ER 245. When this Court affirmed the preliminary injunction in September 2012, *see Melendres*, 695 F.3d at 1002, Casey contacted MCSO executive staff and Arpaio's assistant to inform them that "nothing changes," ER 246. And, after Casey received a letter in October 2012 from a plaintiff's attorney in the *Melendres* case, he told Arpaio that the "backup plan" was "likely a violation of the preliminary injunction." ER 247 (quoting Tr. 148). After speaking with Arpaio, Casey believed that MCSO had violated the injunction; Arpaio promised Casey it was a "mistake" and would not recur. *Id.*

In fact, MCSO policy continued unchanged into 2013. On January 17, 2013, Arpaio stated in a press release that "[u]ntil the laws are changed, my deputies will continue to enforce state and federal immigration laws." GX 36I. MCSO press releases

in March and April announced that MCSO had turned over individuals to ICE. *See* ER 247. On May 22, 2013, the district court presiding over the *Melendres* litigation issued a permanent injunction that precluded the MCSO from, among other things, "[d]etaining, holding, or arresting Latino occupants of vehicles in Maricopa County based on a reasonable belief, without more, that such persons were in the country without authorization." ER 247-48 (citation omitted). Between January 2, 2013 and May 22, 2013, the MCSO turned over to federal authorities 60 persons not charged with a criminal offense. ER 248 (citing GX 20).

B. Procedural history

On July 31, 2017, the district court issued "Findings of fact and conclusions of law" that found Arpaio guilty of criminal contempt. ER 242-55. To sustain a conviction for criminal contempt, the evidence must show beyond a reasonable doubt that the defendant knew of, and willfully disobeyed, a clear and definite order. *See United States v. Baker*, 641 F.2d 1311, 1317 (9th Cir. 1981). The court made specific factual findings about Arpaio's conduct, ER 242-48, and determined that (1) the December 2011 preliminary injunction was "clear and definite," ER 248-50; (2) Arpaio knew about the preliminary injunction, ER 250-52; and (3) Arpaio willfully disobeyed the preliminary injunction, ER 252-55. The district court therefore found Arpaio guilty of criminal contempt. ER 255. Sentencing was scheduled for October 2017. *Id.*

Before sentencing, the President granted Arpaio a "Full and Unconditional Pardon." ER 677. The Constitution authorizes the President to "grant Reprieves and

Pardons" for federal offenses "except in Cases of Impeachment." U.S. Const. art. II, § 2, cl. 1. The pardon in this case encompassed Arpaio's "Conviction" under 18 U.S.C. § 401(3) and any other criminal contempt offenses arising out of the underlying civil litigation. ER 677.

Arpaio moved to dismiss the case with prejudice and "vacate the verdict and all other orders." ER 668-69. He argued, among other things, that vacatur was appropriate because the pardon mooted the case and thereby deprived him of the opportunity to challenge the merits of the verdict on appeal. *See United States v. Schaffer*, 240 F.3d 35, 38 (D.C. Cir. 2001) (en banc) (per curiam) (vacating guilty verdict where pardon was issued before conclusion of appeals). The government filed a brief that similarly maintained that the pardon's issuance "after the guilty verdict but before judgment moots the case, prevents appellate review, and thus warrants vacatur." DE 236 at 3; *see id.* at 2 (arguing that *Schaffer* "strongly counsels for vacatur").

At a hearing on Arpaio's motion, the district court dismissed the criminal-contempt action against Arpaio with prejudice and took under advisement whether to "enter any further orders." ER 679. In a subsequent written order, the court denied Arpaio's motion for vacatur "insofar as it seeks relief beyond dismissal with prejudice." ER 259. The district court reasoned that the defendant in *Schaffer* accepted a presidential pardon "before the legal question of his guilt could be retried" because the en banc appellate court had granted his petition for review. ER 258-59. Because Arpaio, in contrast, had accepted the pardon after being found guilty but before entry of the

judgment of conviction, the "only matter mooted" was Arpaio's "sentencing and entry of judgment," which the court had already vacated. ER 259.

