UNITED STATES COURT OF APPEALS
FIRST CIRCUIT

AMERICAN HOSPITAL ASSOCIATION, et al., *Plaintiffs-Appellees*, v. ROBERT F. KENNEDY, JR., Secretary of the US Department of Health and Human Services, et al., *Defendants*, ABBVIE INC., et al., *Interested Parties-Appellants*.	No. 25-2237

APPELLANTS' RESPONSE TO ORDER TO SHOW CAUSE

The Court ordered Appellants to show cause why this appeal is not moot in light of the district court's order granting the parties' joint motion for voluntary remand with vacatur. *See* March 6, 2026 Order. The appeal is not moot because Appellants' claim on appeal is capable of repetition yet evading review. Should this Court disagree, however, the appropriate course would be to vacate the district court's order denying Appellants' motions to intervene under *United States v. Munsingwear*, 340 U.S. 36 (1950), as several other courts of appeals have done in cases

where a determination of mootness deprived the proposed intervenor of an opportunity to appeal the denial of intervention.

The question presented in this appeal is whether a party granted special approval by a federal agency to participate in a regulatory pilot program may intervene under Federal Rule of Civil Procedure 24 to defend that approval and protect its rights. The clear answer is yes. But the district court denied Appellants' motions to intervene. As a result, the district court refused to consider Appellants' legal arguments or their evidence negating Plaintiffs' purported harms and establishing that Appellants faced billions of dollars in potential losses if the federal program were enjoined. Within two months, the district court enjoined the federal program, including the approvals Appellants had applied for and obtained, this Court declined to stay that injunction pending appeal, and the district court granted a motion jointly filed by Plaintiffs and Defendants to vacate the federal program and remand for the agency to start over.

The district court's vacatur and remand order does not moot this appeal. Three things are reasonably clear: (1) Defendants are actively considering another iteration of the federal program at issue; (2) if

Defendants launch another iteration of that program, Plaintiffs will again challenge it on an expedited basis; and (3) unless this Court corrects the fundamental legal errors in the district court's intervention order, there is a substantial risk the district court will again deny Appellants their right to intervene. And if that occurs, Appellants likely will not be able to obtain meaningful appellate review because—as this case demonstrates—critical judicial decisions regarding implementation of the federal program likely will be made before this Court can reverse a decision erroneously denying intervention. This Court should hear Appellants' appeal and reverse the district court's order denying intervention. Alternatively, this Court should apply *Munsingwear* and vacate the district court's order denying intervention.

BACKGROUND

The underlying dispute between Plaintiffs and Defendants concerned the Rebate Model Pilot Program (the "Pilot Program"). The Health Resources and Services Administration (HRSA) created the Pilot Program for various reasons, including to test the viability of using post-sale rebates (as opposed to up-front reduced sale prices) to effectuate certain discounts prescription drug manufacturers are required to

provide as a condition of their participation in federal healthcare programs. HRSA decided to test the rebate model on a narrow subset of transactions that occur at the intersection of two such federal drug-discount schemes: the 340B Program and the Inflation Reduction Act's (IRA) Drug Price Negotiation Program. *See* 90 Fed. Reg. 36,163 (Aug. 1, 2025); 90 Fed. Reg. 38,165 (Aug. 7, 2025). The 340B Program requires every pharmaceutical manufacturer with medications eligible for Medicaid and Medicare Part B to "offer" its drugs for sale to certain hospitals and other healthcare providers (known as "covered entities") at steeply discounted rates—often pennies on the dollar. *See* 42 U.S.C. §§ 256b, 1369r-8(c); Dkt. 36-2 ¶ 3. Separately, the IRA requires the Department of Health and Human Services (HHS) to set a "maximum fair price" (MFP) for certain selected drugs dispensed to Medicare-covered individuals. *See* 42 U.S.C. §§ 1320f(a), (c)(2), 1320f-2(a)(3).

