No. 07-100

In the Supreme Court of the United States

HARRIS COUNTY, TEXAS,

Petitioner,

v.

KAY STALEY,

Respondent.

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

RANDALL L. KALLINEN
Law Office of Randall L. Kallinen
1406 Castle Court
Houston, TX 77006
(713) 528-8586

AYESHA N. KHAN
Counsel of Record
RICHARD B. KATSKEE
Americans United for Separation of Church and State
518 C Street, NE
Washington, DC 20002
(202) 466-3234

Counsel for Respondent

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

Though the County purports to present a single question, its Petition actually raises two independent legal issues:

(1) A party seeking vacatur bears a heavy burden to demonstrate equitable entitlement. This Court and the courts of appeals have uniformly held that when a case becomes moot on appeal, vacatur turns on the equities, with special attention paid to the parties' respective responsibilities for the mooting event and to the public interest.

The County unilaterally removed the challenged religious display over three years into this lawsuit, after a panel of the Fifth Circuit had affirmed the district court's decision. Although the County claimed that the removal was part of a longstanding courthouse renovation, it acted on the Friday before oral argument; and it had not previously informed the courts of the renovation or its potential impact on the monument. When the County redisplays the monument, it can move to clarify, modify, or dissolve the injunction if necessary. In the meantime, the district court's decision will have no legal effect on other public or private displays.

The first question presented by the Petition is whether the en banc court erred in concluding that the County failed to meet its heavy burden of demonstrating equitable entitlement to vacatur under these circumstances.

(2) The courts of appeals have uniformly treated attorneys' fees separately from vacatur, consistently holding that a civil-rights plaintiff is entitled to a fee award when she obtains a final judgment in the district court and the case then becomes moot on appeal, whether the judgment remains intact or is vacated.

The second question presented by the Petition is whether a civil-rights plaintiff is deprived of her statutory right to fees when the defendant unilaterally moots the case on appeal after the plaintiff has obtained a favorable final judgment.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT 2

A. The Factual Background 2

B. The Proceedings Below 4

REASONS FOR DENYING THE WRIT 7

I. The En Banc Court Employed a Legal Standard and Reached a Result on Vacatur That Is Consistent with the Decisions of this Court and All the Circuits 7

A. This Court Has Provided the Lower Courts with Clear Direction on the Prevailing Legal Standards 7

B. There Is No Circuit Split on the Legal Principles to Be Applied When Mootness Results from the Actions of the Losing Party 11

1. Legislative-amendment cases are inapplicable here because they are exempt from the *Bancorp* presumption 13

2. The circuit-court decisions arising outside the legislative-amendment context apply the same legal standards as those applied below 17

C. The En Banc Court's Denial of Vacatur Is Consistent with the Rulings of the Other Circuits 20

II. There Is No Circuit Split Regarding Staley's Entitlement to Attorneys' Fees 26

CONCLUSION 30

TABLE OF CONTENTS — Continued

Page

APPENDIX A: Facsimile transmission from Michael A. Stafford, Harris County Attorney, to Valerie Bellanger, Fifth Circuit Assistant Calendaring Clerk (Jan. 19, 2007) (providing copies of County Commissioners' Feb. 2004 Resolution and vote regarding renovation) 1a

APPENDIX B: Facsimile transmission from Michael A. Stafford, Harris County Attorney, to Valerie Bellanger, Fifth Circuit Assistant Calendaring Clerk (Jan. 19, 2007) (providing "Timeline" respecting renovation and litigation) 7a

TABLE OF AUTHORITIES

Page(s)

CASES

Adarand Constr., Inc. v. Slater, 528 U.S. 216 (2000) 21

Agostini v. Felton, 521 U.S. 203 (1997) 24

Alioto v. Williams, 450 U.S. 1012 (1981) 29

Am. Family Life Assurance Co. v. FCC, 129 F.3d 625 (D.C. Cir. 1997) 19

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) 10, 22

Associated Gen. Contractors v. City of New Haven, 41 F.3d 62 (2d Cir. 1994) 28

AT&T Commc'ns v. City of Austin, 235 F.3d 241 (5th Cir. 2000) 16

AT&T Commc'ns v. City of Dallas, 243 F.3d 928 (5th Cir. 2001) 16

Bagby v. Beal, 606 F.2d 411 (3d Cir. 1979) 11, 28

Bishop v. Comm. on Prof'l Ethics & Conduct, 686 F.2d 1278 (8th Cir. 1982) 28

Brooks v. Vassar, 462 F.3d 341 (4th Cir. 2006), *cert. denied*, 127 S. Ct. 2251 (2007) 15, 22

Cammermeyer v. Perry, 97 F.3d 1235 (9th Cir. 1996) 18, 19

Chem. Producers & Distribs. Ass'n v. Helliker, 463 F.3d 871 (9th Cir. 2006) 16

Constangy, Brooks & Smith v. NLRB, 851 F.2d 839 (1988) 11, 12, 28

Crowell v. Mader, 444 U.S. 505 (1980) (per curiam) 8, 27

TABLE OF AUTHORITIES — Continued

Page(s)

Davis v. Wakelee, 156 U.S. 680 (1895) 24

DeFunis v. Odegaard, 416 U.S. 312 (1974) 11

Dilley v. Gunn, 64 F.3d 1365 (9th Cir. 1995) 17, 18, 22

Doe v. Marshall, 622 F.2d 118 (5th Cir. 1980) 27

Ford v. Wilder, 469 F.3d 500 (6th Cir. 2006) 15, 16, 28

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000) 10, 11

Hous. Chron. Publ'g Co. v. League City, 488 F.3d 613 (5th Cir. 2007) 19, 20, 28

ICEE Distrib., Inc. v. J & J Snack Foods Corp., 445 F.3d 841 (5th Cir. 2006) 24

John T. v. Del. County Intermediate Unit, 318 F.3d 545 (3d Cir. 2003) 30

Karcher v. May, 484 U.S. 72 (1987) 8, 9, 11

Kerkhof v. MCI WorldCom, Inc., 282 F.3d 44 (1st Cir. 2002) 19

Khodara Envtl., Inc. ex rel. Eagle Envtl. L.P. v. Beckman, 237 F.3d 186 (3d Cir. 2001) 14, 15, 22

King v. Richmond County, 331 F.3d 1271 (11th Cir. 2003) 25

Lafferty v. Humphrey, 248 F.2d 82 (D.C. Cir. 1957) 28

Lewis v. Cont'l Bank Corp., 494 U.S. 472 (1990) 29

Liberty Res., Inc. v. Se. Pa. Transp. Auth., 54 Fed. App'x 769 (3d Cir. 2002) 27

Martinez v. Wilson, 32 F.3d 1415 (9th Cir. 1994) 28

McClendon v. City of Albuquerque, 100 F.3d 863 (10th Cir. 1996) 11

TABLE OF AUTHORITIES — Continued

Page(s)

McCreary County v. ACLU of Ky., 545 U.S. 844 (2005) 4, 22, 25

Modrovich v. Allegheny County, 385 F.3d 397 (3d Cir. 2004) 25

Monzillo v. Biller, 735 F.2d 1456 (D.C. Cir. 1984) 27

Murphy v. Fort Worth Indep. Sch. Dist., 334 F.3d 470 (5th Cir. 2003) 27, 30

Nat'l Black Police Ass'n v. District of Columbia, 108 F.3d 346 (D.C. Cir. 1997) ..... *passim*

Nat'l Black Police Ass'n v. D.C. Bd. of Elections & Ethics, 168 F.3d 525 (D.C. Cir. 1999) 29

