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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This case provides the Court with the unique opportunity to address two distinct, recurring, and important legal issues, each of which merits this Court's review. First, this case provides the Court with an ideal vehicle for resolving a question on which the courts of appeals are clearly divided: the proper disposition of cases that are rendered moot by a party's voluntary conduct not related to the litigation. Second, this case also provides the Court with the opportunity to finally resolve whether an award of attorneys' fees is proper in cases mooted during appellate review.

I. Happenstance Prevented En Banc Review.

The Fifth Circuit granted en banc review to determine whether a divided panel had properly held that the Mosher Monument's (the "Monument") display of the Bible violated the Establishment Clause. As Staley concedes, shortly after granting rehearing on the merits, the Fifth Circuit ordered the parties to brief the issue of whether ongoing renovations to the Harris County Civil Courts Building (the "Courthouse") mooted the dispute. Opp. 5. In addition to contesting the merits, the County, as the Fifth Circuit ordered, briefed the mootness issue. The Fifth Circuit ultimately held that the renovations mooted the dispute. Pet. App. 6a.

Staley attempts to avoid the legal consequences of happenstance by implying that the County removed the Monument as part of a litigation strategy. Opp. 5. Not a single judge who heard the case en banc actually credited that assertion, and with good reason. As the en banc majority explained, the record leaves no doubt that "the bottom-line cause of the removal was related to the ongoing renovations." Pet. App. 10a. Indeed, in suggesting that the Monument may have been removed for tactical reasons, Staley primarily relies upon the proximity between the dates of the Monument's actual removal and oral argument before the en banc court. But a review of the timeline appended to Sta-

ley's opposition indicates that the renovation project began several years *before* Staley filed her complaint, and it remained ongoing while the litigation was pending. While the Courthouse was vacated in March 2006, the contract for demolition was not approved until November 7, 2006, and the demolition process did not begin until December 11, 2006. Opp. App. 9a. The Monument was placed into storage shortly after demolition began. Nothing about that timeline suggests that the long-planned, ongoing renovations were not the true reason for the Monument's removal. Indeed, at all times, including before the en banc court, the County vigorously argued that the Monument did not violate the Establishment Clause.

Staley also incorrectly asserts that the case was mooted "because the relief requested had been obtained." Opp. 6. That is not so. The case was mooted because changes in the circumstances that prevailed at the beginning of the litigation—in particular, the partial demolition of the Courthouse and removal of the Monument—prevented a final adjudication of Staley's constitutional challenge. Pet. App. 10a. Staley presumably would not contend that she "obtained" anything remotely approaching judicial "relief" if, following the Courthouse's destruction by an earthquake, the County had removed the Monument to facilitate reconstruction efforts. The supervening mootness that resulted from the renovation of the Courthouse should be treated no differently, and, under this Court's cases, just as obviously requires vacatur of the "preliminary" decision of the district court. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950).

II. Granting Certiorari Would Permit This Court To Clarify That *Munsingwear* Continues To Control The Disposition Of Controversies Mooted By An Appellant's Voluntary Actions That Are Unrelated To The Litigation.

For more than half a century, this Court has commanded that vacatur is "'the duty of the appellate court'" when review of a district court judgment is "prevented through hap-

penstance." *Munsingwear*, 340 U.S. at 40 (quoting *Duke Power Co. v. Greenwood County*, 299 U.S. 259, 267 (1936)). Yet, substantial confusion exists among the courts of appeals regarding the proper disposition of cases mooted by events unrelated to the litigation, in part due to the circuit courts' inability to harmonize subsequent rulings by this Court that defined categories of mootness—other than happenstance—in which vacatur is not automatically available.

A prime example of this confusion is the Fifth Circuit's mistaken belief that this Court's ruling in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), somehow abrogated *Munsingwear*, leaving *all* questions of vacatur to be decided through an *ad hoc* equitable inquiry based on "the equities of the individual case." Pet. App. 10a. *Munsingwear*, however, sets forth a venerable rule of appellate practice that *requires* vacatur in certain circumstances—when mootness results from "happenstance." When a circuit court—sitting en banc, no less—concludes that this Court's "uniform rule" is no longer the law (*id.*), this Court's intervention is clearly warranted to restore clarity and uniformity to this important area of federal procedural practice.