The MFP and 340B discounts are so large that providing both for the same prescription could result in a negative price. Dkt. 36-1 ¶ 14. Accordingly, the IRA mandates that manufacturers "shall not be required to provide" both the MFP and the 340B discounts. 42 U.S.C. § 1320f-2(d). Although duplicate discounts are inconsistent with federal

law, the agency that administers the IRA program disclaimed "responsibility for deduplicating discounts," leaving manufacturers to shoulder that burden.[1] For manufacturers, determining up front which discount applies to a specific transaction can often prove nearly impossible, including because they (unlike covered entities) do not have access to the claims data for each transaction. Compounding that complexity is the fact that the two federal programs have starkly different payment processes. Under the IRA, manufacturers may effectuate the maximum fair price through a post-sale rebate.[2] For the 340B ceiling price, however, Defendants' position is that manufacturers currently must offer an up-front discount. *See* 90 Fed. Reg. at 38,165. So if a manufacturer were to make a 340B-priced sale to a covered entity but the medication was then dispensed to an MFP-eligible patient, and the MFP was lower than the 340B price, then the manufacturer would either

[1] See Ctrs. For Medicare & Medicaid Servs. (CMS), *Medicare Drug Price Negotiation Program: Final Guidance* (Oct. 2, 2024) at 55, https://tinyurl.com/ychztdfu.

[2] CMS, *Medicare Drug Price Negotiation Program: Final Guidance, Implementation of Sections 1191-1198 of the Social Security Act for Initial Price Applicability Year 2028 and Manufacturer Effectuation of the Maximum Fair Price in 2026, 2027, and 2028* (Sept. 30, 2025) ("IPAY2028 Final Guidance") at 212, https://tinyurl.com/uf86dc2f.

have to provide a duplicate discount or face severe civil penalties under the IRA. *See* 42 U.S.C. §§ 1320f-6(c), 1320f-2(a)(5).

Appellants are manufacturers who research and develop innovative medicines subject to both 340B and MFP pricing obligations.[3] The Pilot Program was HRSA's solution to Appellants' deduplication dilemma. The Pilot Program had two key features. ***First***, it authorized manufacturers to use post-sale rebates to effectuate the 340B price for medications that are also subject to the IRA's MFP scheme. 90 Fed. Reg. at 38,165. ***Second***, it required covered entities to provide manufacturers with standard claims data for dispenses of medications subject to both the 340B Program and the IRA. *Id.* at 38,167. Under the Pilot Program, Appellants would sell IRA-selected drugs to covered entities at the commercial price; covered entities would submit claims data to manufacturers; and manufacturers would review the data to determine

[3] Appellants are AbbVie, Inc., Pharmacyclics, LLC, AstraZeneca Pharmaceuticals LP, Pharmaceutical Research & Manufacturers of America (PhRMA), Boehringer Ingelheim Pharmaceuticals Inc., and Novo Nordisk Inc. Appellant PhRMA represents the interests of its manufacturer members subject to the 340B Program and the MFP scheme and whose Pilot Program applications were approved by HRSA. As it relates to PhRMA, "Appellants" describes PhRMA's representation of those members.

the applicable price and then provide the appropriate discount through a rebate. Appellants invested thousands of hours and millions of dollars to design their Pilot Program rebate models. *See e.g.*, Dkt. 36-1 ¶ 17; Dkt. 39-1 ¶ 23. HRSA reviewed Appellants' rebate model applications and approved the applications in a series of decision letters issued beginning in October 2025. The Pilot Program was set to commence on January 1, 2026, the same day Appellants' MFP obligations took effect.

On December 1, 2025—one month before the Pilot Program and Appellants' MFP obligations were to begin and months after HRSA announced the program—a collection of covered entities filed this suit seeking an emergency injunction. Plaintiffs claimed that participating in a rebate system and providing manufacturers with claims data would impose significant financial and administrative burdens on them and that the Pilot Program should not go into effect.

Appellant AbbVie immediately noticed its intent to intervene and participated in the district court's initial teleconference. Dkts. 25, 31. Thereafter, AbbVie and the other Appellants sought intervention under Federal Rule of Civil Procedure 24. *See* Dkts. 36, 39, 45, 50, & 80. Plaintiffs opposed intervention; Defendants did not take a position. *See*

Dkts. 74, 76. Appellants also submitted a joint opposition to Plaintiffs' request for emergency injunctive relief. Dkt. 72. Altogether, Appellants argued (and provided supporting written testimony) that: (1) Appellants should be permitted to intervene because, as approved applicants who would be participating in the Pilot Program and who faced billions of dollars in losses or civil penalties if the program were enjoined, the existing parties did not adequately represent Appellants' interests; and (2) Plaintiffs' claims of impending financial injury were either unsupported or self-imposed, such that the extraordinary relief of enjoining a federal program days before it begins was unwarranted. *See* Dkts. 36, 39, 45, 50, 72, & 80. In their injunction-opposition brief, Defendants did not argue that the Pilot Program was necessary to protect Appellants from disastrous duplicate discounts or civil penalties; nor did Defendants provide detailed affirmative evidence demonstrating that Plaintiffs' claimed harms were illusory, *i.e.*, the sort of evidence that Appellants sought to introduce by intervening. *See* Dkt. 36-2 ¶¶ 17-20, 23-27; Dkt. 72-1. Defendants barely addressed the deduplication issue at all, *see* Dkt. 75 at 14-15, 22, despite that "primarily" being HRSA's goal for the Pilot Program, *id.* at 6. Instead, Defendants' lead argument was

that they have complete, unreviewable discretion on 340B matters—a position that, as entities regulated by Defendants, is contrary to Appellants' interests. *See id.* at 9-13.