C. Rulings for review

Arpaio renews his challenge to the district court's denial of his motion to vacate the guilty verdict and other orders. ER 256-59. In the alternative, Arpaio asks this Court to review various aspects of the criminal contempt prosecution. *See* Br. 18-49 (arguing that (1) prosecution was time-barred; (2) the district court's order finding Arpaio guilty violated his right to be present for the verdict; (3) insufficient evidence supported the verdict; (4) the verdict violated the Due Process Clause; and (5) the district court failed to credit Arpaio's good-faith advice of counsel and public authority defenses).

SUMMARY OF ARGUMENT

The presidential pardon mooted the criminal contempt prosecution of Arpaio because it ensured he will face neither legal punishment nor collateral consequences stemming from a conviction. The ordinary practice when mootness precludes appellate review is to vacate the decision below. Under the equitable principles governing vacatur established in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), and *U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), vacatur is inappropriate where the party seeking relief from the decision below caused mootness through voluntary action, but warranted where mootness resulted from "happenstance" or the unilateral action of the prevailing party. The "unpredictable grace of a presidential pardon," *United States v.*

Schaffer, 240 F.3d 35, 38 (D.C. Cir. 2001) (en banc) (per curiam), which issued from the same Executive Branch that had "prevailed" by securing the guilty verdict, counseled in favor of vacatur here. That conclusion follows from the D.C. Circuit's decision in *Schaffer*, is consistent with this Court's decision in *United States v. Payton*, 593 F.3d 881 (9th Cir. 2010), and accords with this Court's practices under the abatement doctrine, which the Court has applied when a defendant dies after the verdict, but before entry of judgment. *United States v. Oberlin*, 718 F.2d 894, 895-96 (9th Cir. 1983). The district court's decision denying vacatur, which did not consider or discuss the relevant principles, was erroneous.

ARGUMENT

THE PRESIDENTIAL PARDON MOOTS ARPAIO'S CRIMINAL CONTEMPT PROSECUTION AND COUNSELS VACATUR OF THE DISTRICT COURT'S FACTUAL ADJUDICATION OF GUILT.

Arpaio principally argues (Br. 3-16) that the district court erred when it denied his motion to vacate the guilty verdict and other orders following the presidential pardon. This Court reviews the denial of a motion to vacate for abuse of discretion. *See United States v. Estate of Stonehill*, 660 F.3d 415, 443 (9th Cir. 2011). The presidential pardon rendered the case against Arpaio moot, and vacatur is appropriate in that circumstance. *See United States v. Pool*, 659 F.3d 761, 761-62 (9th Cir. 2011) (en banc) (citing *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)). The district court abused its discretion when it concluded otherwise.

A. The presidential pardon mooted the criminal contempt prosecution.

The judicial power of the federal courts extends only to "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. "To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review.'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)). The presidential pardon issued to Arpaio mooted this case.

Most obviously, as a result of the pardon, Arpaio faces no punishment or legal disabilities. *See United States v. Noonan*, 906 F.2d 952, 958 (3d Cir. 1990) ("The pardon removes all legal punishment for the offense.") (quoting *Bjerkan v. United States*, 529 F.2d 125, 128 n.2 (7th Cir. 1975) (citation omitted)); *Hirschberg v. CFTC*, 414 F.3d 679, 682 (7th Cir. 2005) ("[T]he legal effect of a presidential pardon is to preclude further punishment for the crime."). The presidential pardon relieved Arpaio from "all disabilities imposed by the offence" and "restore[d] to him all his civil rights." *Knote v. United States*, 95 U.S. 149, 153 (1877); *accord Effects of a Presidential Pardon*, 19 Op. O.L.C. 160, 162 (1995) ("A presidential pardon relieves the offender of all punishments, penalties, and disabilities that flow directly from the conviction."). No term of imprisonment or monetary penalties will result from the district court's finding of guilt because the court vacated the sentencing hearing and dismissed the case. *See* DE 222. The presidential pardon also removes other disabilities that stem from a criminal conviction. *See, e.g.*, 18 U.S.C. § 921(a)(20) (noting that a conviction "for which a person has been pardoned" does not constitute a conviction for purposes of Chapter 44 of

Title 18 of the U.S. Code, which governs firearms restrictions); *see also Effects of a Presidential Pardon*, 19 Op. O.L.C. at 164-70 (presidential pardon removes state-law firearms disabilities that flow from the conviction and extends to remission of court-ordered restitution not yet received by the victim).