1. To escape review of the Fifth Circuit's erroneous judgment, Staley first asserts that "[t]his Court has on several occasions addressed the legal standards to be applied in awarding vacatur." Opp. 7. It is true that this Court has held that litigants are not entitled to vacatur of the underlying decision if they give up their right to appeal via settlement (*Bancorp*), fail to prosecute their appeal (*Karcher v. May*, 484 U.S. 72 (1987); *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997)), or voluntarily abandon the conduct previously determined to be unlawful in a specific effort to moot the dispute (*Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000)). These cases cited in Staley's opposition, however, provide little, if any, guidance on the proper disposition of cases that are mooted by voluntary conduct unrelated to the litigation, as is the case here.

Staley cites no case from this Court further illuminating "the legal standards to be applied in awarding vacatur" in cases of voluntary conduct unrelated to the litigation because—apart from *Munsingwear* itself—none exists. Like the Fifth Circuit, Staley simply takes it as self-evident that *Bancorp* somehow renounced *Munsingwear*. But *Bancorp* involved mootness caused by voluntary settlement—not happenstance. And even if *Bancorp*'s dicta could be fairly interpreted in the manner that the Fifth Circuit and Staley suggest, the Fifth Circuit remains obligated to follow the *Munsingwear* rule until this Court repudiates it. *See State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

Next, relying on the en banc majority's self-serving declaration that its holding did not "creat[e] a circuit split" (Pet. App. 12a), Staley asserts that there is no circuit split "when mootness results from the actions of the losing party." Opp. 11. By carefully commingling the analyses of cases involving an appellant's conduct that is related to the litigation (not happenstance) with cases involving voluntary conduct unrelated to the litigation (happenstance), Staley seeks to circumvent the true inquiry before the Court—*Munsingwear*'s ongoing applicability to cases mooted by conduct unrelated to the litigation, i.e., happenstance.

As the petition demonstrated, the Fifth Circuit's approach conflicts with that employed by the circuits who continue to follow *Munsingwear*'s rule. Pet. 10-13. Staley's opposition attempts to distinguish those cases by sheer *ipse dixit*, implausibly pigeonholing many of them into a previously unrecognized category of "legislative-amendment cases." Opp. 13-17. According to Staley, these cases constitute some sort of "exception" to the "*Bancorp* presumption against vacatur" rather than evidence of *Munsingwear*'s continued vitality. Opp. 13-15. This effort ignores reality. *Munsingwear* itself involved executive rather than legislative action. Rather than demonstrate some type of "exception" to *Bancorp*, each of the cases cited by the County illustrates that vacatur is the appropriate remedy when the "vaga-

ries of circumstance" (and not litigation-related decisions) prevent appeal.

Unable to distinguish the "non legislative-amendment case" of *Dilley v. Gunn*, 64 F.3d 1365, 1369-70 (9th Cir. 1995), Staley simply asserts that the Ninth Circuit takes the "same nuanced approach" that other circuits employ when considering cases of happenstance. Opp. 18. This assertion ignores the Ninth Circuit's unambiguous language to the contrary. As recently as last year, the Ninth Circuit declared that it "direct[s] vacatur" where "mootness [is] caused by . . . 'happenstance' or the 'vagaries of circumstance.'" *Chem. Producers & Distribs. Ass'n v. Helliker*, 463 F.3d 871, 878 (9th Cir. 2006) (quoting *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 799 (9th Cir. 1999) (en banc)). That declaration echoed the Ninth Circuit's multiple previous holdings that vacatur is "'automatic'" for all cases where mootness results from happenstance. *Pub. Utils. Comm'n v. FERC*, 100 F.3d 1451, 1461 (9th Cir. 1996) (quoting *Dilley*, 64 F.3d at 1369); *see also Pub. Utils.*, 100 F.3d at 1461 ("[M]ootness resulting from happenstance . . . *does* require vacatur." (emphasis in original)). Indeed, Staley *concedes* that *Dilley* ruled that the mootness in that case "should be attributed to happenstance" if the mooting event was "'wholly unrelated to th[e] lawsuit'"—the County's position here—but suggests that this ruling is not a "blanket rule." Opp. 18. This might come as a surprise to the Ninth Circuit, which recently reaffirmed that *Dilley* reflects its "established practice." *Ctr. for Biological Diversity v. Lohn*, 483 F.3d 984, 990 (9th Cir. 2007) (reaffirming *Dilley* in yet another "non legislative-amendment case").