New Hampshire v. Maine, 532 U.S. 742 (2001) 24

19 Solid Waste Dep't Mechs. v. City of Albuquerque, 76 F.3d 1142 (10th Cir. 1996) 17, 26

Rendell v. Rumsfeld, 484 F.3d 236 (3d Cir. 2007) 14, 15, 22

Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) 25

Ross v. Moffitt, 417 U.S. 600 (1974) 21

Sierra Club v. Callaway, 499 F.2d 982 (5th Cir. 1974) 23

Smyth ex rel. Smyth v. Rivero, 282 F.3d 268 (4th Cir. 2002) 29

Sole v. Wyner, 127 S. Ct. 2188 (2007) 29

Travis County v. Matthews, 235 S.W.2d 691 (Tex. Civ. App. 1950) 17

United States v. Munsingwear, Inc., 340 U.S. 36 (1950) 7, 8, 9, 12

TABLE OF AUTHORITIES — Continued

Page(s)

U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18 (1994) ..... *passim*

Valero Terrestrial Corp. v. Paige, 211 F.3d 112 (4th Cir. 2000) 14, 15, 21, 24

Van Orden v. Perry, 545 U.S. 677 (2005) 4, 22

Walling v. James V. Reuter, Inc., 321 U.S. 671 (1944) 11

Watson v. County of Riverside, 300 F.3d 1092 (9th Cir. 2002) 29

STATUTES AND RULES OF COURT

42 U.S.C. § 1988 ..... 7, 29

Fed. R. App. P. 35(a)(2) 23

Fed. R. Civ. P. 60(b)(5) 24

Sup. Ct. R. 10 21

MISCELLANEOUS

18 Moore's Federal Practice 3d § 134.02[1][d] (1997) ... 26

Bill Murphy, *Monument's Removal Adds Twist to Bible Display Appeal*, Hous. Chron., Jan. 22, 2007, at A1 ..... 13, 23

BRIEF FOR THE RESPONDENT IN OPPOSITION

For the first three years after this lawsuit was filed, Petitioner Harris County opposed Respondent Staley's claim on the merits, vociferously arguing that the challenged religious display was permissible under Establishment Clause jurisprudence. That argument bore little success: The district court rejected it, as did a panel of the Fifth Circuit. After obtaining en banc review, the County abruptly changed course: On the eve of the en banc oral argument, the County removed the monument, placed it in storage, and claimed that the case had thereby become moot.

The County's claim to mootness did not rest on garden-variety cessation of challenged conduct. Rather, the County said that it intended to redisplay the monument in the future, but argued that the case was nonetheless nonjusticiable because the details of the future display were unknown. Seeking unfettered discretion in erecting that future display, the County asked the en banc court to vacate the district court's decision. The County also asked the court to deny Staley attorneys' fees.

The decision of an overwhelming majority of the en banc Fifth Circuit to deny vacatur under those circumstances was consistent with the decisions of this Court and the other circuits, all of which recognize that vacatur is an equitable, case-specific remedy. No circuit has recognized the existence of a split in this area, and none of the cases that the County cites applied legal rules that conflict with those applied by the en banc court.

The County's Petition is really a request that this Court substitute its own analysis of the equities for the analysis of the court below. But the equities to which the County points are grossly insufficient to outweigh the considerations that counsel against vacatur. And because vacatur rulings are case-specific, a ruling from this Court would have little effect on any case beyond this one.

Not a single judge on the en banc court accepted the County's invitation to deny Staley attorneys' fees. That comes

as no surprise, for the circuits agree that a plaintiff who obtains a favorable final judgment from a district court remains the prevailing party if the case becomes moot on appeal, whether or not the decision is vacated. Even if this Court were inclined to give the lower courts guidance in this area despite the lack of a circuit split, this case would present a particularly poor vehicle for doing so in light of the timing of, and the parties' respective responsibilities for, the mooting event.

STATEMENT

A. The Factual Background

The monument at issue was conceived by a Christian charity, Star of Hope Mission. The monument consists of an open Bible atop a glass-encased podium bearing the following inscription:

Star of Hope Mission
Erected in Loving Memory of Husband & Father
William S. Mosher
A.D. 1956

Pet. App. 66a-67a. The Bible was included as the monument's centerpiece to "honor and promote" Christianity (*id.* at 74a) and to send the message that "this is a Christian government" (*id.* at 67a).[1]

The monument was installed in 1956 outside the main entrance of the Harris County Civil Courthouse in Houston, Texas, upon a unanimous vote of the Harris County Commissioners (Trial Tr. 221-22, 234-35), all of whom later

[1] The County claims that the Bible was included to "exemplif[y] the connection between Mr. Mosher's religious faith and his charitable work." Pet. 2-3. But there is nothing on the monument to suggest that Mosher even *participated* in charitable work, let alone to establish that the Bible was included to commemorate the connection between the two. And the district court did not find that the Bible served that function; rather, the court found that the Bible was included to "memorialize," "commemorate," and "honor" Mosher's Christian faith. Pet. App. 67a, 73a, 79a.

attended the monument's 1956 unveiling (*id.* at 229). The unveiling ceremony included Christian prayers (Pet. App. 67a) and was attended by "a lot of the preachers around the city" (Trial Tr. 229).

Between 1956 and 1988, the monument was vandalized and the Bible stolen and replaced several times. Pet. App. 68a. In 1988, after county residents complained about the Bible, it was again removed (or not replaced); and from 1988 to 1995, the display remained empty. *Id.*

In 1995, state-judge John Devine obtained the County's permission to refurbish the monument as part of his campaign promise to "put[] Christianity back into government." *Id.* Devine believed that "we are a Christian nation" (Trial Tr. 248), and he sought through the renovation to "get the word of God back into" people's lives (*id.* at 243-44). Devine asked his court reporter to spearhead the refurbishment. *Id.* at 199. She accepted the assignment as part of her religious "duty [to] tell others what the Bible says." Pl.'s Trial Ex. 28 (Friend Aff. ¶¶ 21-22).

The monument was both restored and embellished. The Bible was replaced and outlined in red neon lighting to give it greater prominence. Pet. App. 30a, 68a, 74a. The King James Version was selected for the refurbished display — not because it was consistent with the monument's original contents, but because Devine's court reporter believed that version of the Bible to be "historically correct." Trial Tr. 203.

The 1995 rededication ceremony was attended by Devine, his court reporter, Harris County's chief executive, and "pastors from the whole community." *Id.* at 249; *see also id.* at 133, 144, 201. The ceremony included a "whole bunch" of Christian prayers. *Id.* at 249; *accord* Pet. App. 69a.[2]

---

[2] Almost all the facts pertinent to the refurbishment — including Devine's motivations and the nature of the unveiling ceremony — go unmentioned by the County. *Cf.* Pet. 3. The County also mischaracterizes the refurbishment (continued...)

B. The Proceedings Below

After holding a two-day bench trial and viewing the monument (Trial Tr. 90), the district court found that the monument was originally displayed, and later refurbished, with a predominantly religious purpose. Pet. App. 72a-75a. The court also found that the display's configuration, setting, and history would lead a reasonable observer to conclude that the County had endorsed religion. *Id.* at 75a-76a.

A panel of the Fifth Circuit affirmed. *Id.* at 26a-60a. Judge Jolly, joined by Judge Higginbotham, held that although the monument was not erected with a predominantly religious purpose in 1956, the 1995 restoration was constitutionally flawed under *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005), and *Van Orden v. Perry*, 545 U.S. 677 (2005), because it was a contemporary endeavor, driven by wholly religious rather than historical motivations, that transformed the display into "a predominantly religious symbol." Pet. App. 41a-45a.

Judge Smith dissented, arguing both that *McCreary* and *Van Orden* create a presumption that old monuments are constitutional, and that Devine's intervention was insufficient to overcome that presumption. Pet. App. 45a-56a (Smith, J., dissenting).