Arpaio also faces no "collateral consequences" that would suggest a live controversy about the merits of the prosecution. *See Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (to defeat mootness, a defendant who has been released from prison must establish "some 'collateral consequence' of the conviction"); *see also Sibron v. New York*, 392 U.S. 40, 57 (1968) (defendant's appeal of criminal convictions moot where "there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction"). Appellate decisions from other circuits have disagreed whether collateral consequences flow from a presidential pardon following a conviction. *Compare Bjerkan*, 529 F.2d at 126-29 (presidential pardon moots further appeal because it "do[es] away" with all "collateral consequences" of the conviction (internal quotation marks omitted)), *with Robson v. United States*, 526 F.2d 1145, 1147 (1st Cir. 1975) (presidential pardon did not moot further appeal because, notwithstanding the pardon, the defendant's conviction "may be considered at sentencing in any subsequent criminal proceeding") (citing *Carlesi v. New York*, 233 U.S. 51 (1914)). But here, unlike in *Bjerkan* and *Robson*, there is no final conviction because the district court never entered judgment, and there has been and will be no appellate review of the criminal contempt case. The timing of Arpaio's presidential pardon means that "the

efficacy of the . . . verdict against [him] remains only an unanswered question lost to . . . mootness." *United States v. Schaffer*, 240 F.3d 35, 38 (D.C. Cir. 2001) (en banc) (per curiam).[2]

B. The district court should have vacated the guilty verdict following the presidential pardon.

1. That the presidential pardon mooted the case does not preclude this Court—and did not preclude the district court—from "mak[ing] such disposition of the whole case as justice may require." *Walling v. James V. Reuter, Inc.*, 321 U.S. 671, 677 (1944); *see U.S. Bancorp*, 513 U.S. at 21 (rejecting argument that court lacked jurisdiction to decide vacatur of a civil judgment after the case became moot because "Article III does not

[2] Arpaio's brief suggestion (Br. 16-18)—which he raises only as an alternative to his primary argument of mootness—that collateral consequences may exist is mistaken. His reliance on this Court's decisions in *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987), and *Chacon v. Wood*, 36 F.3d 1459 (9th Cir. 1994), *superseded on other grounds* by 28 U.S.C. § 2253(c), is misplaced because those cases, unlike Arpaio's, involved individuals whose convictions had become final and who, therefore, could face potential future sentencing consequences based on those convictions in the future. *See, e.g.*, *Chacon*, 36 F.3d at 1463. Arpaio's suggestion (Br. 18 n.15) that his "conviction" qualifies as a "prior sentence" under the United States Sentencing Guidelines ("U.S.S.G.") because a "prior sentence" includes "any sentence previously imposed upon adjudication of guilt," U.S.S.G. § 4A1.2(a)(1), is likewise misplaced because in the absence of any sentencing proceeding, no "sentence [was] imposed," U.S.S.G. § 4A1.2(a)(1), and no "execution of sentence was totally suspended or stayed," U.S.S.G. § 4A1.2(a)(3). Finally, he is incorrect in his assertion (Br. 18 n.15) that, notwithstanding the dismissal of this prosecution, he would be deemed to have a "conviction" for purposes of enhanced sentencing under state law. *See, e.g.*, Arizona Rev. Stat. § 4-248(B) (conviction "means a final conviction"); Arizona Rev. Stat. § 28-3320(E) (defining conviction as "final conviction or judgment"). At bottom, Arpaio is correct that the case is moot, that any conviction here is "non-final," and that he cannot face punishment in the future. Br. 1, 16-17.

prescribe such paralysis"). The Supreme Court and this Court have regularly concluded that a case is moot and then considered whether vacatur is the proper disposition. *See, e.g.*, *Camreta v. Greene*, 563 U.S. 692, 710-14 (2011) (vacatur appropriate after mootness); *U.S. Bancorp*, 513 U.S. 22-29 (vacatur not appropriate after mootness); *Munsingwear*, 340 U.S. at 39-41 (vacatur not appropriate after mootness); *Pool*, 659 F.3d at 761-62 (vacatur appropriate after mootness); *United States v. Payton*, 593 F.3d 881, 883-86 (9th Cir. 2010) (vacatur not appropriate after mootness). That principle permits the Court to determine whether, following the presidential pardon that mooted the criminal contempt prosecution, vacatur of the guilty verdict is appropriate. And it similarly would have allowed the district court to vacate the guilty verdict.