Here, despite recognizing that "the bottom-line cause of the [Monument's] removal was related to the ongoing renovations" to the Courthouse, and not litigation-related conduct, the Fifth Circuit refused to vacate as compelled by *Munsingwear*. Pet. App. 10a. In *Munsingwear*'s stead, Staley urges the Court to adopt the Fifth Circuit's freewheeling analysis where "[a]ll the equities must be considered." Opp. 11.

The Fifth Circuit's analysis of a variety of "equitable factors" to determine whether vacatur was appropriate stands in sharp contrast with the Ninth Circuit's clear and automatic application of the *Munsingwear* vacatur rule to cases mooted by happenstance. Furthermore, refusing to follow *Munsingwear*'s rule commanding vacatur in cases of happenstance thwarts vacatur's worthy purpose: to "prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *Munsingwear*, 340 U.S. at 41. This Court should grant the instant petition to clarify that vacatur is required in cases mooted by an appellant's actions when those actions are unrelated to the litigation.

2. Staley is wrong to suggest that the County advocates "the very same approach it faults the en banc court for having taken" (Opp. 20), merely because the County's petition demonstrated that the Fifth Circuit's "equitable" analysis is, in fact, inequitable. That the Fifth Circuit's ruling is highly questionable on its own terms merely confirms the unwisdom of that court's decision to ignore *Munsingwear*. And the County surely is entitled to point out that the equitable free-for-all that Staley urges as a rule has very little to recommend it when, as this case demonstrates, it produces results so demonstrably at odds with equity. The harm caused to the County by being subjected to a district court judgment that it cannot appeal illuminates the unfair consequences that result when courts eschew *Munsingwear*'s mandate to vacate judgments that are mooted by happenstance so as to prevent those cases from "spawning any legal consequences." *Munsingwear*, 340 U.S. at 41.

Staley also takes the position that because her judgment is of so little future value—it will not control the context-specific analysis of any future redisplay of the Monument—no real harm will be done by leaving it in place. Opp. 23-26 (arguing that the judgment will have no possible effect on the County's decision to redisplay the Monument, will be unlikely to affect any other display, and is only "a district-court ruling [that] has no controlling effect on any court or any other case"). This is, to say the least, a peculiar argu-

ment, which serves only to place in sharper focus the absence of any real justification for leaving the judgment in place. Staley's efforts to downplay the potential reach of the district court's judgment mask her true intent in seeking to preserve it. In addition to the effect that the district court's judgment would have on others (Pet. 14-18), Staley's opposition makes clear that Staley intends to use the unreviewable judgment to prevent any future display of the Monument. Opp. 24.[1] Unless reversed, the Fifth Circuit's decision not to vacate will clearly spawn legal consequences in violation of *Munsingwear*'s mandate.

III. The Petition Should Be Granted To Resolve The Recognized Issue Regarding The Availability Of Attorneys' Fees In Cases Mooted During Appellate Review.

Although entitlement to attorneys' fees is evaluated "separately from vacatur" (Opp. i), this Court has made clear that whether a plaintiff "can be deemed a 'prevailing party' in the District Court, even though the judgment was mooted after being rendered but before the losing party could challenge its validity on appeal, is a question of some difficulty." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 483 (1990). In this case, the award of legal fees based on a decision "which in the statutory scheme was only preliminary" is especially problematic. *Munsingwear*, 340 U.S. at 40. Despite Justices of this Court describing "[t]he question raised here [a]s of significance," *Alioto v. Williams*, 450 U.S. 1012, 1013 (1981) (Rehnquist, J., dissenting from the denial of certiorari), the Court has never resolved whether, for "prevailing party" status, a preliminary victory before the district court must be tested through appellate review. The instant petition

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[1] The Fifth Circuit specifically recognized the potential effect that retaining the judgment would have on any future display of the Monument. *See* Pet. App. 14a.

presents a unique opportunity to squarely address this important issue.