The County sought and obtained rehearing en banc. Its petition argued that the panel erred in concluding that the display was unconstitutional, but did not mention that the

---

[2] (...continued)
as "private." *See id.* The *funds* for the restoration were raised from private sources; but in all other respects, the refurbishment was a government-driven affair — overseen by a state district judge, approved by the Harris County Commissioners, and subsequently publicly financed when the County assumed the electric bill for the added lighting. Pet. App. 30a, 68a-69a. The district court rejected the County's argument that the monument constitutes private rather than public speech (*see id.* at 71a-72a), a conclusion that neither the panel nor the en banc court revisited.

courthouse was being remodeled or that the display was slated for removal. *See* Pet. for Reh'g En Banc (Aug. 29, 2006). Immediately after granting rehearing, however, having independently learned of the renovation, the en banc court requested that the parties address whether the remodeling project affected Staley's standing to sue or mooted the case. Pet. App. 89a-90a.

At that point, the County seized on a litigation strategy that it believed held the promise of letting the County off scot-free despite the weakness of its position on the merits. The County argued in its en banc brief, for the first time in the case, that the case was moot because the monument would be removed at some unknown future time. Although the Petition suggests that the County asserted mootness as an afterthought (Pet. 4), that was in fact the County's lead argument; and half of its brief was devoted to mootness and related arguments. *See* County's En Banc Br. 7-15, 30-32. The County pledged that it would redisplay the monument in the future, but it argued that a challenge to the renewed display was unripe because the details of the redisplay were currently unknown. *Id.* at 8, 10.

Staley responded by arguing that the fact that a case may become moot in the future does not make it moot now; that it was unclear whether the monument's planned removal was precipitated by the renovation or by the County's desire to moot the case; and that the County had not met its burden of establishing that the challenged action would not recur. Accordingly, Staley argued that the case should be remanded for an initial mootness determination predicated on factfinding regarding the County's plans and motivations. Staley's En Banc Br. 12-19.

On the Friday before the Tuesday en banc oral argument, having received Staley's brief explaining that the monument's possible future removal could not have already rendered the case moot, the County removed the monument and placed it in storage (Pet. App. 3a) — timing that the en banc court

understandably found suspicious (*see id.* at 10a, 13a-14a). The basis for suspicion only grew when, in response to the court's request, the County submitted a "Timeline" showing that the renovation had begun in 2004 and that the courthouse had closed for the renovation even before the *panel* had issued its decision in 2006. *See* App. 9a, *infra* (noting that "the courts vacated the 1910 Courthouse and moved into the new Harris County Civil Courthouse" in March 2006); Pet. App. 21a n.1 (DeMoss, J., dissenting) (noting that "[t]he Old Civil Courts Building closed on April 28, 2006, and the new courthouse opened the following Monday, on May 1, 2006").

Neither the County nor its counsel claimed to have only recently learned of the renovation. *Cf.* Pet. 2 (eliding the question by stating: "As the County prepared for oral argument before an en banc panel of the Fifth Circuit, events unrelated to the litigation mooted the County's appeal."). Indeed, the County has not provided, either here or in the court below, any explanation for why it failed to raise the issue earlier — or why, after nearly three year's renovation, the removal just happened to fall on the eve of the oral argument.

The en banc majority held that the monument's removal mooted the case (because the relief requested had been obtained), and that any dispute over the redisplay was unripe — thus giving the County just what it had sought. Pet. App. 6a. But the court declined to strip Staley of her district-court victory, concluding that the County had not overcome the presumption against vacatur that attaches when mootness results from the unilateral act of the party that lost below. *Id.* at 10a-14a. In evaluating the equities, the court found that the County's proffered benign reason for the removal was outweighed by a host of other considerations: The County had failed to suggest mootness or to keep the courts updated on the status of the renovation, even though the project began in 2004; Staley had obtained full relief in the district court and an affirmance from a three-judge panel; and retaining the district court's decision

would stave off litigation over "identical issues by the same parties under the same circumstances" when the County redisplays the monument. *Id.* at 12a-14a.

Two dissenters argued that the case law from other circuits makes vacatur available when the mooting action is taken for reasons unrelated to the litigation (*see id.* at 18a-21a (DeMoss, J., joined by Smith, J., dissenting in part)), but the majority explained that the equities in those cases counseled in favor of vacatur to a far greater extent than did the circumstances here. *Id.* at 10a-12a. Three other judges did not reach the vacatur question, instead agreeing with Staley that a remand for further factfinding was necessary because the County had not met its burden on mootness under the existing record. *Id.* at 16a-18a (Garza, J., joined by Clement and Owen, JJ., dissenting).

The en banc court also rejected the County's argument that Staley should be denied attorneys' fees under 42 U.S.C. § 1988. But this time, none of the sixteen judges on the court accepted the County's argument — not even the two dissenters who favored vacatur of the district court's decision. *See* Pet. App. 15a; *id.* at 18a-25a (DeMoss, J., dissenting in part) (remaining silent on fee question).

REASONS FOR DENYING THE WRIT

I. The En Banc Court Employed a Legal Standard and Reached a Result on Vacatur That Is Consistent with the Decisions of this Court and All the Circuits.

A. This Court Has Provided the Lower Courts with Clear Direction on the Prevailing Legal Standards.

This Court has on several occasions addressed the legal standards to be applied in awarding vacatur.

In *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), which involved a price-fixing lawsuit mooted by changes in the governing regulatory structure, the Court stated in dictum that "[t]he established practice" when a civil case becomes moot

while on appeal is to "reverse or vacate the judgment below and remand with a direction to dismiss." *Id.* at 39. The Court did not grant vacatur, however, but merely suggested that vacatur would have been granted had it been requested at an earlier stage in the proceedings. *Id.*

Thereafter, in *Crowell v. Mader*, 444 U.S. 505, 506 (1980) (per curiam), the Court summarily directed vacatur of a district-court judgment when a state legislature mooted the case by replacing the challenged legislation.

This Court next visited the question of vacatur in *Karcher v. May*, 484 U.S. 72 (1987). In *Karcher*, a state legislature intervened to defend a challenged statute after the named defendants had capitulated. After the district court declared the statute unconstitutional and the court of appeals affirmed, the intervening legislators lost their leadership posts and their replacements declined to continue with the appeal, thereby concluding the case. This Court denied the former legislators' request for vacatur because the case became moot not "due to circumstances unattributable to any of the parties," but as a result of the decision of the newly substituted defendants not to continue prosecuting the case. *Id.* at 83.

The next step in the evolution of vacatur doctrine was *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994). In *Bancorp*, the plaintiff had won in both the district court and the court of appeals, and the case had settled while pending in this Court. The defendant then moved for vacatur of the district court's decision. In a unanimous opinion, this Court held that vacatur is an extraordinary remedy as to which the party seeking relief bears the burden of demonstrating equitable entitlement. *Id.* at 26; *see also id.* at 24 (noting that moot cases must be disposed of in the manner "most consonant to justice . . . in view of the nature and character of the conditions which have caused the case to become moot") (internal quotation marks omitted).

The Court considered the various policy arguments and the concerns of the public that are at stake when a case becomes moot on appeal. *Id.* at 25-29. It concluded that the equities will generally counsel in favor of vacatur when mootness is caused by "happenstance" — which the Court described as involving "circumstances unattributable to any of the parties" (*id.* at 23 (quoting *Karcher*, 484 U.S. at 82)) — or when "mootness results from the unilateral action of the party who prevailed below." *Id.* at 25.[3]

In contrast, when "the party seeking relief from the judgment below caused the mootness by voluntary action," the equities will generally counsel against vacatur. *Id.* at 25. And when the parties share equal responsibility for the mootness (as in a settlement), vacatur is similarly disfavored because the party seeking vacatur needs to show that it bears *less* responsibility for the mootness than the opposing party in order to meet its burden. *Id.*at 26. In the Court's view, "[t]o allow a party who steps off the statutory path to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would — quite apart from any considerations of fairness to the parties — disturb the orderly operation of the federal judicial system." *Id.* at 27.

The Court declined the invitation to address the propriety of the lower court's decision as part of the vacatur analysis because the federal courts lack the constitutional power to make "assumptions about the merits" once a case is moot, and because there is benefit in allowing the lower courts to tease out an issue, both rightly and wrongly, before it reaches this Court.