When, as here, a case becomes moot prior to a decision by the court of appeals, that mootness "ordinarily requires not only dismissal of the appeal but vacatur of the district court opinion being appealed." *Payton*, 593 F.3d at 884-85 (citing *Munsingwear*, 340 U.S. at 39-40); *see NASD Dispute Resolution v. Judicial Council, Cal.*, 488 F.3d 1065, 1068 (9th Cir. 2007) ("Without vacatur, the lower court's judgment, 'which in the statutory scheme was only preliminary,' would escape meaningful appellate review thanks to the 'happenstance' of mootness.") (citing *Munsingwear*, 340 U.S. at 39). Following the Supreme Court's decision in *Munsingwear*, this Court generally "treated automatic vacatur as the 'established practice,' applying whenever mootness prevent[ed] appellate review." *Dilley v. Gunn*, 64 F.3d 1365, 1369 (9th Cir. 1995); *but see Ringsby Truck Lines, Inc. v. Western Conference of Teamsters*, 686 F.2d 720, 722 (9th Cir. 1982) (recognizing

an exception to automatic vacatur following mootness where "the appellant has by his own act caused the dismissal of the appeal"). Although *Munsingwear* considered vacatur following mootness in a civil case, both the Supreme Court and this Court have vacated underlying orders following mootness in criminal cases. *See Claiborne v. United States*, 551 U.S. 87, 87-88 (2007) (per curiam); *Pool*, 659 F.3d at 761-62; *see also Payton*, 593 F.3d at 884-85 (considering whether to apply vacatur following mootness in a criminal case and citing *Munsingwear*).

In *U.S. Bancorp*, the Supreme Court clarified that vacatur following mootness was not automatic, but instead governed by equitable principles. 513 U.S. at 24-26; *see Dilley*, 64 F.3d at 1370 ("*U.S. Bancorp* makes clear that the touchstone of vacatur is equity."). For example, vacatur is inappropriate "if the party seeking appellate relief fails to protect itself or is the cause of the subsequent mootness." *Public Util. Com'n of State of Cal. v. FERC*, 100 F.3d 1451, 1461 (9th Cir. 1996) (emphasis omitted). Vacatur is also inappropriate where the parties' settlement causes mootness. *See U.S. Bancorp*, 513 U.S. at 24. "The 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. *Id.* In contrast, where mootness results from "the vagaries of circumstance" or "'happenstance'—that is to say, where a controversy presented for review has 'become moot due to circumstances unattributable to any of the parties'"—then vacatur is appropriate. *Id.* at 25-26 (quoting *Karcher v. May*, 484 U.S. 72, 82-83 (1987)). Similarly, vacatur is called for when

"mootness results from unilateral action of the party who prevailed below." *Id.* at 25. Those principles ensure the disposition 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 (quoting *United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U.S. 466, 477-78 (1916)) (cleaned up).

Those equitable principles counsel in favor of vacating the district court's guilty verdict here. The presidential pardon mooted the case before Arpaio's guilty verdict was subject to appellate review, which "ordinarily requires" vacatur. *Payton*, 593 F.3d at 884. None of the "exceptions" to "the general rule of *Munsingwear*" applies. *See NASD*, 488 F.3d at 1069; *see also Public Util. Com'n*, 100 F.3d at 1461 (describing the Supreme Court's "recognized exceptions" to ordinary post-mootness vacatur rule). A presidential pardon, not Arpaio, caused the mootness. To be sure, Arpaio accepted the pardon,[3] but that acceptance should not be seen as a sufficiently "voluntary action" that displaces the ordinary vacatur rule because the President could have issued the pardon even if Arpaio had not accepted it. *See Biddle v. Perovich*, 274 U.S. 480, 486-88 (1927). Nor did Arpaio, as occurred in *Munsingwear*, "sle[ep] on [his] rights" and fail to protect himself. 340 U.S. at 40. Rather, Arpaio moved for vacatur three days after the pardon

[3] Arpaio did not, as some pardon recipients do, apply for a presidential pardon. *See* ER 670.

mooted the prosecution. *See* ER 674 (pardon issued on Aug. 25, 2017); ER 668-72 (vacatur motion filed on Aug. 28, 2017).

