NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 22-7168

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DISTRICT OF COLUMBIA, *et al.*,
APPELLANTS,

v.

THE KROGER CO., *et al.*,
APPELLEES.

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

APPELLANTS' RESPONSE TO THE COURT'S ORDER AND MOTION FOR VACATUR OF THE DECISION BELOW

In response to this Court's order of January 18, 2023, appellants acknowledge that the payment of the $4 billion special dividend has mooted this appeal but respectfully request vacatur of the challenged order in light of that development, *see* ECF No. 69, No. 1:22-cv-3357 (D.D.C. Dec. 13, 2022). Last week, in *Washington v. Albertsons Cos., Inc.*, No. 101530-5, the Washington Supreme Court vacated an existing temporary restraining order ("TRO") enjoining Albertsons from paying the special dividend to its shareholders. Days later, the dividend was paid. Accordingly, this interlocutory appeal challenging the denial of a preliminary injunction against the dividend's payment is moot. Because this appeal was mooted by appellees'

unilateral actions, this Court should dismiss the appeal, vacate the decision below, and remand for further proceedings. *See, e.g.*, *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); *Animal Legal Def. Fund v. Shalala*, 53 F.3d 363, 366 (D.C. Cir. 1995) ("[I]n dismissing this appeal on grounds of mootness, we vacate the District Court's order denying a preliminary injunction, and remand the case.").

DISCUSSION

An appeal becomes moot when the reviewing court can no longer grant effective relief. *West Va. Ass'n of Cmty. Health Centers, Inc. v. Heckler*, 734 F.2d 1570, 1576-79 (D.C. Cir. 1984). In that circumstance, this Court customarily dismisses the appeal and vacates the decision under review. *United States v. Schaffer*, 240 F.3d 35, 38 (D.C. Cir. 2001) (en banc) (citing *Munsingwear*, 340 U.S. at 39). Doing so "'clears the path for future relitigation' by eliminating a judgment the loser was stopped from opposing on direct review." *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 71-72 (1997) (quoting *Munsingwear*, 340 U.S. at 40); *see Flynt v. Weinberger*, 762 F.2d 134, 135-36 (D.C. Cir. 1985) ("Where a controversy has become moot, it is the duty of the appellate court to clear the path for future relitigation of the issues raised." (citing *Munsingwear*, 340 U.S. at 40)).

Vacatur is particularly appropriate when, as here, "mootness results from unilateral action of the party who prevailed below." *Hall v. CIA*, 437 F.3d 94, 99-100 (D.C. Cir. 2006); *see Arizonans*, 520 U.S. at 71-72 (same). Equity does not

permit prevailing parties "to obtain a favorable judgment, take voluntary action that moots the dispute, and then retain the benefit of the judgment." *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (per curiam) ("One clear example where vacatur is in order is when mootness occurs through the unilateral action of the party who prevailed in the lower court." (cleaned up)). Otherwise, appellants would be forced to accept the preclusive effects of an adverse judgment, review of which was prevented by their adversaries' conduct. *Hall*, 437 F.3d at 99-100; *see Planned Parenthood of Wis., Inc. v. Azar*, 942 F.3d 512, 516, 519 (D.C. Cir. 2019) (ordering vacatur where appeal was mooted in part by appellee's disbursement of funds that appellants "affirmatively sought to prevent" in the district court).

The same vacatur principles apply to interlocutory appeals from orders denying preliminary injunctive relief. *See Heckler*, 734 F.2d at 1576-77. In *Heckler*, a nonprofit organization challenged certain funding calculations made by the Secretary of Health and Human Services, and it sought to preliminarily enjoin the distribution of funds under that calculation for fiscal year 1983. *Id.* at 1572-73. The district court denied the preliminary injunction, and the Secretary distributed all funds for fiscal year 1983 after the nonprofit organization appealed. *Id.* at 1573-74. As a result, this Court dismissed the appeal as moot and vacated the decision below. *Id.* at 1576-77. The Court explained that, while "appellants' entire lawsuit" may not be moot, their appeal of the preliminary injunction ruling was, given that "equitable

relief [wa]s no longer available with respect to FY83 funds." *Id.* at 1576. Accordingly, this Court held that the appropriate remedy under *Munsingwear* was to "vacate the District Court's order denying preliminary injunctive relief." *Id.* at 1577 (citing *Munsingwear*, 340 U.S. at 39-41).