On the eve of the injunction hearing, the district court denied Appellants' motions to intervene. Dkt. 83. The district court imposed a "heightened burden" for Appellants to establish that Defendants would not adequately represent Appellants' interests. *Id.* at 9. The district court did so despite the Supreme Court's longstanding admonition that the burden for establishing inadequate representation under Rule 24 "should be treated as minimal," *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972), and this Court's precedents explaining that the inadequacy-of-representation burden is lightest when the putative intervenor is a direct beneficiary of the challenged government action, *Cotter v. Mass. Ass'n of Minority Law Enf't Officers*, 219 F.3d 31 (1st. Cir 2000); *see also Maine v. Dir., U.S. Fish & Wildlife Serv.*, 262 F.3d 13, 20 (1st. Cir 2001) (discussing the lessening effect of "direct private interests" on a putative intervenor's burden).

The consequences for Appellants were swift and severe. During the injunction hearing the following day, there was no consideration of the

financial injuries Appellants would suffer from an injunction. There were only passing references to the deduplication problem. *See* Dec. 19, 2025 Hr. Tr. (Dkt. 86) at 35:9, 47:25-48:11. And there was no evidence presented to rebut Plaintiffs' claims that the Pilot Program would imminently and irreparably harm them. Eleven days after the intervention denial, the district court enjoined the Pilot Program and the following day denied a stay pending appeal. Dkts. 90, 96. Defendants immediately sought a stay pending appeal from this Court; Appellants both appealed the district court's order denying intervention and simultaneously moved to intervene in Defendants' appeal. *See* Mot. for Stay Pending Appeal & Administrative Stay, No. 25-2236 (1st Cir. Dec. 30, 2025); Mot. to Intervene on Appeal, No. 25-2236 (1st Cir. Dec. 31, 2025); Dkt. 97.

Twenty days after the district court's intervention denial, this Court affirmed the injunction without addressing Appellants' right to intervene. And because the district court's order deprived Appellants of party status, this Court did not consider Appellants' interests or their evidence that the Pilot Program was the only feasible and accurate method to avoid duplicate discounts under the 340B Program and the

IRA. Just the opposite: this Court accepted Defendants' contrary representation "that manufacturers have alternative methods to address the … duplication issue" and concluded that those supposed alternatives "further underscor[ed] the lack of any substantial injury in the absence of a stay." *Am. Hosp. Ass'n v. Kennedy*, 164 F.4th 28, 37 (1st Cir. 2026). Twenty-nine days after the district court denied intervention, Plaintiffs and Defendants voluntarily dismissed the appeal after settlement discussions from which Appellants were excluded, because they were not parties to the proceedings. Consent Mot. to Voluntarily Dismiss, No. 25-2236 (1st Cir. Jan. 16, 2026).

A mere forty-nine days after the district court's intervention denial, Plaintiffs and Defendants jointly moved for vacatur of the Pilot Program and remand, requiring HRSA to start over. Dkt. 114. Plaintiffs' and Defendants' agreed-upon resolution contemplates future litigation if HRSA approves a new 340B rebate program. Specifically, "Defendants agree[d] to set any effective date for any new 340B rebate program to no earlier than 90 days following the public announcement of any approval of drug manufacturer applications" specifically to allow Plaintiffs time to bring another legal challenge. Dkt. 114 ¶ 9. HRSA has already taken

the first steps toward another 340B rebate program. *See* 91 Fed. Reg. 7,287 (Feb. 17, 2026) ("HRSA is issuing this Request for Information (RFI) to gather input from interested parties regarding the potential use of rebates to effectuate the ceiling price under the 340B Program ….").

