No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has consistently held that vacatur is "'the duty of the appellate court'" if review of a district court judgment is "prevented through happenstance." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950) (quoting *Duke Power Co. v. Greenwood County*, 299 U.S. 259, 267 (1936)). This longstanding practice clears the path for future litigation and eliminates judgments not subjected to appellate scrutiny.

In this case, the district court concluded that a monument located on the grounds of the Harris County Civil Courts Building violated the Establishment Clause. While an appeal of that ruling was pending, this Court issued two decisions that superseded the legal standards on which the district court had relied. The Fifth Circuit ordered an en banc hearing on the Establishment Clause issue, but that hearing was mooted by the removal of the monument pursuant to longstanding renovation plans wholly unrelated to the litigation. Over the dissent of five judges, the en banc court refused to vacate the district court's judgment, and, on that basis, ruled that respondent remains a "prevailing party" entitled to attorneys' fees.

The question presented is 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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Harris County, Texas (the "County"), respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit's en banc opinion is reported at 485 F.3d 305 (5th Cir. 2007) (en banc). App., *infra*, 1a. The order granting rehearing en banc is reported at 470 F.3d 1086 (5th Cir. 2006). *Id.* 87a. The Fifth Circuit's panel opinion is reported at 461 F.3d 504 (5th Cir. 2006). *Id.* 26a. The district court's opinion enjoining the monument's display of the Bible is reported at 332 F. Supp. 2d 1030 (S.D. Tex. 2004). *Id.* 61a.

JURISDICTION

The district court exercised federal question jurisdiction pursuant to 28 U.S.C. § 1331, and the Fifth Circuit reviewed the district court's judgment pursuant to 28 U.S.C. § 1291. On April 24, 2007, the Fifth Circuit, sitting en banc, entered its judgment. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment, U.S. Const. amend. I, provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

This case raises an important and recurring question that bears directly upon the proper operation of the federal courts. Absent this Court's review, this issue will continue to divide the circuits, impede litigation, and, in factually similar situations, chill the exercise of First Amendment rights.

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. Despite this Court's command that vacatur is "'the duty of the appellate court'" when review of a district court judgment is "prevented through happenstance," *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950) (quoting *Duke Power Co. v. Greenwood County*, 299 U.S. 259, 267 (1936)); *see also U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 23 (1994), the Fifth Circuit refused to vacate the district court's judgment based on its mistaken belief that after *Bancorp*, *Munsingwear* no longer requires vacatur in cases mooted by events unrelated to the litigation. As a result, the Fifth Circuit preserved a flawed and anachronistic district court judgment that a three-judge panel of the Fifth Circuit had largely rejected.

The Fifth Circuit's en banc opinion exemplifies the current confusion among the circuit courts regarding the proper way to dispose of cases mooted by events unrelated to the litigation. Certiorari is necessary to clarify the proper application of *Munsingwear* and *Bancorp* to such cases.

1. The Mosher Monument (the "Monument") stood outside of the Harris County Civil Courts Building (the "Courthouse") from 1956 until January 19, 2007, when it was removed to facilitate pre-planned renovations to the Courthouse. *See* App., *infra*, 2a-3a; *id.* 21a (DeMoss, J., dissenting). The Star of Hope Mission, a private Houston charity, built the Monument to honor the charitable work of Houston philanthropist William S. Mosher. *Id.* 27a. In a glass-covered chamber located at the top of the Monument, Star of Hope placed an open Bible, which exemplified the connec-

tion between Mr. Mosher's religious faith and his charitable work. *Id.* 28a. Some time after 1988, the Monument fell into a state of disrepair, and the Bible was temporarily removed. *Id.* 29a. In 1995, a state court judge led a private effort to restore the Monument, which resulted in the cleaning and polishing of the Monument, the repair of the Monument's display case, the replacement of the Bible inside the glass case, and the rededication of the Monument. *Id.* 30a. For nearly fifty years, the Monument stood without legal challenge. *See id.* 27a, 31a.

