No. _____

In the

Supreme Court of the United States

JOHN C. EASTMAN,

Petitioner,

v.

BENNIE G. THOMPSON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE HOUSE SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6 ATTACK ON THE UNITED STATES CAPITOL, HOUSE SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6 ATTACK ON THE UNITED STATES CAPITOL, AND CHAPMAN UNIVERSITY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner appealed a decision of the District Court compelling Petitioner to disclose ten emails that the Court agreed were privileged. The District Court reasoned that although the emails at issue fell within the scope of the attorney-client or work product privileges, they were subject to the "crime-fraud" exception. That ruling created a stigma for both Petitioner and his client, the former President of the United States and current candidate for the presidency. Petitioner sought a stay from the District Court, which was denied. He also sought emergency relief from the Ninth Circuit, which was still pending at the time of the production deadline ordered by the District Court. At the deadline for production, Petitioner provided a link to the documents to congressional defendants but asked that they not view the documents until the Ninth Circuit ruled on Petitioner's emergency application for a stay. Defendants ignored Petitioner's request and distributed the emails to members of the committee. Then, in a public filing, defendants published the link to the confidential documents which were downloaded by several reporters following the case, thereby mooting Petitioner's appeal. The Ninth Circuit subsequently denied Petitioner's motion to vacate the judgment of the District Court.

The question presented for review is whether vacatur is required where a case becomes moot solely by the action of defendants who had prevailed in the District Court and where Petitioner's only actions were compliance with the court's production order while his motion for emergency stay on appeal was pending?

PARTIES TO THE PROCEEDING

Petitioner John C. Eastman was the plaintiff in the District Court and appellant in the Ninth Circuit.

Defendants in the District Court and Appellees in the Ninth Circuit were Bennie G. Thompson, in his official capacity as Chairman of the House Select Committee to Investigate the January 6 Attack on the United States Capitol, and Chapman University.

CORPORATE DISCLOSURE STATEMENT

Petitioner is not a corporation and has not issued shares of stock to any person.

RELATED CASES

Petitioner is not aware of any related cases.

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Petitioner John C. Eastman respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit denying a motion to vacate a judgment of the District Court which was rendered moot by action of the counsel for the congressional defendants.

OPINIONS BELOW

The order of the United States Court of Appeals for the Ninth Circuit dismissing the appeal as moot and denying petitioner's motion to vacate the underlying judgment of the District Court is not published but is reproduced in the Appendix at pages App. 1-2. The Order denying en banc review is reproduced in the Appendix at page App. 152. The orders of the District Court are reproduced in the Appendix at pages App. 3-29, 30-69, and 70-143.

STATEMENT OF JURISDICTION

The judgment of the court below dismissing the appeal as moot and denying the motion to vacate the District Court's judgment was entered on November 7, 2022 (App. 1), and Petitioner's motion for en banc review was denied on January 30, 2023 (App. 152). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT STATUTORY AND CONSTITUTIONAL PROVISIONS

Article III, § 2 of the United States Constitution provides: "The judicial power shall extend to all cases

. . . controversies to which the United States shall be a party… ."

Section 2106 of Title 28 of the United States Code provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

STATEMENT OF THE CASE

The 2020 Election

That the 2020 presidential election was controversial, both in its conduct and its result, is beyond dispute. State agencies altered voting procedures without participation of the Legislature – an issue related to the issue before this Court in *Moore v. Harper* (No. 21-1271). Members of this Court noted the problem in a statement on the denial of a motion to expedite consideration of petition for writ of certiorari in *Republican Party of Pennsylvania v. Bookvar*, 592 U.S. ___ (2020), (Statement of Alito, J., joined by Thomas, J., and Gorsuch, J.) ("The Supreme Court of Pennsylvania has issued a decree that squarely alters an important statutory provision enacted by the Pennsylvania Legislature pursuant to its authority under the Constitution of the United States to make rules governing the conduct of elections for federal office.") The Wisconsin Supreme Court has ruled that

the Wisconsin Election Commission's decision to provide unstaffed ballot drop boxes was illegal. *Tiegen v. Wisconsin Elections Comm'n*, 976 N.W. 2d 519, 539 (Wisc. 2022). The state commission also permitted ballot harvesters to deposit ballots into the unstaffed drop boxes. This resulted in thousands of illegal votes being included in the certified results of the election. *Id*. at 556 n.4.