The district court granted the motion to vacate and remand five days later, on February 10, 2026. Dkt. 115. Thus, only fifty-four days after holding that Appellants' interests would be adequately represented in this case, the district court terminated Appellants' approvals to participate in a federal program specifically designed for Appellants, as well as the federal program in its entirety—without ever considering Appellants' evidence or interests and without this Court having had the opportunity to consider Appellants' instant appeal to vindicate their right to intervene. And because Appellants were not parties to the proceedings, the district court did not consider their objections to the nature or scope of the district court's final order—including their objection to vacatur of the Pilot Program during the remand. *See* Dkt. 72 at 25 (Appellants opposing injunctive relief on the grounds that "the appropriate remedy would be … a remand for supplemental reasoning"

without vacatur of the Pilot Program (citing *Central Me. Power Co. v. FERC*, 252 F.3d 34, 47 (1st Cir. 2001))).

This Court subsequently issued an order asking Appellants to show cause "why this appeal should not be dismissed for lack of jurisdiction," considering "there is no longer a pending case in which Appellants could intervene." March 6, 2026 Order. Appellants hereby respond.

ARGUMENT

This appeal has not become moot because the district court's error is capable of repetition yet evading review. And even if this Court disagrees, the proper course would be to remand to the district court with instructions to vacate, under *Munsingwear*, the order denying Appellants' motions to intervene.

I. Appellants' Claim Is Not Moot Because It Is Capable Of Repetition And Likely To Evade Review.

To determine whether an appeal meets the capable of repetition yet evading review exception, this Court first asks whether "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration." *United States v. Chin*, 913 F.3d 251, 256–57 (1st Cir. 2019). If so, then this Court assesses whether "there [is] a reasonable expectation that the same complaining party [will] be subjected to the

same action again." *Id.* (citation omitted). This appeal satisfies both conditions.

A. Appellants' Claim Is Inherently Time-Limited.

It is beyond dispute that requests for emergency injunctive relief operate on a condensed timeline. Suits like the one Plaintiffs brought here are a paradigmatic example of the type of "'inherently transitory' claims the Supreme Court has recognized as likely to evade review." *See ACLU of Mass. v. U.S. Conf. of Catholic Bishops*, 705 F.3d 44, 57 (1st Cir. 2013) (citing *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 542 (1976)).

The same is true for "important procedural issues raised by the unusual circumstances" of suits like this. *Procter & Gamble Co v. Bankers Tr. Co*, 78 F.3d 219, 224 (6th Cir. 1996). In the expedited context of emergency litigation, there is a substantial risk that a district court's erroneous denial of a motion to intervene will "always evade review absent this exception to mootness" because the underlying suit likely will be resolved before Appellants can obtain complete and meaningful appellate review. *Id.* A decision denying a motion to intervene so that the movant can defend against a claim for emergency injunctive relief is

thus as "inherently transitory" as the request for injunctive relief itself. *ACLU of Mass.*, 705 F.3d at 57.

The facts of this case reinforce that point. Appellants moved to intervene at the very beginning of the case, but only fifty-four days elapsed from the time the district court denied intervention until the underlying case was resolved. *See* Dkt. 83 (denying intervention on December 18, 2025); Dkt. 115 (vacating Pilot Program and remanding to HRSA on February 10, 2026). This Court has recognized that even longer spans of time are "'too short' …, given that the appeal process often takes longer than a few months." *Chin*, 913 F.3d at 257 (three months) (citation omitted). Even "one year is an insufficient amount of time … to adjudicate the typical case." *Bourgeois v. Peters*, 387 F.3d 1303, 1309 (11th Cir. 2004).

The fact that Plaintiffs and Defendants settled, instead of litigating to a final judgment, does not automatically moot this appeal from the district court's intervention denial. *See, e.g.*, *Sommers v. Bank of Am., N.A.*, 835 F.3d 509, 513 n.5 (5th Cir. 2016) ("Our caselaw does not forbid intervention as of right in a jurisdictionally and procedurally proper suit that has been dismissed voluntarily."); *CVLR Performance Horses, Inc. v.*

Wynne, 792 F.3d 469, 475 (4th Cir. 2015) ("We find more persuasive the reasoning of those courts holding that dismissal of the underlying action does not automatically moot a preexisting appeal of the denial of a motion to intervene."); *Neidig v. Rendina*, 298 F. App'x 115, 116 n.1 (3d Cir. 2008) ("The fact that the civil rights action has been dismissed, however, does not render [appellant's] appeal of the denial of his motion to intervene in that suit moot."); *see also Alt. Rsch. & Dev. Found. v. Veneman*, 262 F.3d 406, 410 (D.C. Cir. 2001) ("[O]ur jurisdiction to review that denial is not affected by the fact that the district court denied intervention *after* the stipulated dismissal was entered; the dismissal does not render the appeal moot.").