---

[3] The *Bancorp* Court proffered a rationale for the suggestion in *Munsingwear* that vacatur would have been granted there had it been requested: "that repeal of administrative regulations cannot fairly be attributed to the Executive Branch when it litigates in the name of the United States." 513 U.S. at 25 n.3. The *Bancorp* Court "express[ed] no view" on whether that conclusion represents a proper application of the "happenstance" doctrine. *Id.*

Id. at 27. The Court also rejected the argument that the availability of vacatur would facilitate settlement, noting that vacatur "may *deter* settlement at an earlier stage" because "litigants . . . may think it worthwhile to roll the dice rather than settle . . . [if] an unfavorable outcome can be washed away by a settlement-related vacatur." *Id.* at 28.

The Court cautioned, however, that vacatur should not always be denied even when mootness results from settlement. *Id.* at 29. Rather, "the determination is an equitable one, and exceptional circumstances may conceivably counsel in favor of [vacatur]" in a different case. *Id.*

In *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), this Court reiterated that vacatur is an equitable remedy permitting of no bright-line rules. In that case, the plaintiff-employee had won in the district court and then mooted the case by quitting her job while the case was pending in the court of appeals. But neither she nor the employer's counsel timely informed the appeals court of her resignation. Even though *Bancorp* advised that vacatur is normally favored when mootness is caused by the winning party (*see Bancorp*, 513 U.S. at 25), this Court did not base its decision to vacate on that fact alone. Rather, the Court also considered both the plaintiff's lack of candor regarding the mooting events, and federalism concerns arising from retention of the decisions below, ultimately concluding that vacatur was appropriate under those "exceptional circumstances." *Id.* at 74-75; *see also id.* at 68 n.23.[4]

---

[4] In *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 173, 179 (2000), the plaintiffs prevailed in the district court on their claim against an alleged polluter; but while the case was pending in this Court, the defendant shuttered the offending plant. Although remanding for a mootness determination, the Court noted that vacatur would likely be unavailable even if the case were found moot because the mootness would have resulted from the "voluntary conduct of the party that lost in the District Court." *Id.* at 194 n.6.

(continued...)

These cases together provide sufficient "guidance on the factors that would make vacatur appropriate" (Pet. 7): All the equities must be considered, including the parties' respective responsibilities for the mootness, the policy considerations at stake, and the public interest. And as demonstrated below, the lower courts have had little trouble implementing those instructions.

B. There Is No Circuit Split on the Legal Principles to Be Applied When Mootness Results from the Actions of the Losing Party.

The County claims that there is a circuit split on whether "happenstance" vacatur is to be awarded when mootness results from voluntary conduct by the losing party that is unrelated to the litigation. Pet. 7-14.[5] But no court has recognized a split;

---

[4] (...continued)

Laidlaw relied on *Walling v. James V. Reuter, Inc.*, 321 U.S. 671, 677-78 (1944), in which this Court denied vacatur upon the defendant-corporation's dissolution. *See Laidlaw*, 528 U.S. at 194 n.6. The dissolution, undertaken "to secure tax advantages," had consisted of the "simple expedient of dissolving [the family business] and continuing the business under the individual control of members of the family." *Walling*, 321 U.S. at 673, 675. The Court analogized those circumstances to mootness, explaining that "[i]f a judgment has become moot, this Court may not consider its merits, but may make such disposition of the whole case as justice may require." *Id.* at 677. The Court concluded that justice requires that "petitioner is entitled to retain the benefit of the judgment entered in his favor by the District Court." *Id.*

[5] The County's Petition leaves the impression that vacatur is always unavailable when the mooting event is *related* to the litigation. But even there, vacatur turns on the equities of the particular case. When mootness is caused by the defendant's acquiescence in the judgment, vacatur is usually denied (*see Bancorp*, 513 U.S. at 25-26; *Karcher*, 484 U.S. at 83), though that is not always the result (*see, e.g., McClendon v. City of Albuquerque*, 100 F.3d 863, 868 (10th Cir. 1996)). And when mootness results from *involuntary* compliance with an unstayed judgment, vacatur is usually granted (*see, e.g., DeFunis v. Odegaard*, 416 U.S. 312, 320 (1974); *Bagby v. Beal*, 606 F.2d 411, 414, 417 (3d Cir. 1979)), though that too is not guaranteed (*see, e.g., Constangy, Brooks & Smith v. NLRB*, 851 F.2d 839, (continued...)

and although two dissenters below thought that the majority's ruling gave rise to one (*see* Pet. App. 18a-21a (DeMoss, J., dissenting)), the eleven judges in the majority rejected that conclusion, explaining that the cases cited in the dissent did not entail the equities here. *Id.* at 12a & n.4.[6]

The County thus takes upon itself the task of dividing the cases into two camps: those supposedly applying an automatic rule of "happenstance" vacatur when the losing party, while responsible for the mootness, acted for reasons unrelated to the litigation (*see* Pet. 10-13); and those considering equitable factors beyond the motivation for the mooting action (*see id.* at 13-14).[7]

---

[5] (...continued)
842 (1988)).

[6] The County misreads the en banc decision when it claims that, "[u]nlike the Fifth Circuit, several courts of appeals continue to follow the rule that vacatur is required in cases of 'happenstance . . . .'" Pet. 7. The court below plainly recognized that mootness resulting from "happenstance" calls for vacatur. *See* Pet. App. 9a-10a n.2; *accord id.* at 8a. But the attribution of mootness to happenstance is a legal conclusion that turns on the equities in the case. *Cf. Bancorp*, 513 U.S. at 25 ("The reference to 'happenstance' in *Munsingwear* must be understood as an allusion to this equitable tradition of vacatur."). The County's gripe with the en banc court relates not to whether happenstance merits vacatur, but to whether the mooting event here should be deemed happenstance.

[7] Even if this Court were to adopt the former rule, as the County advocates, it would not necessarily change the outcome in this case. The County repeatedly states that the en banc court "reject[ed] any inference that the County removed the Monument as part of a litigation strategy." Pet. 4 (quoting Pet. App. 10a ("we acknowledge that the bottom-line cause of the removal was related to the ongoing renovations")); *accord* Pet. 13. But the quoted clause from the opinion says only that the removal was "related" to the renovation, not that the renovation was the *sole* motivation for the removal. Indeed, the clause immediately preceding the quotation — "the timing of the removal may be open to question" (Pet. App. 10a) — underscores the court's view that the removal on the eve of the oral argument may well have been a litigation strategy. And whatever factual "findings" the
(continued...)

But the first category does not exist: Every decision that the County places in that category eschewed the application of automatic vacatur rules — and no decision elevated intent over all other considerations. To be sure, in some of those cases, the courts declined to apply the *Bancorp* presumption when the mootness resulted from a statutory amendment passed without an illegitimate motive. But that was because the mootness had resulted from *legislative* action, a context that presents unique considerations and involves a mooting entity distinct from the party-defendant — factors on which the courts relied in granting vacatur. Accordingly, the County errs both in citing those decisions as holding that vacatur is warranted when the losing party moots a case for reasons unrelated to the litigation, and in applying their holdings to a nonlegislative context.

1. Legislative-amendment cases are inapplicable here because they are exempt from the *Bancorp* presumption.

In the legislative context (as in all others), the courts have uniformly held that vacatur is an equitable remedy permitting of no bright-line rules. *See Nat'l Black Police Ass'n v. District of Columbia* ("*NBPA*"), 108 F.3d 346, 351 (D.C. Cir. 1997)

---

[7] (...continued)
en banc court might have made in this regard were premised solely on statements that the County had made to the court, rather than on independent fact-gathering.

The County's subsequent treatment of the monument also appears to have been driven by the litigation. The County has said that it intends to redisplay the monument "elsewhere on county property" (Bill Murphy, *Monument's Removal Adds Twist to Bible Display Appeal*, Hous. Chron., Jan. 22, 2007, at A1), but the County has never explained why it must wait until the renovation is complete before doing so. There is nothing sacred about the old courthouse grounds; the County could easily have chosen to transfer the monument (without the Bible, of course) to the grounds of the new courthouse or to any other government space. Instead, it appears that the County is attempting to manipulate the outcome of the litigation by leaving the monument in storage.

