NO. 21-15587

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOY GARNER, ET AL.,
Plaintiffs-Appellants,

V.

JOSEPH R. BIDEN, PRESIDENT OF THE UNITED STATES,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA
2:20-CV-02470-WBS-JDP

SUPPLEMENTAL BRIEF FOR THE PRESIDENT

PHILLIP A. TALBERT
United States Attorney
PHILIP A. SCARBOROUGH
Assistant U.S. Attorney
Eastern District of California
501 I Street, Suite 10-100
Sacramento, California 95814
Telephone: (916) 554-2700

Attorneys for the President

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

President Biden respectfully submits this supplemental brief to address the effect of the district court's order dated February 11, 2022 (the "February 11 Order"). The February 11 Order purported to grant a Rule 60(b) motion and vacate the district court's judgment, but that court lacked jurisdiction to enter it. The order therefore has no effect.

In this circumstance, this Court has discretion to remand under Federal Rule of Appellate Procedure 12.1(b) but should decline to do so because the appeal raises legal issues subject to *de novo* review and the case is frivolous. In the interest of economy for this Court and the district court, this Court should decide the merits now.

BACKGROUND

The district court entered final judgment on February 23, 2021, and plaintiffs timely appealed. 1-ER-2, 4-ER-656. On January 5, 2022, nearly a year after judgment was entered and after briefing in the appeal was complete, plaintiffs filed a motion in the district court under Federal Rule of Civil Procedure 60(b)(6) seeking to disqualify Senior Judge William B. Shubb, who had presided over the case, because of a purported violation of 28 U.S.C. § 455. 1-SER-14. The motion also requested that the district court vacate the judgment. *See id.* The basis

for the motion was plaintiffs' alleged discovery in late December 2021 of a purported financial conflict of interest due to Judge Shubb's ownership of stock in various pharmaceutical companies. *See* 1-SER-23.

Meanwhile, on February 4, 2022, Judge Wardlaw recused herself in this appeal in response to plaintiffs' similar motion based on Judge Wardlaw's financial disclosures. *See* Dkt. 36. Her recusal order stated that, though she did not believe that recusal was required, she would recuse "in the interest of avoiding any potential appearance of impropriety." *Id.* at 1.

A week after Judge Wardlaw recused herself, Judge Shubb issued the February 11 Order, which has been filed on the docket of this appeal. Dkt. 39 (also included at 1-SER-3-4). Judge Shubb stated that, "out of an abundance of caution, and in order to avoid any potential appearance of impropriety, [he would] follow Judge Wardlaw's example" and recuse himself. *Id.* at 2. He then recused "himself from all proceedings in this case nunc pro tunc" and purported to vacate the judgment and all orders he had entered. *Id.*

ARGUMENT

I. The February 11 Order Was Entered Without Jurisdiction.

When an appeal of a judgment is pending, a district court lacks jurisdiction to grant a Rule 60(b) motion without the Court of Appeals first remanding the case. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam); *Williams v. Woodford*, 384 F.3d 567, 586 (9th Cir. 2004); *Scott v. Younger*, 739 F.2d 1464, 1466 (9th Cir. 1984); *see also* Fed. R. Civ. P. 62.1(a); Fed. R. App. P. 12.1.

The proper procedure is for the litigant seeking vacatur first to ask the district court for an indicative ruling on the Rule 60(b) motion. If the district court is inclined to grant it, the movant should then file a motion in this Court seeking a limited remand for that purpose. *See, e.g.*, *Davis v. Yageo Corp.*, 481 F.3d 661, 685 (9th Cir. 2007). This procedure was codified in 2009 through Federal Rule of Civil Procedure 62.1 and Federal Rule of Appellate Procedure 12.1.

Neither the plaintiffs nor the district court followed this procedure. Rather than requesting an indicative ruling, plaintiffs asked the district court to vacate the judgment, and they have not filed a motion requesting a remand in this Court. And the district court

purported to vacate the judgment despite its lack of jurisdiction. Because the February 11 Order was entered without jurisdiction, it has no effect unless this Court remands to allow the district court to grant the motion. *Accord Orff v. United States*, 358 F.3d 1137, 1149 (9th Cir. 2004) (orders entered in absence of jurisdiction are a "nullity").

Nonetheless, this Court has held that strict compliance with Rule 62.1 is not necessary to implicate the indicative ruling procedures of Federal Rule of Appellate Procedure 12.1. *See Mendia v. Garcia*, 874 F.3d 1118, 1121-22 (9th Cir. 2017). Instead, even when proper procedures are not followed, this Court construes an unambiguous ruling that a district court would grant a Rule 60 motion as an indicative ruling, which gives this Court discretion to remand under Rule 12.1(b). *See id.*; Fed. R. App. P. 12.1(b).

The district court's February 11 Order clearly purports to grant the Rule 60(b) motion. Pursuant to *Mendia*, it therefore should be construed as an indicative ruling under Rule 12.1(b).