Indeed, the agreement between Plaintiffs and Defendants to voluntarily dismiss the underlying action confirms that this Court should resolve the intervention issue now. That agreement reflects the parties' commonsense conclusion that the district court's injunction and this Court's order effectively affirming that injunction resolved the case. *See* Dkt. 114 ¶ 4 ("The Parties agree that, in the circumstances of this case, judicial economy and the interests of the Parties would be best served by a vacatur and remand order rather than further litigation."). So it is not

as though this is a one-off situation where the supposedly mooting event "result[ed] from 'happenstance'; it was almost certainly driven by [the] panel opinion," which "brought the parties to the table to negotiate [the vacatur and remand] agreement and expedited the end of this case." *United States v. Flute*, 951 F.3d 908, 910 (8th Cir. 2020). The upshot for purposes of this Court's present analysis is that the expedited orders on injunctive relief, even if styled as "preliminary," will be the definitive rulings in cases like this. And those definitive rulings will typically come too soon for wrongly denied intervenors to obtain appellate review.

Even if Plaintiffs and Defendants had not reached a settlement, the case likely would have been litigated to a final judgment before Appellants could obtain appellate review. At a minimum, critical steps in the district court would no doubt have passed by while this Court considered whether Appellants had a right to participate in the district court proceedings. Plaintiffs themselves emphasized in the district court that the case could be fully litigated within four months of the complaint being filed. *See* Dec. 19, 2025 Hr. Tr. (Dkt. 86) at 4:19-22 ("[W]e believe … this case can be heard expeditiously on the merits, likely [by] … April [] 2026."); *id.* at 19:11-15 (same); Dkt. 82 at 13 (explaining that "a few

months [would] allow this Court time to fully consider the merits"). As discussed above, four months is seldom sufficient time to complete appellate review. *See Chin*, 913 F.3d at 257; *Bourgeois*, 387 F.3d at 1309.

Moreover, "[t]o allow a settlement between parties to moot an extant appeal concerning intervention of right might well provide incentives for settlement that would run contrary to the interests of justice." *Fed. Deposit Ins. Corp. v. Jennings*, 816 F.2d 1488, 1491 (10th Cir. 1987). This Court should take care to avoid creating such incentives.

B. Appellants' Claim Is Likely To Recur.

There is "a reasonable expectation or a demonstrated probability that the same controversy will recur involving" Appellants right to intervene. *Barr v. Galvin*, 626 F.3d 99, 105 (1st Cir. 2010) (cleaned up).

In their joint motion for vacatur and remand, Plaintiffs and Defendants previewed what is to come if HRSA launches another iteration of the Pilot Program: another round of litigation. Defendants specifically agreed to schedule any new program—the consideration of which is already underway—around the expectation that Plaintiffs will challenge it. Dkt. 114 ¶ 9; *See* 91 Fed. Reg. 7,287 (Feb. 17, 2026).

Appellants would surely once again seek to intervene in any subsequent suit. The new suit (like the prior one) likely would challenge HRSA orders approving rebate model applications from drug manufacturers such as Appellants. Appellants will still face billions of dollars in duplicate discounts or statutory penalties and will want to exercise their right to defend their own interests, which—however a potential new rebate program might be structured—are "different in kind [and] degree from" Defendants' interests. *B. Fernandez & Hnos., Inc. v. Kellogg USA, Inc.*, 440 F.3d 541, 546 (1st Cir. 2006). There is no reason to think Plaintiffs would not again oppose Appellants' intervention and, absent some remedial action by this Court, invoke the district court's intervention denial below in their support. *See* Appellees' Opp'n to Mot. to Intervene on Appeal at 6, No. 25-2236 (1st Cir. Jan. 12, 2026) (arguing that "the district court correctly held" that Appellants' interests were adequately represented by Defendants).

If this Court leaves the district court's erroneous conclusion undisturbed, even a different district court may consider the first district court's decision persuasive in new litigation, as it involved the same parties, also raised claims under the Administrative Procedure Act, and

was not overturned on appeal. Either way, the consequence of dismissing this case as moot is that Appellants may be stuck with a decision their appeal of which was halted before it began.

And based on their representations to the district court, Plaintiffs and Defendants anticipate that litigation over a new rebate program could be fully resolved in ninety days, if not faster. *See* Dkt. 114 ¶ 9; *see also* Dkt. 82 at 13 (explaining that the parties needed "a few months to allow this Court time to fully consider the merits."). That expedited posture likely would result in a similar short-circuiting of Appellants' opportunity to obtain appellate review and then return to the district court to participate in the proceedings. *E.g.*, *Bourgeois*, 387 F.3d at 1309 (one year an insufficient time to obtain review); *Chin*, 913 F.3d at 257 (three months insufficient); *In re Grand Jury*, 744 F.3d at 219 (two months insufficient).