(stating that "vacatur is an equitable remedy, not an automatic right," and that "where mootness results from voluntary action, vacatur should not be granted unless to do so would serve the public interest"); *Khodara Envtl., Inc. ex rel. Eagle Envtl. L.P. v. Beckman*, 237 F.3d 186, 194-95 (3d Cir. 2001) (rejecting application of any "categorical rule" on vacatur because "vacatur is an equitable remedy rather than an automatic right," and holding that "absent unusual circumstances, the appellate vacatur decision under *Bancorp* is informed almost entirely, if not entirely, by the twin considerations of fault and public interest") (citation omitted); *Rendell v. Rumsfeld*, 484 F.3d 236, 243 (3d Cir. 2007) (analyzing particular circumstances of case and concluding that "[o]n balance, . . . it is most equitable to wipe the slate clean") (internal quotation marks omitted); *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 117-18 (4th Cir. 2000) (holding that "absent unusual circumstances, the appellate vacatur decision . . . is informed almost entirely, if not entirely, by the twin considerations of fault and public interest"; that when party seeking relief from judgment has caused mootness, vacatur is available only in "'exceptional circumstances'" (quoting *Bancorp*, 513 U.S. at 29); and that when mootness is fault of neither party, or results from unilateral action of party who prevailed below, vacatur will be granted subject "to considerations of the public interest").

To be sure, these courts recognized that the *Bancorp* presumption against vacatur is generally inapplicable when mootness results from a legislative amendment passed without intent "to overturn an unfavorable precedent" (*NBPA*, 108 F.3d at 351; *accord Rendell*, 484 F.3d at 243; *Khodara*, 237 F.3d at 195);[8] but the abandonment of the presumption was premised on

---

[8] The County erroneously claims that the legislative-amendment cases call for vacatur when the mooting action is "unrelated to the litigation." Pet. 8. Vacatur in those cases turned on whether the amendment was specifically intended to undo the unfavorable decision, not on whether the amendment (continued...)

the peculiarities of the legislative context, where there are special separation-of-powers concerns and the mooting action is not taken by the party-defendant. *See NBPA*, 108 F.3d at 352-53 (relying on "[s]eparation of powers concerns" "to exempt from *Bancorp*'s presumption . . . the situation of a case which has become moot . . . due to passage of legislation," and declining to attribute mootness to defendant because, "in most multi-branch governments defense of existing laws falls to the executive whereas initiation of legislation is the responsibility of the legislature"); *Brooks v. Vassar*, 462 F.3d 341, 349 (4th Cir. 2006) (holding that "a State legislature's amendment of a challenged law is not . . . attributable to the State's executive officials defending a challenge to that law"), *cert. denied*, 127 S. Ct. 2251 (2007); *Valero*, 211 F.3d at 121 (granting vacatur because "mootness was . . . caused by the state *legislature*'s amendment of statutory provisions . . . , and not by the actions of any of the defendants before this court, all of whom are state *executive* officials, none of whom is the Governor [who signed the amendment]"); *Rendell*, 484 F.3d at 243 (granting vacatur where mooting action was "not attributable to the defendant," and had been taken by nonparties, including U.S. Congress, in fulfillment of a legislative responsibility).[9]

---

[8] (...continued)
was related to the litigation. *NBPA*, 108 F.3d at 351; *accord Khodara*, 237 F.3d at 195 (granting vacatur when amendment was "a commendable effort 'to repair what may have been a constitutionally defective statute'" (citation omitted)).

[9] When the legislators are themselves the parties-defendant, a vacatur ruling is likely to come out the other way, irrespective of the relationship between the mooting event and the litigation. In *Ford v. Wilder*, 469 F.3d 500 (6th Cir. 2006), for example, a state-senate candidate sued members of the state legislature for trying to void an election in which she had prevailed. After she won below, and while the case was on appeal, a senate commission voided the election on an entirely different basis and a new election was held, thereby mooting the case. In declining to vacate the district court's decision, the Sixth Circuit evaluated all the equities in the case: The party seeking (continued...)

The Fifth Circuit has likewise granted vacatur when mootness results from a legislative amendment unattributable to the party defendant. *See, e.g., AT&T Commc'ns v. City of Dallas*, 243 F.3d 928, 931 (5th Cir. 2001) (vacating decision in plaintiffs' favor after State of Texas legislatively mooted case); *AT&T Commc'ns v. City of Austin*, 235 F.3d 241, 244 (5th Cir. 2000) (same).

Whether one characterizes these decisions as creating an exception to the *Bancorp* presumption or as simply falling outside the terms of that presumption (because the mooting action is not attributable to the losing party), the result is the same: The doctrine is *sui generis* to the legislative context.

Even in that context, however, vacatur is not assured. *See NBPA*, 108 F.3d at 354 (holding that "vacatur should [not necessarily] be granted in all cases" involving a legislative amendment passed without "illegitimate motive," because "vacatur is an equitable remedy and the record in particular cases may militate in favor of denying vacatur"). Accordingly, it is simply untenable to claim that *NBPA* and the other legislative-amendment cases adopted an automatic rule of vacatur for *any* circumstance, let alone for cases that arise outside the legislative arena.

But beyond that, actions taken by municipalities are not governed by the legislative-amendment cases because they do not give rise to the considerations raised by federal and state legislation. *See Chem. Producers & Distribs. Ass'n v. Helliker*, 463 F.3d 871, 880 (9th Cir. 2006) (noting that "[t]he rule of vacatur [for mootness resulting from legislative amendment] is

---

[9] (...continued)
relief from the judgment below had caused the mootness by voluntary action; the legislative-mooting cases were inapplicable because "the defendants' legislative action mooted a case brought directly against them"; the facts suggested that the legislature "knew or should have known" that its conduct was substantially likely to moot the appeal; and the defendants had not shown that vacatur would further the public interest. *Id.* at 506 & n.10.

for . . . enactments of Congress and state legislatures" and that "[t]he strength of the rule may attenuate for lesser public bodies and those with mixed legislative and executive character"); *19 Solid Waste Dep't Mechs. v. City of Albuquerque*, 76 F.3d 1142, 1144-45 (10th Cir. 1996) (denying vacatur when appeals court learned at oral argument that city-defendant had amended challenged drug-testing policy, even though city claimed that amendment was interim measure designed to allow continued drug-testing and was not passed as effort to comply with district court's opinion or to moot case).

Unlike federal and state governments, which include entirely separate executive and legislative branches, Harris County has a unitary, five-person governing body. That body was responsible for: displaying the monument and authorizing its refurbishment (Pet. App. 71a; Trial Tr. 221-22, 235; defending the litigation (*see Travis County v. Matthews*, 235 S.W.2d 691, 697 (Tex. Civ. App. 1950) (a county's "right of defense [in litigation] is held by the Commissioners' Court since the powers and duties of a county are vested in a Commissioners' Court")); and overseeing the courthouse renovation (*see* App. 3a-6a, *infra*). Accordingly, unlike the legislative-amendment cases, the decision of the court below represents a straightforward application of *Bancorp*'s presumption of nonvacatur when mootness results from the actions of the party that lost in the district court.

2. The circuit-court decisions arising outside the legislative-amendment context apply the same legal standards as those applied below.

The only nonlegislative decisions that the County places on the pro-vacatur side of a purported circuit split are from the Ninth Circuit. *See* Pet. 10. But that Circuit, like all the others, has explicitly repudiated the application of "automatic vacatur" when mootness results from actions unrelated to the litigation, holding that, in that context as in all others, "the touchstone of vacatur is equity." *Dilley v. Gunn*, 64 F.3d 1365, 1369-70 (9th

Cir. 1995); *accord Cammermeyer v. Perry*, 97 F.3d 1235, 1239 (9th Cir. 1996).