Based on these and numerous other irregularities and violations of law, former President Trump retained a team of attorneys to challenge the results of the election. When Texas filed an original action in this Court challenging the illegal conduct of the election by non-legislative officials in four States, Dr. Eastman filed a motion to intervene on behalf of the former President. After Texas's motion for leave to file the original action was denied by this Court, Dr. Eastman (together with the Marks law firm in Pennsylvania) filed a petition for writ of certiorari and motion for expedited consideration challenging three decisions of the Pennsylvania Supreme Court altering state election law that had been adopted by the legislature of Pennsylvania pursuant to its authority under Article II of the Constitution to direct the manner of choosing president electors. When an eligible judge had not been appointed for nearly a month to hear an election challenge filed in Georgia in early December, 2020, Dr. Eastman (together with the Hilbert law firm in Georgia) filed a federal court action in the Northern District of Georgia. And when none of these courts took up the merits of the former President's allegations of illegality, Dr. Eastman advised, based on his-

torical and scholarly research, that in his role as presiding officer of the joint session of Congress, the Vice President accede to requests from more than a hundred state legislators for a brief delay in the certification of presidential electors to allow time for the legislatures to assess the impact of the illegality on the results of the election. Former Vice President Pence declined to accede to the legislators' requests for delay, and after a 4-hour delay caused by an incursion into the Capitol by rioters, the joint session proceeded to certify the election of Joe Biden as President.

Procedural History

Respondent committee subpoenaed Dr. Eastman's emails that were archived on the computers at Chapman University where petitioner had been a professor of law and dean. Dr. Eastman filed this action to quash that subpoena on the grounds that the subpoena sought attorney-client privileged communications and attorney work product. The District Court upheld Dr. Eastman's assertion of privilege for most of the documents. That court also ruled, however, that ten of the privileged emails – most of which were not authored by Dr. Eastman and none of which were copied to former President Trump – were subject to the "crime-fraud" exception to the privilege.[1] The

[1] In an interim order on March 28, 2022, the District Court ordered production of a single email pursuant to the crime-fraud exception. It ordered production of another single email in its interim order dated June 7, 2022. Neither email was authored by Dr. Eastman or copied to Dr. Eastman's former client. This Court has previously held that interim orders regarding privilege are not subject to interlocutory appeal. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 109 (2009). Dr. Eastman challenged

court ruled that the President and Eastman were likely guilty of "obstruction of an official proceeding" (the counting of state electors on January 6). The court found that President Trump's two postings to Twitter in advance of the January 6 proceeding, his meeting with the Vice President, a phone call to the Vice President, and his speech on the Ellipse (at which the Vice President was not in attendance) all amounted to a "pressure campaign" on the Vice President and that constituted obstruction of an official proceeding. App. 121-23, 126 n. 225. The District Court also ruled that these actions were taken with "corrupt intent" because "Attorney General Barr publicly disagreed with President Trump's claims of election improprieties." App. 126 n. 225. The District Court also concluded that Dr. Eastman and President Trump engaged in a conspiracy to defraud the United States by filing a verified complaint in the Northern District of Georgia. App. 26-29.

The Decision of the Ninth Circuit Court of Appeals.

Once the District Court entered final judgment, but before he was required to disclose the last of the confidential documents, Dr. Eastman filed with the District Court a motion for reconsideration or, in the alternative, a stay pending appeal, supported by an *in camera* declaration referencing roughly fifty privileged documents that had previously been provided for the court's *in camera* review and that placed the

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these interim rulings in his notice of appeal after the Court's final judgement was issued in October.

disputed documents in proper context. As the deadline for production approached, Dr. Eastman moved for an extension of the production deadline to allow time for the District Court to rule on the motion for stay and, failing that, time to file a motion for stay with the Ninth Circuit. All three motions were denied by the District Court. Eastman then filed a motion for stay pending appeal with a single circuit judge (as allowed by Ninth Circuit rules) with notification to the Ninth Circuit Clerk. Respondent committee was copied on the transmittal of the motion for stay pending appeal.

The stay motion was not ruled upon by the production deadline set by the District Court, so in order to comply with the District Court's order while preserving his right to appeal, Dr. Eastman provided to the Select Committee's counsel a link to a DropBox folder containing the eight remaining disputed documents with a request that the documents not be accessed until the pending stay motion was ruled upon. Instead of honoring that request, the Select Committee accessed and downloaded the documents for its own internal review.

In response to Dr. Eastman's motion for an injunction, the committee then filed, without redaction, a pleading containing the link to the DropBox folder with the confidential documents. Reporters following the case immediately accessed the confidential documents, rendering the appeal moot. Attorneys for the committee asserted to the Ninth Circuit that their publication of the DropBox link was inadvertent.

Inadvertent or not, the publication of the link led to disclosure of the confidential communications and

rendered the appeal moot. Dr. Eastman then moved for dismissal based on mootness and further moved for an order vacating the judgment of the District Court. The Ninth Circuit granted the motion to dismiss but denied the motion to vacate, asserting without explanation that mootness was attributable in part to Dr. Eastman's actions. App. 1-2. The Ninth Circuit denied en banc review of that ruling. App. 152.