2. In 2003, Kay Staley, an attorney who practiced at the Courthouse, challenged the Monument's display of the Bible, alleging that it violated the Establishment Clause. *Id.* 31a. Applying the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), the district court held that the Monument's display of the Bible inside the glass chamber violated the Establishment Clause both (i) from the Monument's inception and (ii) after the 1995 rededication. The district court issued an order that both enjoined the Monument's display of the Bible and directed the County to pay Ms. Staley's attorneys' fees. *See* App., *infra*, 85a-86a.

3. The County appealed to the Fifth Circuit. While that appeal was pending, this Court issued two decisions that significantly altered this Court's Establishment Clause jurisprudence. *See McCreary County v. ACLU*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005). A three-judge panel of the Fifth Circuit recognized that Ms. Staley's challenge should be resolved according to *Van Orden* and *McCreary County* rather than *Lemon*. Armed with these new cases, all three members of the panel agreed that the district court erred in holding that the Monument violated the Establishment Clause before the 1995 restoration. *See* App., *infra*, 42a; *id.* 52a (Smith, J., dissenting). A divided panel, however, affirmed the district court's injunction. The two judges in the majority held that, although the Monument did not offend the Establishment Clause during its first forty years of existence, the rededication and subsequent redisplay of the Bible in the glass compartment so changed the context of the

Monument as to render the display of the Bible unconstitutional. *Id.* 43a-45a.

4.a. The Fifth Circuit granted en banc rehearing, "to decide whether, in the factual context presented, the display of a Bible in a monument dedicated to a philanthropic citizen and located on the grounds of the Harris County Civil Courthouse, violates the Establishment Clause." *Id.* 2a. The grant of rehearing "automatically abrogated" the divided panel's decision, but it kept the district court's judgment in effect subject to the en banc review. *Id.* 13a n.5.

About two months before oral argument in the rehearing en banc, it came to the court's attention that the Courthouse where the Monument stood had been closed for renovations. The court raised the issue of mootness and requested that the parties brief that issue. *Id.* 89a. On January 19, 2007, the Monument was placed in storage to facilitate the renovation plan that had been developed years before Ms. Staley filed suit. *Id.* 2a-3a; *id.* 21a (DeMoss, J., dissenting).

The County's subsequent en banc brief vigorously argued that the Monument did not violate the Establishment Clause. The County also recognized, however, that the closure of the Courthouse and removal of the Monument pursuant to a preexisting renovation plan had mooted the case.

b. The rehearing en banc resulted in a majority opinion and two dissenting opinions. The majority held that the removal of the Monument mooted the appeal, and explained that, in light of the fact-sensitive inquiry required by this Court's Establishment Clause jurisprudence, any dispute over the probable future redisplay of the Monument was not ripe. *See id.* 6a. Moreover, it "acknowledge[d] that the bottom-line cause of the [Monument's] removal was related to the ongoing renovations" (*id.* 10a), thereby rejecting any inference that the County removed the Monument as part of a litigation strategy. Nevertheless, the majority refused to vacate the district court's judgment. In so doing, the majority discarded this Court's *Munsingwear* decision, reading *Bancorp* as a "reject[ion of] the longstanding rule reflected in

Munsingwear" (*id.* 7a), such that "*Bancorp*, [and] not the earlier case of *Munsingwear*, [] control[led] [the] decision." *Id.* 10a. Based on an ad hoc analysis of the "equities"—primarily the fact that the County "voluntarily" mooted the case after respondent obtained "full relief" in the district court—the majority concluded that vacatur was not appropriate. *Id.* 10a-14a.