Instead, the circumstances here more closely resemble the two contexts identified in *U.S. Bancorp* as appropriate for vacatur following mootness. *See* 513 U.S. at 25. A pardon is both "unpredictable," *Schaffer*, 240 F.3d at 38, and a presidential "act of grace," *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833). Those features place a presidential pardon squarely within the category of "happenstance" or a "vagar[y] of circumstance." *See U.S. Bancorp*, 513 U.S. at 25. And to the extent a party "prevailed" below, it was the government, through the Executive Branch, that prosecuted Arpaio to a guilty verdict for criminal contempt. The head of the Executive Branch, operating under his constitutional prerogative to "grant Reprieves and Pardons" for federal offenses, U.S. Const. art. II, § 2, cl. 1, then took the unilateral step to pardon Arpaio. Such unilateral action by the prevailing party also militates in favor of vacatur.[4] *See U.S. Bancorp*, 513 at 25.

[4] Vacatur "sets aside or nullifies the conviction and its attendant legal disabilities," but does not "erase the fact of the conviction." *United States v. Crowell*, 374 F.3d 790, 792 (9th Cir. 2004). By contrast, expungement—an "extraordinary" measure appropriate "only in extreme circumstances" and which Arpaio does not seek, *see* Br. 7—"requests 'the judicial editing of history.'" *Crowell*, 374 F.3d at 792, 796 (citations omitted). Thus, vacating the guilty verdict in Arpaio's case will nullify any legal consequences that flow from the guilty verdict, but not "destroy" or "seal" court records, including the district court's conclusion that Arpaio committed criminal contempt of court by willfully disobeying a preliminary injunction order. *See id.* at 792. Following vacatur, the record of Arpaio's conviction will remain intact, even though no punitive or legal consequences flow from it.

2. Applying vacatur here is consistent with *United States v. Schaffer*, *supra*, the most closely analogous federal appellate case. In *Schaffer*, the D.C. Circuit addressed the propriety of vacatur where the President granted a pardon to a defendant who was adjudicated guilty but whose conviction was not yet final. 240 F.3d at 36-38. That court concluded that the legal question of the defendant's guilt was never final and the case was moot because the President had pardoned the defendant at the "uncertain juncture" while the parties were awaiting en banc oral argument. *Id.* at 37-38. There, as here, final judgment was never reached on whether the "conviction" was established as a matter of law. *Id.* at 38. There, as here, all parties agreed the pardon mooted the case, and the court reasoned that vacatur was "just and appropriate" because that "mootness result[ed] not from any voluntary acts of settlement or withdrawal by Schaffer, but from the unpredictable grace of a presidential pardon." *Id.* This Court cited *Schaffer* as an example of "circumstances in which *Munsingwear* might conceivably apply in a criminal context." *United States v. Tapia-Marquez*, 361 F.3d 535, 538 & n.2 (9th Cir. 2004).[5]

[5] In *Tapia-Marquez*, this Court rejected the defendant's motion to vacate the judgment after his release from custody mooted his case. *See* 361 F.3d at 536. That conclusion rested principally on the ground that "existing precedent squarely foreclosed the only issue [the defendant] raised in his appeal," *id.*, which is not relevant to this case. The Court also expressed skepticism that the *Munsingwear* vacatur doctrine applied to criminal cases because neither the Supreme Court nor this Court had ever applied it in the criminal context. *See id.* at 538. As noted above, *see supra* at 17, both the Supreme Court and this Court have since applied *Munsingwear* to criminal cases.