REASONS FOR GRANTING THE PETITION

This case presents a question of exceptional importance. The District Court's crime-fraud holding, which Petitioner has described as "clearly erroneous" when viewed in the context of numerous privileged communications, has cast aspersions not just on Dr. Eastman but also on his former client, the former President of the United States who is a candidate for the office of President in 2024. The ramifications, both political and legal, of such a holding are significant, and Petitioner, both on his own behalf and for his former client's benefit, should not have to be subjected to those ramifications on an ongoing basis when he was deprived of his right to appeal by the unilateral actions of the government – the party that prevailed in the District Court – that mooted the appeal.

The Ninth Circuit panel refused to order vacatur of the District Court opinion, but its only explanation for the ruling was a citation to *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 25 (1994) with the parenthetical note that the "*Munsingwear* rule is inapplicable when mootness results from circumstances attributable in part to appellant's actions." App. 2. The lower court did not identify any

actions by Dr. Eastman that caused the case to become moot. The only two actions taken by Dr. Eastman that the lower court could plausibly have relied on for its order was Dr. Eastman's compliance with the District Court order and Dr. Eastman's *inaction* – his asserted failure to deactivate the link to the DropBox folder although he had no basis for predicting that the committee would publish that link in a public filing in the lower court. This Court should grant review to rule that neither action takes the case out of the *Munsingwear* rule.

This Court held in *U.S. v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950), that it is the "established practice" once a case on appeal has become moot to vacate the lower court judgment and to "remand with a direction to dismiss." That rule does not apply in cases that have become moot because of voluntary action by the appellant, such as where the parties have settled their dispute. *Bancorp*, 513 U.S. at 29. In such a case, the party seeking review participated in the action mooting the case. The equitable remedy of vacatur cannot be invoked by parties who voluntarily forfeited their right of review by agreeing to a settlement. *Id*. at 26.

In this case, however, the action became moot by the unilateral action of the committee – first accessing and then publishing the link to the confidential communications in a public filing with the Court of Appeal while an application for a stay was pending.

I. This Court should grant review on the important question of whether complying with a court order is a "voluntary" action that disqualifies petitioner from the equitable remedy of vacatur.

Munsingwear, as clarified by *Bancorp*, creates a line between those cases requiring vacatur because mootness is caused by "happenstance" or by the prevailing party, and those not requiring vacatur because mootness is caused by the party challenging an adverse ruling on appeal. The issue for this Court in *Bancorp* was whether the appealing party's acts were "voluntary." *Bancorp*, 513 U.S. at 25 ("The principal condition to which we have looked is whether the party seeking relief from the judgment below caused the mootness by *voluntary* action." (emphasis added)).

Dr. Eastman in this case took no voluntary action that resulted in his appeal becoming moot. He did not acquiesce in the District Court's decision. He moved for reconsideration or, alternatively, for a stay pending appeal. He moved for an extension of the production deadline. He even filed an emergency motion for stay pending appeal with a single Ninth Circuit Judge, as permitted by F.R.A.P. 8(d)(2), followed by a notice of appeal and electronic filing of the motion for stay once the appeal had been docketed.

After the motions for reconsideration, stay, and extension were denied by the District Court, but while the motion for stay pending appeal was still pending before a judge of the Ninth Circuit, Dr. Eastman provided a link to respondent's counsel to a DropBox

folder containing the disputed documents in order to comply with the District Court's production order and not be found to be in contempt of that court's order. In order to preserve his appellate rights, however, Petitioner expressly requested that the documents not be viewed or downloaded until the still-pending motion for stay was ruled upon.

Complying with the District Court's order is certainly not a "voluntary" act by Dr. Eastman that caused the matter to become moot; it was, instead, a compelled act, enforceable by the contempt power of the District Court. *See, e.g., Shillitani v. United States*, 384 U.S. 364, 370 (1966) ("There can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt."). If compliance with an order of the District Court (all the while taking steps necessary to challenge that order) is the basis of the Ninth Circuit's ruling that the case became moot due to Dr. Eastman's actions, that ruling presents an issue deserving of this Court's attention.

Dr. Eastman's compliance with the District Court order while seeking review of that order is consistent with prior decisions of this Court. *Brownlow v. Schwartz*, 261 U.S. 216 (1923), a case cited by this Court in *Munsingwear*, illustrates this point. The case involved a petition for a writ of mandate for the issuance of a building permit. The trial court denied the petition, but that decision was reversed on appeal and remanded with directions to issue the permit. The building inspector filed a petition for rehearing, which was denied. He also applied to this Court for a writ of error, but before that writ of error was allowed,

he issued the building permit in order to comply with the decision of the court of appeals, thereby mooting the case. This Court nevertheless reversed the judgment below and ordered that the action be dismissed. *Id*. at 218-19.