The en banc majority then examined the question of attorneys' fees. *Id.* 15a. Even though the district court had relied on superseded precedent to decide the case, and mootness had deprived the County of the ability to contest the merits of the judgment, the majority held that Ms. Staley was entitled to fees by virtue of the court's own refusal to vacate the judgment. *Id.* "Given our opinion today," the court explained, "Staley has obtained the primary relief she sought and therefore remains the prevailing party." *Id.* Accordingly, it remanded the case to the "district court solely for a determination of appropriate attorneys' fees for Staley." *Id.*

Five judges dissented. Judge Garza, joined by Judge Clement and Judge Owen, took issue with the majority's conclusion that the case was moot. *Id.* 16a (Garza, J., dissenting). Judge Garza argued that when voluntary cessation of the challenged conduct terminates a controversy, the case should be dismissed as moot only when it is "absolutely clear that the . . . violation . . . could not reasonably be expected to recur." *Id.* 17a (Garza, J., dissenting). And he believed that the record before the court was insufficient to resolve the question of whether the violation might recur. *Id.* 17a-18a (Garza, J., dissenting). Accordingly, Judge Garza suggested that the case be remanded to the district court for additional fact-finding and an initial mootness determination. *Id.* 18a (Garza, J., dissenting).[1]

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[1] The redesign of the Courthouse and plaza will make it physically impossible to return the Monument to its past location. The County has not made a decision regarding any aspect of the future display of the Monument. *See* App., *infra*, 6a. Accordingly, the "fact-intensive and

Judge DeMoss, joined by Judge Smith, believed that "the few vacatur rules given to us by the Supreme Court do not directly answer the question" in this case—that is, "whether vacatur is appropriate when voluntary action taken by an appellant moots a case, *but the action taken is completely unrelated to the litigation.*" *Id.* 18a (DeMoss, J., dissenting) (emphasis in original). But Judge DeMoss believed that this situation should be controlled by *Munsingwear*, and he observed that the majority's refusal to vacate the district court's judgment even though the case was mooted by events unrelated to the litigation is "contrary to the decisions by other circuits to vacate under similar circumstances" and thus "creat[es] a circuit split." *Id.* 24a (DeMoss, J., dissenting). Judge DeMoss also took issue with the majority's view that vacatur is to be determined in all cases on the basis of ad hoc equitable factors (*id.* 22a-24a & n.2 (DeMoss, J., dissenting)), noting that "[t]here is no equity in creating a circuit split to leave in place the judgment and remedy in this case." *Id.* 24a (DeMoss, J., dissenting).

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's refusal to vacate the district court's decision—despite the inability of the County to appeal—left in place a judgment based on a superseded legal standard. Left untouched, that anachronistic judgment subjects the County to an unjust award of attorneys' fees on the basis of claims it did not have a full opportunity to litigate, will cloud future litigation should the County decide to redisplay the Monument, and will chill the exercise of First Amendment rights.

The en banc court concluded that *Bancorp* wholly abandoned the *Munsingwear* rule of automatic vacatur, even though *Bancorp* expressly "st[oo]d by" *Munsingwear*'s

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context-specific analysis required by *McCreary* and *Van Orden*" simply cannot be undertaken at this time. *Id.*

statement "that mootness by happenstance provides sufficient reason to vacate." *Bancorp*, 513 U.S. at 25 n.3. That unjustifiable departure from a rule that has been followed for more than fifty years compels review here. Indeed, even if the reasoning of *Bancorp* could fairly be taken to suggest the Fifth Circuit's conclusion that vacatur is never *required*, even in cases of "happenstance," this Court's cases leave no doubt that the Fifth Circuit's duty was to follow *Munsingwear*'s opposite rule until that rule is repudiated by this Court. *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).

Unlike the Fifth Circuit, several courts of appeals continue to follow the rule that vacatur is required in cases of "happenstance," understood to include voluntary conduct by the parties that is unrelated to the litigation. That circuit split on a procedural issue that arises with great frequency is important enough to warrant this Court's attention, for even if this Court agrees that vacatur is not necessarily *compelled* in *all* such cases, the lower courts would plainly benefit from this Court's guidance on the factors that would make vacatur appropriate. This Court should grant certiorari and give clear instructions to the courts of appeals for how to dispose of cases mooted by events that are unrelated to the litigation.