Staley argues that certiorari is not necessary for this issue because "the lower courts have . . . unanimously conclud[ed] 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." Opp. 27. But unanimity in an error hardly justifies its blind perpetuation. Surely this Court's review cannot be circumvented in cases where circuit courts erroneously apply the law simply because the erroneous practice appears unanimous. *See generally Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 621 (2001) (Scalia, J., concurring) ("[O]ur disagreeing with a 'clear majority' of the Circuits is not at all a rare phenomenon. Indeed, our opinions sometimes contradict the *unanimous* and longstanding interpretation of lower federal courts." (emphasis in original)).

As a plain matter of statutory interpretation, it has long been clear that attorneys' fee awards are dependent on a plaintiff's ability to "succeed ultimately" and are not available merely because of success in a "preliminary, incomplete . . . merits examination." *Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268, 276-77 (4th Cir. 2002); *accord Hensley v. Eckerhart*, 461 U.S. 424, 434-37 (1983) (plaintiff cannot recover fees on unsuccessful claims, even if she was successful on other claims). Indeed, as this Court observed last Term, a fee award is improper when a litigant, although prevailing during a preliminary stage of the litigation, "leaves the courthouse emptyhanded." *Sole v. Wyner*, 127 S. Ct. 2188, 2192, 2196 (2007) (describing district court victory as merely winning a "battle"). The conclusion that Staley was not a "prevailing party" when the Fifth Circuit ordered that she receive fees is especially compelling in light of *Munsingwear*, a case that was part of the firmly established legal backdrop when 42 U.S.C. § 1988 was enacted and of which Congress was presumably aware. *See, e.g., Callanan v. United States*, 364 U.S. 587, 594 (1961) ("Congress is,

after all, not a body of laymen unfamiliar with the commonplaces of our law . . . . We attribute to Congress a tacit purpose . . . to maintain a long-established distinction" set forth in the case law. (citation and internal quotations omitted)). *Munsingwear* squarely confirms that Staley's victory in district court was "only preliminary" and should not spawn any legal consequences after the case became moot. *Munsingwear*, 340 U.S. at 40; *see also Kay v. David Douglas Sch. Dist. No. 40*, 484 U.S. 1032, 1034 (1988) (White, J., dissenting from the denial of certiorari).

Even if Staley's position were otherwise a plausible reading of the statute, this Court would have to reject it because of the grave constitutional doubts that such an interpretation would create. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). As this Court noted in *Bancorp*, "no statute could authorize a federal court to decide the merits of a legal question not posed in an Article III case or controversy." 513 U.S. at 21. That principle, of course, does not prescribe complete paralysis, and a court may properly take such actions to dispose of the case as vacating the lower court judgment or awarding costs. *Id.* But it is entirely a different thing to say that a court may also, as the Fifth Circuit did here, decide that one of the parties to a moot controversy should be paid compensation by the other party under a statutory regime that governs the shifting of attorneys' fees. This Court's cases have long held that Article III courts lose the power to make such compensatory awards when a case becomes moot. *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 451-52 (1911) (plaintiff not entitled to "any compensation or relief" in the form of civil contempt fines when the underlying cause became moot); *see also Lewis*, 494 U.S. at 480 ("Th[e] interest in attorney's fees is . . . insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim.").

Here, the County "should not be forced to bear an award of fees where [it] ha[s] never been finally determined [that the County has] violated the Federal Constitution or laws

and ha[s] steadfastly maintained the contrary position." *Kay*, 484 U.S. at 1034 (White, J., dissenting from the denial of certiorari). Where "petitioner[] exercised [its] right to appeal," no such finality is available because "the propriety of the injunction was being challenged . . . at the time the case became moot and the appeal dismissed." *Alioto*, 450 U.S. at 1013 (Rehnquist, J., dissenting from the denial of certiorari). This Court has thus identified an important issue that merits resolution: whether absent the finality of appellate review, a district court injunction is too preliminary to sustain "prevailing party" status. *See generally Kay*, 484 U.S. at 1033 (White, J., dissenting from the denial of certiorari) (recognizing "a conflict in the courts over the award of fees when the underlying action is rendered unreviewable after it has been filed"). This petition provides the appropriate vehicle for this Court to squarely decide whether "prevailing party" status requires a plaintiff to sustain a district court victory throughout the appellate process.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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