II. This Court Should Decline to Remand Because the Appeal Raises Legal Issues Subject Subject to *De Novo* Review.

This Court should decline to remand. Instead, it should decide the merits of the appeal. Plaintiffs' Rule 60(b) motion relied upon the recusal statute at 28 U.S.C. § 455 as the basis for relief. *See* 1-SER-14. When a recusal issue is identified after judgment is entered, this Court has flexibility to fashion an appropriate remedy. "Although § 455 defines the circumstances that mandate disqualification of federal judges, it neither prescribes nor prohibits any particular remedy for a violation of that duty." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 862 (1988). "Congress has wisely delegated to the judiciary the task of fashioning the remedies that will best serve the purpose of the legislation." *Id.*

The Supreme Court has set forth several factors to consider when deciding whether a judgment should be vacated under Rule 60(b) for an alleged violation of § 455. These include "the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." *Id.* at 864. In the

circumstances of this case, these factors counsel against remand and in favor of deciding the merits.

The first two *Liljeberg* factors (the risk of injustice to the parties and whether denial of relief will cause injustice in other cases) clearly weigh against remand. There is no risk of injustice to the plaintiffs. The issues on appeal are all legal issues subject to *de novo* review,[1] and they have been thoroughly briefed in this Court. There is no allegation that any member of the current panel should be disqualified. Resolving these legal issues now is not only fair; it is also an efficient use of scarce judicial resources.

In contrast, remanding the case to vacate the judgment, assign a new judge, and re-litigate the motion to dismiss is only likely to result in delay and a waste of the resources of the district court, this Court, and the parties. This is particularly true where, as here, the issues on appeal are straightforward and do not present questions on which there is substantial room for disagreement. Plaintiffs' suit is driven by

[1] *See, e.g.*, *Mont. Shooting Sports Ass'n v. Holder*, 727 F.3d 975, 979 (9th Cir. 2013) (decision that plaintiff lacks standing reviewed *de novo*); *Cooper v. Tokyo Elec. Power Co.*, 860 F.3d 1193, 1212 (9th Cir. 2017) (political question doctrine reviewed *de novo*).

conspiracy theories and frivolous legal arguments. *See, e.g.*, Ans. Br. at 16 (providing examples). The most prudent course is to resolve the appeal now, rather than wasting further judicial resources on an obviously frivolous case.

Nor does remanding prevent injustice in other cases. This factor evaluates whether a remand would assist the bench and bar in identifying future potential conflicts of interest. For example, in *Liljeberg*, the Supreme Court found relief under Rule 60(b) necessary because the district judge was a trustee of a university that, during the trial, was conducting business with one of the litigants that depended on the outcome of the trial. *See, e.g.*, *Liljeberg*, 486 U.S. at 850. Relief from that judgment therefore was necessary to encourage future judges "to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered." *Id.* at 868.

A remand here would serve no such purpose. None of the companies identified in plaintiffs' Rule 60(b) motion are parties to this case. The complaint does not mention them at all. *See* 2-ER-179-252. Instead, the disqualification motion was premised on the possibility that the district judge's stock holdings would be adversely affected if the

court "paus[ed] mandatory vaccination" or "recogniz[ed] . . . that liability free vaccines" benefit "Pharma and its stockholders." 1-SER-17. But the complaint never asked for that relief. On the contrary, it disclaimed any intent to change vaccine liability statutes or to challenge the acts of any federal agencies that provide vaccine approvals.[2] No reasonable person would believe that the relief plaintiffs *did* seek – an ill-defined order requiring the President to use his "reasonable executive discretion" to conduct a "survey" of unvaccinated individuals, to create some kind of informed consent procedure, and to stop third parties from discriminating against unvaccinated individuals, *see* 2-ER-207, 2-ER-245 (¶¶ 49, 172) – would implicate stock values of companies that are not parties to the case and that are not mentioned in the complaint. Future litigants and judges will not benefit from reviewing the recusal decisions here.

Finally, the Court must consider the risk of undermining the public's confidence in the judicial process if relief is not granted. In the

[2] *See* 2-ER-194-95 (¶¶ 32-33) (acknowledging that request to change vaccine liability statutes is a political question); 2-ER-208-09 (¶¶ 51-52) (disclaiming any intent to obtain statutory or regulatory relief from federal agencies).

specific circumstances of this case, this factor does not compel a remand. As noted, the issues on appeal are subject to *de novo* review. Nothing in the February 11 Order suggests any error in the judgment under review. Given the frivolous nature of plaintiffs' arguments, the issues will not benefit from further development on remand. In this case, confidence in the judiciary is best served by efficiently resolving frivolous cases. That requires deciding the merits now.

CONCLUSION

The February 11 Order was entered without jurisdiction and is a nullity. The Court should decline to remand under Rule 12.1(b) and should decide the merits.

Respectfully submitted,

PHILLIP A. TALBERT
United States Attorney

/s/ Philip A. Scarborough
PHILIP A. SCARBOROUGH
Assistant U.S. Attorney