In *Dilley*, a prisoner had obtained a favorable district-court ruling on his challenge to the lack of adequate access to a law library, but the case became moot when he was reclassified and transferred to a lower-security prison while the case was on appeal. The court remanded the vacatur question, but it offered some guidance to the district court on the equitable analysis to be undertaken: It evaluated the competing policy considerations and concluded that although, "[a]s a general matter," vacatur may be inappropriate "even if the appellant engaged in the conduct which caused the mootness for a purpose other than to prevent the appellate court's review of the district court's order,"[10] mootness should nonetheless be attributed to happenstance in this case if the evidence on remand shows that the prisoner's transfer was "wholly unrelated to th[e] lawsuit," because "[t]o hold otherwise might create an incentive for prison officials to hinder routine transfers that would otherwise be available to and desired by inmates who have obtained favorable but not yet reviewed judgments in the district court." *Id.* at 1371-72. Thus, not only was the court's conclusion based on a policy consideration particular to the case, but the court explicitly repudiated the application of a blanket rule.

The Ninth Circuit employed that same nuanced approach in *Cammermeyer*, 97 F.3d at 1239, denying vacatur when, for reasons unrelated to the lawsuit, the Army mooted the plaintiff's case by changing its regulatory regime. The court noted that "the decision to vacate is not to be made mechanically, but should be based on equitable considerations," and explained that the "principal condition to which we have looked is whether the party seeking relief from the judgment below caused the mootness by voluntary action." *Id.* at 1239 (quoting

[10] Like the court below (*see* Pet. App. 11a), the Ninth Circuit noted that this "factor[, when present,] may weigh equitably in favor of vacating the order." *Dilley*, 64 F.3d at 1372 n.6.

Bancorp, 513 U.S. at 18). (Because the mooting action in *Cammermeyer* was a regulatory change by the executive branch, the case entailed different equities than those involved when the mootness results from a legislative amendment. *See NBPA*, 108 F.3d at 353.) Although the mooting action had not been driven by the litigation or taken "to moot the appeal," the court nonetheless denied vacatur in light of the other equities in the case. *Cammermeyer*, 97 F.3d at 1239. Thus, it cannot reasonably be said that the Ninth Circuit adheres to an automatic rule of attributing to happenstance all actions that are "not taken to influence the litigation." Pet. 10. Rather, vacatur in that Circuit, as in all the others, depends on the policy considerations and equities presented by the particular case.[11]

The County concedes that the First Circuit likewise treats the mooting party's intent as just one of the considerations pertinent to a vacatur ruling. *See* Pet. 14 (citing *Kerkhof v. MCI WorldCom, Inc.*, 282 F.3d 44, 53-54 (1st Cir. 2002)). Indeed, in *Kerkhof*, the court granted vacatur in part precisely because the mooting party had acted in "good faith." 282 F.3d at 54.

Similarly, the en banc court below held that "[w]hether a party's voluntary conduct was not done with specific intent to moot the case is certainly one factor we may consider, but the absence of such specific intent does not outweigh other equitable factors." Pet. App. 10a. That approach was repeated in a more recent Fifth Circuit case, *Houston Chronicle Publishing Co. v. League City*, 488 F.3d 613, 619-20 (5th Cir. 2007), where the defendant city caused the case to become moot

---

[11] The County also cites *American Family Life Assurance Co. v. FCC*, 129 F.3d 625 (D.C. Cir. 1997). *See* Pet. 12 n.2. But that case involved an "unreviewed administrative order[]," a context in which this Court has directed vacatur when mootness precludes court review. 129 F.3d at 630. Even then, the D.C. Circuit recognized the importance of "the equities," explaining that the order could cause collateral harm and that the mooting company's successor was not seeking to take advantage of the situation but was instead arguing "that the case is still alive." *Id.* at 631.

by repealing the challenged ordinance while the case was on appeal. The Court denied vacatur not only because the city had caused the mootness by voluntary action, but also because the city had failed to show that the repeal "was not in response to the district court judgment." *Id.* at 620.

In sum, all the circuits (including the Fifth) agree both that there is a presumption against vacatur when the losing party unilaterally moots the case, and that the presumption can be overcome by policy considerations, the facts of the particular case, or the public interest. All the circuits also agree that an exemption to that presumption arises when the mootness results from legislative amendment, though the presumption will apply if the legislature passes the amendment in order to undo the decision, if the legislators are themselves the parties-defendant, or if other equitable considerations counsel against vacatur. To claim that these principles establish an "automatic rule" is to stretch that term beyond recognition.

C. The En Banc Court's Denial of Vacatur Is Consistent with the Rulings of the Other Circuits.

The County claims that retention of the district court's judgment is inequitable for five reasons: (1) the judgment is outdated and erroneous (Pet. 7, 14-15); (2) the decision will impede the redisplay of the monument (Pet. 16); (3) the decision deprives Harris County residents of the ability to view the monument (Pet. 16); (4) the decision will "chill the exercise of activities protected by the First Amendment" (Pet. 16); and (5) retention of the decision subjects the County to an award of attorneys' fees (Pet. 15-16).

As a threshold matter, by making these *equitable* arguments, the County takes the very same approach that it faults the en banc court for having taken. *See* Pet. 13 ("the Fifth Circuit [evaluated] a broad mix of factors, many of which had nothing to do with the relevant inquiry under *Munsingwear* and *Bancorp*"); *id.* at 14 ("None of th[e] factors [considered below]

speaks to the relevant question, which is whether the County's attempt to appeal was 'frustrated by the vagaries of circumstance.'" (quoting *Bancorp*, 513 U.S. at 25)). The considerations to which the County points likewise have "nothing to do" with the nature of the mooting action. Rather, they are pleas directed at the equities.

That reality highlights two important points: that some resort to equitable considerations is not only unavoidable but essential to achieving a fair result on vacatur; and that the County's Petition is, in actuality, a request that this Court substitute its own equitable analysis for the analysis of the court below. But having this Court look over the en banc court's shoulder in performing an equitable inquiry is not an efficient or desirable use of this Court's scarce resources. That is so not only because this Court generally does not review decisions to address their "correctness"(*see Ross v. Moffitt*, 417 U.S. 600, 616 (1974); Sup. Ct. R. 10), but also because the Court's decision would be case-specific, making it of minimal use to the lower courts in other cases.

In any event, the County's list of equitable considerations is grossly incomplete. It disregards the facts that this case has been pending for more than four years and that the district court's decision had been affirmed on appeal before the mooting event occurred. *Cf. Adarand Constr., Inc. v. Slater*, 528 U.S. 216, 224 (2000) ("It is no small matter to deprive a litigant of the rewards of its efforts, particularly in a case that has been litigated up to this Court and back down again. Such action on grounds of mootness would be justified only if it were absolutely clear that the litigant no longer had any need of the judicial protection that it sought."). It ignores the County's announced intention to redisplay the monument and the judicial and public interest in precluding relitigation of "the identical issues by the same parties under the same circumstances." Pet. App. 14a; *cf. Valero*, 211 F.3d at 121 ("given that . . . there is no suggestion of the[] likely reenactment [of the challenged

statutes], we see the public interest as no bar to vacatur").[12] And it ignores the fact that the County failed to timely inform the courts of potential mootness. *Cf. Arizonans*, 520 U.S. at 74-75 (ruling against plaintiff on vacatur in part because she had failed to timely inform court of mooting event); *id.* at 68 n.23 (holding that "[i]t is the duty of counsel to bring to the federal tribunal's attention, *without delay*, facts that may raise a question of mootness" (internal quotation marks omitted)).

All these factors, when considered alongside the fact that the mootness resulted from the County's unilateral action, subject the County to a weighty presumption against vacatur. Indeed, the burden is even greater here than it was in *Bancorp*: If the impetus for settlement is diminished when "an unfavorable outcome can be washed away by a settlement-related vacatur" (*Bancorp*, 513 U.S. at 28), then the impetus is virtually eliminated if an unfavorable outcome can be washed away by unilateral action in which the other side need not even acquiesce.

