

No. 20-1336

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ERIC ESSHAKI,)
)
Plaintiff-Appellee,)
)
MATT SAVICH; DEANA BEARD,)
)
Intervenors-Appellees,)
)
v.)
)
GRETCHEN WHITMER, et al.,)
)
Defendants-Appellants.)

<p>FILED Sep 09, 2020 DEBORAH S. HUNT, Clerk</p>

ORDER

Before: BATCHELDER, STRANCH, and BUSH, Circuit Judges.

On July 22, 2020, appellants filed a motion to remand, requesting that we instruct the district court to dismiss this case for mootness and vacate the opinion below and the panel’s opinion. Appellants point out that candidates eligible to appear on the primary ballot were certified on May 29, 2020; plaintiff-appellee Eric Esshaki and intervenors-appellees Matt Savich and Deana Beard were all certified. Michigan’s primary election was held on August 4, 2020. Appellants contend that the issues regarding access to the primary ballot are no longer live, and the case is therefore moot. In accordance with the doctrine established in *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950), appellants request that this case be remanded with instructions that it be

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dismissed with prejudice and that the panel opinion and order be vacated. Savich filed the only response to the motion, asking that any disposition of the case be without prejudice to his right to seek attorney's fees pursuant to 42 U.S.C. § 1988.

Because the appellees received the relief they sought and were ultimately certified as candidates on the primary ballot, they “lack a legally cognizable interest in the outcome” of litigation around the district court's preliminary injunction. *Ford v. Wilder*, 469 F.3d 500, 504 (6th Cir. 2006) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). Given that the primary has already occurred, the issues in the suit no longer “persist in ‘definite and concrete’ form. . . .” *Mosley v. Hairston*, 920 F.2d 409, 414 (6th Cir. 1990) (quoting *DeFunis v. Odegaard*, 416 U.S. 312, 317 (1974)). There are no “live” issues for review.

In these circumstances, our practice is to vacate the judgment below and remand with instructions to dismiss. *Libertarian Party of Ohio v. Husted*, 497 F. App'x 581, 583 (6th Cir. 2012) (“When a civil case becomes moot pending appellate adjudication, the well-established *Munsingwear* doctrine directs us to vacate the judgment below and remand with a direction to dismiss.”); *Munsingwear*, 340 U.S. at 39. “Vacatur is in order when,” as here, “mootness occurs through. . . circumstances not attributable to the parties [or] the ‘unilateral action of the party who prevailed in the lower court.’” *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71–72 (1997) (quoting *U.S. Bancorp Mortgage Co. v. Bonner Mall P'Ship*, 513 U.S. 18, 23 (1994)).

We **GRANT** the motion to remand and direct the district court to dismiss the case. Our direction is without prejudice to Savich's ability to seek attorney's fees. *Libertarian Party*, 497 F. App'x at 583 (noting after remanding that the “case-specific inquiry” into entitlement to attorney's

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fees under 42 U.S.C. § 1988 “is best left in the first instance to the district court.”). We vacate the district court’s opinion and the panel opinion.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Deborah S. Hunt
Clerk

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Re: Case No. 20-1336, *Eric Esshaki v. Gretchen Whitmer, et al*
Originating Case No. : 2:20-cv-10831

Dear Counsel,

The Court issued the enclosed Ms. Order today in this case.

Sincerely yours,

s/Jill E Colyer
Case Manager
Direct Dial No. 513-564-7024

cc: Ms. Deana Beard
Mr. Michael S. Cafferty
Mr. Erik A. Grill
Mr. David J. Weaver

Enclosure

No mandate to issue