In short, this appeal is not moot.

II. Alternatively, The Court Should Vacate The District Court's Intervention Order Under *Munsingwear*.

If this Court concludes that Appellants' appeal is moot, then the appropriate course would be to vacate the district court's order denying Appellants' motions to intervene. *See, e.g.*, *United States v.*

Munsingwear, 340 U.S. 36 (1950). Vacatur under *Munsingwear* is warranted when "[a] party who seeks review of the merits of an adverse ruling … is frustrated by the vagaries of circumstance," such that the party "ought not in fairness be forced to acquiesce in the" appealed ruling. *ACLU of Mass.*, 705 F.3d at 57-58 (citation omitted). That is precisely what will have happened here, in the event this Court dismisses for mootness: Appellants sought review of the district court's intervention denial but were cut off by the agreement between Plaintiffs and Defendants to vacate and remand. Critically, Appellants did not participate in that agreement and had no right to do so because their motion to intervene had been denied.

Munsingwear vacatur is appropriate here even though the mooting event was a settlement. *See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18 (1994). To be sure, the Supreme Court held in *Bancorp* that vacatur is unwarranted when "the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal," such as "[w]here mootness results from settlement" by the losing party. *Id.* at 25-26. But that principle does not apply here because Appellants did not voluntarily forfeit their rights to appeal or partake in

"the settlement that caused the mootness." *Cf. id.* at 26; *see also, e.g.*, *N. Cal. Power Agency v. Nuclear Regul. Comm'n*, 393 F.3d 223, 225-26 (D.C. Cir. 2004) (*Bancorp* inapplicable where entity seeking vacatur "was not a party to the settlement"); *Atlanta Gas Light Co. v. FERC*, 140 F.3d 1392, 1403 n.11 (11th Cir. 1998) ("*Bancorp* does not control this case because Atlanta Gas was not a party to the settlement.").[4] If this case is deemed moot, it will be because of the "unilateral action" taken by Plaintiffs and Defendants, not because of anything Appellants have done. *Bancorp*, 513 U.S. at 25.

Thus, if "mootness has prevented [this Court] from reviewing the district court's order denying intervention," then this Court should "remand to the district court with instructions to vacate that order to avoid its having preclusive or precedential effect." *Bay Area Nuclear Waste Coal. v. Lujan*, 42 F.3d 1398, at *3 (9th Cir. 1994) (Table Op.) (citing *Munsingwear*, 340 U.S. at 39). It is common practice in the courts of appeals to vacate orders denying intervention when appeals from such

[4] Indeed, this Court has held that even a party to a settlement did not "by its own initiative relinquish its right to vacatur" under *Bancorp* because it "agreed to consider settlement only at the suggestion of this Court." *Motta v. Dist. Dir. of I.N.S.*, 61 F.3d 117, 118 (1st Cir. 1995).

orders become moot before the appellate process concludes. *See Church v. Missouri*, 2020 WL 8255313, *1 (8th Cir. July 8, 2020) ("The case is remanded to the district court with instructions to vacate the … order denying the Attorney General's motion to intervene."); *Animal Legal Defense Fund, Inc. v. U.S. Dep't of Agric.*, 2020 WL 4873759, *1 (D.C. Cir. June 11, 2020) ("[T]he case is remanded with instructions to dismiss the complaint and to vacate the agency's … order denying appellant's motion to intervene in the underlying enforcement action." (citing *Munsingwear*, 340 U.S. at 39)). Doing so will "clear the path for future relitigation," ensuring that "the rights of all parties are preserved and none is prejudiced by a decision which … was only preliminary." *ACLU of Mass.*, 705 F.3d at 58 (cleaned up).

CONCLUSION

This Court should hear Appellants' appeal from the district court's order denying their motions to intervene because this appeal presents an issue that is capable of repetition yet likely to evade review. Alternatively, if the Court does consider this appeal moot, it should vacate the district court's order.

March 20, 2026

Respectfully submitted,

/s/ *Matthew S. Owen*

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/s/ *Matthew S. Owen*
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CERTIFICATE OF SERVICE

I certify that on March 20, 2026, I caused this document to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the First Circuit using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

/s/ *Matthew S. Owen*
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