Yet the County's cited considerations carry little if any countervailing weight. *Bancorp* forecloses the argument that the district court's ruling was erroneous. 513 U.S. at 27 ("It seems to us inappropriate . . . to vacate mooted cases, in which we have no constitutional power to decide the merits, on the basis of assumptions about the merits."). In any event, although the district court's decision was issued before this Court's rulings in *McCreary* and *Van Orden*, even with the benefit of those decisions, the legal standard (*compare* Pet. App. 33a n.6 *with id.* at 64a-65a), half the reviewed rationale (*compare id.* at 43a-45a *with id.* at 74a-76a), and the ultimate outcome in the case remained unchanged. Accordingly, the County grossly

[12] It was likewise clear in the other cases that the County cites that the challenged behavior would not be repeated, though the courts considered that fact in relation to mootness rather than vacatur. *Rendell*, 484 F.3d at 241; *Brooks*, 462 F.3d at 348; *Khodara*, 237 F.3d at 194; *NBPA*, 108 F.3d at 349; *Dilley*, 64 F.3d at 1369.

exaggerates when it asserts that the district court's decision is erroneous and outdated, and that it was "largely rejected" by the panel. Pet. 14-15.

Nor does the granting of rehearing en banc suggest disagreement with the panel's ruling. *Cf.* Pet. 7. Indeed, the en banc court expressly disavowed any conclusion that Staley's "claim lacked merit." Pet. App. 13a. The court could very well have thought that "the proceeding involve[d] a question of exceptional importance" (Fed. R. App. P. 35(a)(2)); or the court could have been motivated by concerns about justiciability rather than the merits, for it requested briefing on justiciability just eleven days after it granted rehearing.

The County is being either disingenuous or hyperbolic when it complains that the district court's decision will impede the County's ability to redisplay the monument. Pet. 16. Either the County will redisplay the monument or it won't.[13] The injunction, of course, serves as no impediment to the latter course. And if the County pursues the former, the injunction would prevent only those acts that are "within its terms as reasonably construed" (*Sierra Club v. Callaway*, 499 F.2d 982, 991 (5th Cir. 1974)); and the en banc court has already held that the new display would be subject to a new "fact-intensive and

---

[13] So there is no ambiguity: The County stated below that "[*w*]*hen* the Monument is again displayed to the public, it *will* be in a different location." County's En Banc Br. 8 (emphasis added). Staley's counsel also brought to the attention of the en banc court at oral argument that the *Houston Chronicle* had reported, just the day before, that the County Attorney had declared that the County intends to "install the monument elsewhere on county property and put the Bible back in it" and that "doing so would be constitutional." Murphy, *supra* note 7, at A1. The County Attorney emphasized that "No Commissioners Court member has said he doesn't want to put it back up." *Id.* Appreciating the distinction between "when" and "if," the en banc court concluded after reading the briefs and hearing oral argument that "the County has pledged to display the monument again after the renovations" (Pet. App. 13a), and that the "County specifically has asserted that it will display the monument again after the renovations are complete" (*id.* at 3a).

context-specific analysis" (Pet. App. 6a). Indeed, the County has claimed that "[t]he redesign of the Courthouse and plaza will make it physically impossible to return the Monument to its past location" (Pet. 5 n.1), and that the new display would thus arise in an entirely different location and context than the old display (*see* County's En Banc Br. 10). So why does the County care about the retention of an injunction that reaches only those actions that the County purports to have neither the intention nor the ability to pursue?[14] And if there is some ambiguity about the injunction's reach, or if circumstances change sufficiently as a result of the renovation and the intended redisplay of the monument, the County can move to clarify, lift, or modify the injunction. *See ICEE Distrib., Inc. v. J & J Snack Foods Corp.*, 445 F.3d 841, 850 (5th Cir. 2006).[15] Lifting the injunction now, rather than after circumstances have developed, would have the perverse effect of allowing the County to return the monument to precisely the same location, in precisely the same context, that the district court and a panel of the Fifth Circuit declared unconstitutional.

---

[14] Having prevailed on the argument that the redisplay would arise in an entirely different factual context and would thus be subject to an entirely new constitutional analysis (*see* Pet. App. 6a), the County is judicially estopped from arguing that retaining the district court's decision would "impede" the redisplay. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the [other] party . . . .") (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)); *id.* at 750-51.

[15] A ruling on such a motion would be governed by Fed. R. Civ. P. 60(b)(5) (*see Valero*, 211 F.3d at 117), which provides that "[o]n motion and upon such terms as are just, the court may relieve a party . . . from a final judgment [or] order . . . [when] . . . it is no longer equitable that the judgment should have prospective application." In ruling on a Rule 60(b)(5) motion, a court may recognize changes in both facts and law. *Agostini v. Felton*, 521 U.S. 203, 215 (1997).

Similarly disingenuous is the County's concern with the "'millions of Harris County residents who have had a possibly constitutional public monument removed at the request of one individual.'" Pet. 16 (quoting 23a n.2 (DeMoss, J., dissenting)). If as the County asserts, the monument's removal was driven by the courthouse renovation, the removal would have taken place whether or not the district court's decision was retained.[16] It is the monument's *return* that may be affected by the district court's decision; and as addressed above, whether the decision would have any effect on the new display will depend on the new circumstances and can be assessed by the district court upon motion.

The County's concern that the district court's decision will "chill the exercise of activities protected by the First amendment" is almost incomprehensible. The only explanation the County provides for this assertion is that "governmental authorities will likely curtail their tolerance for religious speech, for fear of being subjected to litigation." Pet. 16. But the display at issue here is *government* speech, not private speech. *See* Pet. App. 70a-72a; *see also* note 2, *supra*. As the County undoubtedly knows, there is a world of difference between the two. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833-35 (1995). And a court decision about any one government display is so fact-intensive that it is unlikely to have a substantial effect on even another *government* display, let alone a private one.[17]

---

[16] The district court ordered removal of the Bible, not of the monument as a whole. *See* Pet. App. 82a, 85a.

[17] *See McCreary County*, 545 U.S. at 867 ("under the Establishment Clause detail is key"); *Modrovich v. Allegheny County*, 385 F.3d 397, 402 (3d Cir. 2004) (challenge to religious display "requires a fact-specific, case-by-case analysis"); *King v. Richmond County*, 331 F.3d 1271, 1276 (11th Cir. 2003) ("each [religious-display] challenge calls for line-drawing based on a fact-specific, case-by-case analysis").

Further reducing the decision's impact is the fact that, as a district-court ruling, it has no controlling effect on any court or any other case — even one arising in the same federal district. 18 Moore's Federal Practice 3d § 134.02[1][d] (1997). The effect of the decision on other displays is limited to its persuasiveness, so the notion that the ruling could pose a threat to others' free speech borders on frivolous. And even if the decision were to have an effect on other cases, that would not be a valid ground on which to award vacatur. *Bancorp*, 513 U.S. at 27; *cf. 19 Solid Waste*, 76 F.3d at 1145 (dismissing argument that district court's decision could be used offensively in other cases because "[t]his factor should have been considered by the City in deciding whether to advocate dismissal of the claim").

Finally, the County's liability for attorneys' fees is not one of the "very real consequences" (Pet. 16) of the retention of the district court's decision: That liability arises whether the decision is vacated or retained. *See* Part II, *infra*.

In sum, the considerations to which the County points barely register on the scale, much less outweigh both the *Bancorp* presumption and all the case-specific considerations that disfavor vacatur here.