Contrasting the circumstances here with those at issue in *United States v. Payton*, *supra*, is similarly instructive. In *Payton*, the government (believing, incorrectly, that the mandate from this Court had issued) moved to dismiss the case against the defendant following a decision from this Court that a search of the defendant's computer was unlawful. *See* 593 F.3d at 882-83. A judge on this Court, who had sought en banc review, requested vacatur of the Court's decision on the ground that the dismissal mooted the case. *Id.* at 883. This Court denied vacatur for four reasons. First, mootness arose *after* this Court's decision, which meant the Court had decided a "live controversy." *Id.* at 885. Second, the party that suffered the adverse decision—the government—had taken unilateral action to dismiss the case, meaning that "mootness was brought about by the voluntary act of the party losing the decision." *Id.* Third, the government was not "'frustrated by the vagaries of circumstance'" when it simply "[l]os[t] an appeal and dismiss[ed] charges in light of that loss." *Id.* (quoting *U.S. Bancorp*, 513 U.S. at 25). Finally, the government "was deprived of no opportunity to contest" the decision because it "appealed, briefed and argued its position, and made a conscious decision not to petition for rehearing of [the] adverse decision." *Id.* at 885-86. None of those reasons applies here: (1) mootness arose before the case reached this Court; (2) Arpaio, the party losing below, did not cause the mootness through voluntary action; (3) a presidential pardon, unlike an appellate loss followed by a dismissal of charges in light of that loss, constitutes "external 'happenstance' requiring

vacatur," *id.* at 885; and (4) Arpaio, unlike the government in *Payton*, had no meaningful opportunity to contest the district court's factual adjudication of guilt.

3. Although neither *Schaffer* nor any other case of which we are aware has directly addressed the proper course, for either a district court or a court of appeals, when a pardon moots a prosecution before entry of judgment and appeal, nothing suggests that a defendant in that circumstance should be treated differently. Doing so would inexplicably afford greater legal relief to a defendant who receives a pardon later in the process than one who receives a pardon earlier. No sound reason exists to preference later issuance of a pardon.

This Court has addressed an analogous circumstance in its abatement doctrine, under which the "death of a criminal defendant before appeal causes the case to become moot." *United States v. Volpendesto*, 755 F.3d 448, 452 (7th Cir. 2014); *See United States v. Oberlin*, 718 F.2d 894, 895-96 (9th Cir. 1983); s*ee Durham v. United States*, 401 U.S. 481, 483 (1971) (per curiam), *overruled on other grounds*, *Dove v. United States*, 423 U.S. 325 (1976) (per curiam); *see also United States v. Koblan*, 478 F.3d 1324, 1325 (11th Cir. 2007) (per curiam) (applying abatement doctrine). In *Oberlin*, the Court applied that doctrine to find moot the case of a defendant who committed suicide after being found guilty but before entry of judgment. *See Oberlin,* 718 F.2d at 896; *accord United States v. Asset*, 990 F.2d 208, 211 (5th Cir. 1993) ("the rule of abatement applies equally to cases in which a defendant . . . dies prior to entry of judgment"), *abrogated on other grounds by United States v. Estate of Parsons*, 367 F.3d 409 (5th Cir. 2004) (en banc). This Court could identify

"no reason" to distinguish between pre- and post-judgment abatement, because in either case the defendant could not pursue an appeal.[6] *Id.*

Vacatur here is thus appropriate under the reasoning of *Schaffer* and *Oberlin*. The cases differ somewhat on the scope of vacatur: Whereas *Schaffer* ordered vacatur of "all opinions, judgments, and verdicts" in the court of appeals and the district court, 240 F.3d at 38, *Oberlin* directed the district court to vacate judgment and dismiss the indictment, 718 F.2d at 896.[7] They agree, however, that the charging instrument should be dismissed and the finding of guilt should be vacated. That is appropriate here as well.

The district court here provided no sound reason for denying vacatur. *See* ER 256-59. First, the court's decision fails to discuss or apply the equitable principles governing vacatur discussed above. The district court focused principally on the D.C. Circuit's decision in *Schaffer*, distinguishing that case on the ground that (1) no appeal was pending at the time the pardon issued in this case, and (2) Arpaio, unlike the defendant in *Schaffer*, accepted the pardon after "the legal question of his guilt" was "resolved." ER 258-59. But the propriety of vacatur turns on the availability of

[6] Just as Arpaio's acceptance of the pardon should not be construed as sufficiently voluntary action to undermine vacatur, *see supra* at 18, the *Oberlin* defendant's suicide did not "waive[]" or otherwise render unavailable the abatement doctrine. *Oberlin*, 718 F.2d at 896.