Any ruling that Petitioner's action in complying with the District Court's order, particularly as accompanied by an express request that the Select Committee not access the contested documents while the stay motion was pending, is voluntary action that precludes vacatur is in conflict with this Court's ruling in *Brownlow*. This Court should grant review to resolve that conflict.

II. This Court should grant review on the important question of whether inaction by petitioner can be a basis for denial of vacatur under *Munsignwear*

Respondent committee implied in its arguments to the court below that Dr. Eastman's failure to deactivate the link to the contested documents was the reason for the case becoming moot even though it was the committee that published that link in a public filing. Respondent committee gave no notice that it was going to publish that link, so there is no basis for asserting that Dr. Eastman is the one to blame for the committee's publication of the link.

Respondent committee knew that Dr. Eastman's established practice while producing documents over the course of this litigation was to keep the link providing access to the DropBox folder active for one week. While respondent claims inadvertence, it knew

that the link was still active at the time it published that link in a publicly available filing.

In any event, the suggestion by respondent raises a novel exception to the rule in *Munsingwear*. The equitable right to vacatur can be lost not only by voluntarily taking action to moot one's own case, but now, apparently, also by inaction that fails to predict the behavior of the opposing party. This is a radical shift in the long established direction of this Court. Review should be granted to consider this novel exception to the rule of vacatur.

III. In the alternative, this Court should summarily reverse the judgment of the Ninth Circuit and order that the District Court orders be vacated.

As noted above, this is a case of exceptional importance. The crime-fraud ruling of the District Court imposes a stigma not only on Petitioner, but also on his former client, the former President of the United States and current candidate for the presidency in 2024. Because the law is clearly established and the facts are not in dispute, this case is a candidate for summary reversal with an order that the District Court judgment and orders be vacated.

Justices of this Court have noted that summary reversal "is particularly appropriate because the Court of Appeals 'committed [a] fundamental erro[r] that this Court has repeatedly admonished [it] to avoid.'" *Shoop v. Cassano*, 142 S.Ct. 2051, 2057 (2022) (Thomas, J., dissenting from denial of cert.). This Court has regularly remanded cases to the Ninth Circuit with instructions to vacate judgments that had

become moot. *E.g.*, *Mayorkas v. Innovation L. Lab*, 141 S. Ct. 2842 (2021); *Trump v. Hawaii*, 138 S.Ct. 377 (2017); *Camreta v. Greene*, 563 U.S. 692, 698 (2011); *Hollingsworth v. U.S. Dist. Ct. for the N. Dist. of California*, 562 U.S. 801 (2010); *Harper ex rel. Harper v. Poway Unified School Dist.*, 549 U.S. 1262 (2007); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75 (1997); *Citizens Preserving America's Heritage, Inc., v. Harris*, 515 U.S. 155 (1995); *Joint School Dist. No. 241 v. Harris*, 515 U.S. 1154 (1995); *Sivley v. Soler*, 506 U.S. 969 (1992); *Communications Workers of America v. Montano*, 498 U.S. 1077 (1991); *McCarthy v. Blair*, 498 U.S. 954 (1990); *Municipal Court v. Gutierrez*, 490 U.S. 1016 (1989); *Bowen v. Kizer*, 485 U.S. 386, 387 (1988); *Russoniello v. Olagues*, 448 U.S. 806 (1987); *Tulare Lake Canal Co. v. United States*, 459 U.S. 1095 (1983); *Carmen v. Idaho*, 459 U.S. 809 (1982); *Los Angeles County v. Davis*, 440 U.S. 625 (1979).

Mootness in this case was caused by the unilateral action of the respondent – the prevailing party in the District Court – and that action deprived Petitioner of his opportunity to show that crime-fraud determinations by the District Court were clearly erroneous. The Court should grant the petition for writ of certiorari and remand the case to the District Court with instructions to vacate its judgment and opinions.

CONCLUSION

This case became moot by the unilateral action of the defendant that prevailed in the District Court. Respondent committee's action of accessing disputed documents while a motion to stay was pending, and then publishing in a public filing a live link to the confidential documents that were the subject of the appeal, deprived Petitioner of the opportunity to show that the "crime-fraud" conclusions of the District Court were clearly erroneous, thus clearing his name and that of his former client, former President Trump. This Court should grant the petition, summarily reverse the order of the Ninth Circuit, and order the District Court to vacate its judgment and orders.

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