II. There Is No Circuit Split Regarding Staley's Entitlement to Attorneys' Fees.

Although the Petition focuses principally on the alleged circuit split regarding vacatur, the County frames its proposed question as whether "the court of appeals correctly declined to vacate the judgment of the district court, *thereby awarding fees to respondent as a 'prevailing party,'* when factors unrelated to the litigation had mooted the appeal." Pet. i (emphasis added). That wording, together with the County's treatment of the attorney-fee award as one of the "consequences" of retaining the district court's decision (Pet. 16), erroneously suggests that

the County's liability for attorneys' fees is dependent on whether the district court's decision is vacated.[18]

In *Crowell*, 444 U.S. at 505, this Court vacated a district-court order invalidating a legislative voting plan after the state legislature enacted a new plan that mooted the appeal. In vacating, however, the Court noted that the plaintiffs may still "wish to . . . apply for attorney's fees," making plain that vacatur does not preclude a fee award. *Id.* at 506; *accord Monzillo v. Biller*, 735 F.2d 1456, 1463 (D.C. Cir. 1984) (citing *Crowell* as holding that plaintiff whose case is mooted while on appeal can "still apply for attorneys' fees in the district court").

To be sure, *Crowell* said only that the plaintiff could "apply" for fees, not that fees would necessarily be granted. But the lower courts have had little difficulty with the reserved question, unanimously concluding that a civil-rights plaintiff who prevails in a final judgment in the district court is entitled to fees if the case becomes moot on appeal, even if the decision is vacated. *See, e.g.*, *Murphy v. Fort Worth Indep. Sch. Dist.*, 334 F.3d 470, 471 (5th Cir. 2003) (plaintiff entitled to fees even though decision vacated during pendency of appeal upon plaintiff's graduation); *Liberty Res., Inc. v. Se. Pa. Transp. Auth.*, 54 Fed. App'x 769, 771 (3d Cir. 2002) (plaintiff still had

---

[18] The County claims that "the majority held that Ms. Staley was entitled to fees *by virtue of the court's own refusal to vacate the judgment.*" Pet. 5 (emphasis added) (quoting the following sentence: "Given our opinion today, Staley has obtained the primary relief she sought and therefore remains the prevailing party." (Pet. App. 15a)). But immediately before the quoted sentence, the en banc court explains that "[a] determination of mootness neither precludes nor is precluded by an award of attorneys' fees. The attorneys' fees question turns instead on a wholly independent consideration: whether plaintiff is a 'prevailing party.'" Pet. App. 15a (quoting *Doe v. Marshall*, 622 F.2d 118, 120 (5th Cir. 1980)). It is thus clear, when the quoted sentence is read in context, that the en banc court's decision on attorneys' fees was not premised on the court's rulings on mootness and vacatur. The phrase, "Given our opinion today," refers not to the denial of vacatur, but to the court's having failed to reach (much less reverse) the merits of the district court's decision because the case had become moot.

"right to collect attorney's fees" even though summary judgment in its favor had been vacated after case became moot while on appeal); *Bishop v. Comm. on Prof'l Ethics & Conduct*, 686 F.2d 1278, 1290-91 (8th Cir. 1982) (plaintiff-attorney entitled to attorneys' fees as a result of favorable district-court decision invalidating state disciplinary rules, even though case was ultimately mooted by attorney's disbarment and district court's decision was vacated); *Bagby*, 606 F.2d at 415-17 (awarding attorneys' fees on basis of plaintiff's having prevailed in district court, even though case became moot on appeal and district court's decision was vacated); *cf. Associated Gen. Contractors v. City of New Haven*, 41 F.3d 62, 68 n.9 (2d Cir. 1994) (remanding for determination on attorneys' fees, even though case became moot during appeal and district court's decision had been vacated, because "mootness is not determinative as to the propriety of an award of attorney's fees. . . . The attorneys' fees question turns instead on a wholly independent consideration: whether plaintiff is a prevailing party") (internal quotation marks omitted); *Martinez v. Wilson*, 32 F.3d 1415, 1422 & n.8 (9th Cir. 1994) (denying attorneys' fees because plaintiffs had not received any benefit from their victory below, but noting: "That a decision favorable to a section 1983 plaintiff is later vacated as moot does not alter the plaintiff's status as a prevailing party provided the plaintiff achieved that status before the case was rendered moot."); *Lafferty v. Humphrey*, 248 F.2d 82, 84-85 (D.C. Cir. 1957) (concluding that counsel had "achieved substantial benefits" for plaintiff class, and were thus entitled to attorneys' fees from government fund, even though favorable judgment had been vacated as moot).[19]

---

[19] Attorneys' fees are likewise available, of course, if the district court's decision is retained upon a finding of mootness. *See, e.g.*, *Houston Chronicle*, 488 F.3d at 624; *cf. Ford*, 469 F.3d at 506-07 (denying vacatur and remanding for assessment of attorneys' fee in case that had become moot on appeal); *Constangy*, 851 F.2d at 842 (same).

Indeed, that was the very result in the *NBPA* litigation that the County cites regarding vacatur. In a subsequent installment of the case, the D.C. Circuit held that the plaintiffs were entitled to a fee award under § 1988 even though the Circuit had vacated the district court's injunction in its earlier decision. *Nat'l Black Police Ass'n v. D.C. Bd. of Elections & Ethics*, 168 F.3d 525, 528-29 (D.C. Cir. 1999).

The County has not cited a single circuit-court decision reaching a contrary holding; and to our knowledge, none exists. The County does cite *Lewis v. Continental Bank Corp.*, 494 U.S. 472 (1990) (*see* Pet. 8, 15), but that decision expressly reserved, and did not decide, the question whether the plaintiff was entitled to fees. *See id.* at 483. (And the mootness there resulted from the actions of a non-party (*id.* at 475) — a context in which the equities are different than they are here.) The County also cites *Alioto v. Williams*, 450 U.S. 1012, 1013-14 (1981) (Rehnquist, J., dissenting from denial of certiorari). *See* Pet. 8, 15. But that is not a decision of the Court. And even if it were, the claim to attorneys' fees in that case rested on the plaintiff's having obtained a preliminary, rather than permanent, injunction (*see id.* at 1013 (noting that "[n]o permanent injunction ever issued")) — a situation presenting more complex equities that *have* produced a circuit split. *Compare, e.g., Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268 (4th Cir. 2002), *with Watson v. County of Riverside*, 300 F.3d 1092 (9th Cir. 2002). *See generally Sole v. Wyner*, 127 S. Ct. 2188 (2007).

The County blurs the distinction between preliminary and permanent injunctions, repeatedly referring to the latter as "preliminary" merely because they are subject to appellate review. Pet. 7-8, 15. But the courts holding preliminary injunctions inadequate to justify fees have based their rulings on the particular nature of a preliminary, as opposed to a permanent, injunction — not on the availability of appellate review. *See Smyth*, 282 F.3d at 276 (finding fees unavailable because "the merits inquiry in the preliminary injunction

context is necessarily abbreviated" and "a court is guided not only by its assessment of the likely success of the plaintiff's claims, but also by other considerations, notably a balancing of likely harms"); *John T. v. Del. County Intermediate Unit*, 318 F.3d 545, 558-59 (3d Cir. 2003) (finding fees unavailable because preliminary injunction "not based on the merits" of plaintiff's claim).

Finally, even if this Court were inclined to give the lower courts guidance on the availability of attorneys' fees when a case becomes moot on appeal, this case would be a particularly poor vehicle for doing so. Staley's claim to fees rests on having prevailed not just before the district court, but before a panel of the court of appeals. Furthermore, the mootness here resulted from unilateral action taken by the losing party below, rather than from action taken by the winning party or from circumstances unattributable to either party. The Court's guidance would be of greatest use in a case in which the losing defendant had no responsibility for the mootness (*see, e.g.*, *Murphy*, 334 F.3d at 470-71) — a situation in which the legal questions are more difficult and the equities more balanced.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

RANDALL L. KALLINEN
Law Office of
Randall L. Kallinen
1406 Castle Court
Houston, TX 77006
(713) 528-8586

AYESHA N. KHAN
Counsel of Record
RICHARD B. KATSKEE
Americans United for
Separation of Church
and State
518 C Street, NE
Washington, DC 20002
(202) 466-3234

Counsel for Respondent

AUGUST 2007