[7] The government's response to Arpaio's vacatur motion agreed that, under *Schaffer*, the Court should vacate all orders. *See* DE 225 at 4.

appellate review, not whether the party seeking vacatur had yet noticed an appeal. *See, e.g.*, *Oberlin*, 718 F.2d at 896 (even though defendant had not appealed at time of death, he still "possessed an appeal of right from his conviction," so case was moot and vacatur appropriate); *Tapia-Marquez*, 361 F.3d at 538 ("The purpose underlying the vacatur rule in *Munsingwear* is to deny preclusive effect to a ruling that, due to mootness, was never subjected to meaningful appellate review."); *Payton*, 593 F.3d at 884 (where case becomes moot prior to appellate decision, vacatur is "ordinarily" required). Relatedly, the district court's factual adjudication did not conclusively "resolve" the "legal question" of Arpaio's guilt. Arpaio retained a right to appeal that factual adjudication and other rulings in the case—until the presidential pardon deprived him of an "opportunity to contest" those rulings through appellate briefing and argument. *See Payton*, 593 F.3d at 885. Finally, the district court expressed concern that granting vacatur may encroach on "judicial record-keeping" or improperly "revise the historical facts" of Arpaio's case. ER 259 (citing *United States v. Noonan*, 906 F.2d 952, 955 (3d Cir. 1990), and 67A C.J.S. *Pardon & Parole* § 33). Those concerns were ill-founded, however, because it is expungement—which Arpaio does not seek and the government does not advocate—not vacatur that gives rise to those consequences. *See supra* at 19 n.4. Even following vacatur, the district court's factual adjudication of Arpaio's guilt "will not be ripped from" the pages of the federal reporter. *NASD*, 488 F.3d at 1069.

4. Although the Court may enter an order "necessary and appropriate to the final disposition" of the district court's order denying vacatur, *see U.S. Bancorp*, 513 U.S.

at 22, mootness following the pardon prevents the Court from reaching the merits claims that Arpaio presses (Br. 18-49) as alternative arguments. *See U.S. Bancorp*, 513 U.S. at 21 (court may not "decide the merits of a legal question not posed in an Article III case or controversy"). Arpaio acknowledges (Br. 16) that this Court can only reach his alternative merits-based arguments if it concludes that a live case or controversy exists. But he also notes, correctly, that the presidential pardon "does indeed seem" to "render any appeal on the merits moot." Br. 16 (quoting *Schaffer*, 240 F.3d at 36). That mootness forecloses consideration of his alternative arguments.[8]

[8] Those alternative arguments that the government has addressed previously in this Court and below lack merit. *See, e.g.*, Answer by Real Party in Interest The United States, *United States v. Arpaio*, No. 17-71094 (9th Cir.), ECF No. 5 at 8-30 (May 2, 2017) (addressing the statute-of-limitations and jury-trial arguments); DE 162 at 3-4 (explaining why the preliminary injunction was a clear and definite order); *id.* at 11-12 (explaining why the public authority defense was inapplicable).

CONCLUSION

For the foregoing reasons, this Court should vacate the district court's order denying vacatur and remand the case with instructions to vacate the guilty verdict.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, the United States is not aware of any related cases.

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), the undersigned counsel of record certifies that the foregoing Brief for the United States was this day served upon counsel for appellant by notice of electronic filing with the Ninth Circuit CM/ECF system.

DATED: APRIL 22, 2019

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CERTIFICATE OF COMPLIANCE

1. This brief does not comply with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32.1 because it contains 6,816 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). A motion to file an oversized brief has been filed along with the brief.
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Garamond 14-point font in text and Garamond 14-point font in footnotes.
3. This brief complies with the privacy redaction requirement of Fed R. App. 25(a)(5) because it contains no personal data identifiers.
4. The digital version electronically filed with the Court on this day is an exact copy of the written document to be sent to the Clerk; and
5. This brief has been scanned for viruses with the most recent version of McAfee VirusScan Enterprise, version 8.7.0*i*, which is continuously updated, and according to that program is free of viruses.

DATED: APRIL 22, 2019

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