The same relief is warranted in this case, too. Albertsons and Kroger—not appellants—rendered this appeal moot in the wake of the Washington Supreme Court's recent decision by paying the $4 billion special cash dividend that appellants sought to preliminarily enjoin. As the parties have explained, the State of Washington sued Albertsons and Kroger in state court under state antitrust law, based on a theory that was similar to, but narrower than, the claim brought by appellants in this case. In particular, Washington argued that Albertsons and Kroger violated state antitrust law by agreeing to pay a special dividend, and it sought a TRO and preliminary injunction to stop payment of that dividend.

On November 3, 2022, the state trial court in that case entered a TRO, enjoining the special dividend's payment. Before that TRO expired on December 19, the Washington Supreme Court granted the state's emergency motion for an injunction pending appeal on December 16. That ruling extended the TRO "until further order of the court" and "at least until the discretionary review and direct review questions are resolved." 12/16/22 Order at 4.

On January 17, 2023, a majority of the Washington Supreme Court denied the state's request for direct review. In doing so, the court did not address the merits of the suit, but the majority's decision "terminated" "the extension of the temporary restraining order." 1/17/23 Order at 1. That ruling cleared the way for Albertsons and Kroger to pay the special dividend, which they did on January 20, 2023.

Consequently, this interlocutory appeal is moot. The only issue before the Court in this appeal was whether the district court erred in declining to preliminarily enjoin payment of the special dividend, as the dividend was the only part of the challenged arrangement set to occur before merger review. But with the dividend paid, this Court can no longer grant effective preliminary relief as to the dividend. Thus, although effective relief remains available in the district court with regard to appellants' underlying suit,[1] this appeal from the denial of a preliminary injunction is moot. *See Shalala*, 53 F.3d at 364; *Heckler*, 734 F.2d at 1576-77.

This Court should accordingly vacate the decision below and remand the case for further proceedings. Vacatur is appropriate here because appellants did not cause their appeal to become moot. *See Hall*, 437 F.3d at 99-100. On the contrary, this

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[1] For example, the district court could enjoin Kroger from enforcing the merger agreement's credit and debt restrictions or order disgorgement of illicit profits. *See, e.g.*, *Randall v. Meese*, 854 F.2d 472, 482 (D.C. Cir. 1988) (R.B. Ginsburg, J.) ("[A] court armed with equitable remedial authority can grant retroactive relief where necessary to 'do complete rather than truncated justice.'" (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946))).

appeal was mooted by the unilateral actions of the parties who prevailed below—namely, Kroger and Albertsons's payment of money following the termination of a TRO in another lawsuit in another court. *See Planned Parenthood*, 942 F.3d at 519. That is precisely the sort of situation in which vacatur is most warranted. *See Heckler*, 734 F.2d at 1572, 1576-77. This Court should thus follow the "established practice" of vacating the decision below in this case, so that Kroger and Albertsons cannot "retain the benefit of" a "favorable judgment" in an appeal that they mooted through their own "voluntary, unilateral action," *Garza*, 138 S. Ct. at 1792-93 (internal quotation marks omitted), and so that appellants are not unfairly "subject to the judgment's preclusive effect" going forward, *Hall*, 437 F.3d at 99-100; *see Arizonans*, 520 U.S. at 75 ("[V]acatur down the line is the equitable solution.").

CONCLUSION

The Court should dismiss this interlocutory appeal as moot, vacate the decision below, and remand for further proceedings.

Respectfully submitted,

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January 2023

CERTIFICATE OF COMPLIANCE

I certify that this response and motion complies with the type-volume limitation in this Court's January 18 Order, as well as Federal Rule of Appellate Procedure 32(a)(7)(B) and Federal Rule of Appellate Procedure 27(d)(1), because it contains 1282 words, excluding exempted parts. This response complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Times New Roman 14-point font.

/s/ Bryan J. Leitch
BRYAN J. LEITCH