This case is an excellent vehicle for the adjudication of this recurring question. In light of the intervening case law from this Court, the public interest scarcely favors the preservation of the now-outdated district court precedent. Indeed, the Fifth Circuit had voted to hear the Establishment Clause issue en banc—necessarily concluding either that the question was exceptionally important or that there was very good reason to doubt the correctness of the district court's ruling under this Court's cases, or both. *See* Fed. R. App. P. 35(b). Moreover, apart from the perpetuation of highly questionable precedent, the primary tangible effect of the ruling below is to preserve a purported basis for an award of attorneys' fees. That is an anomalous result: Although respondent secured a victory that should be regarded only as "pre-

liminary" in our system of appellate review (*Munsingwear*, 340 U.S. at 40), and no fees could lawfully have been awarded if the merits of the case had "ultimately [been] decided against her" (*Sole v. Wyner*, 127 S. Ct. 2188, 2196 (2007)), the Fifth Circuit nonetheless treated that unreviewable and highly questionable "preliminary" decision as though it were clearly correct, final, and binding for purpose of awarding fees. *Cf. Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 483 (1990); *Alioto v. Williams*, 450 U.S. 1012 (1981) (Rehnquist, J., dissenting from the denial of certiorari, joined by White, J.). Finally, an untested injunction based on superseded precedent can reasonably be expected to chill protected private speech and religious exercise. To adequately protect First Amendment rights, this Court should require vacatur in such cases.

I. The Circuits Are Divided On The Issue Of Whether *Munsingwear* Controls The Disposition Of Controversies Mooted By Voluntary Actions Of The Appellant That Are Unrelated To The Litigation.

1. In a consistent line of cases stretching back for more than half a century, this Court has prescribed a single remedy for cases mooted on appeal by happenstance: "The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here . . . is to reverse or vacate the judgment below." *Munsingwear*, 340 U.S. at 39. Moreover, *Munsingwear* itself establishes that "happenstance" has long been understood to encompass those situations in which mootness results from the appellant's own voluntary conduct, if that conduct was unrelated to the litigation.

In *Munsingwear*, the United States sued for both monetary and injunctive relief. The government alleged violations of a regulation setting a maximum price for the sale of certain commodities. *Id.* at 37. The district court held the claim for damages in abeyance pending a determination of the claim for injunctive relief. *Id.* After the district court held

that Munsingwear's prices complied with the regulation and dismissed the claim for injunctive relief, the United States both appealed and decontrolled the commodity that was the subject of the lawsuit. *Id.* The court of appeals then dismissed the appeal as moot. *Id.* The United States, however, never moved to vacate the district court's judgment. Shortly thereafter, Munsingwear convinced the district court to dismiss the damages claim on the ground of res judicata. *Id.* The court of appeals affirmed that dismissal, and the United States sought relief from this Court.

This Court acknowledged that vacatur is "'the duty of the appellate court'" in cases of mootness by "happenstance." *Id.* at 40 (quoting *Duke Power*, 299 U.S. at 267 (1936)). Despite the fact that mootness had resulted from the voluntary conduct of the United States, the Court stated that vacatur was "commonly utilized *in precisely this situation* to prevent a judgment, unreviewable because of mootness, from spawning *any legal consequences*." *Munsingwear*, 340 U.S. at 41 (emphases added). The Court explained that a lower court decision necessarily is "preliminary" in cases in which an appeal is provided as of right, and noted that vacatur in such cases "clears the path for future relitigation of the issues" and ensures that "none is prejudiced" by the preliminary decision. *Id.* at 39-40. But this Court nonetheless affirmed the judgment of the court of appeals because the United States never had asked for vacatur of the initial judgment of the district court. *Id.* at 39. "[H]aving slept on its rights," the court explained, the United States was no longer entitled to vacatur and could properly be held bound by res judicata in the second round of litigation. *Id.* at 41.

In *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), this Court held that vacatur is not required by *Munsingwear* in cases mooted by a voluntary *settlement* between the parties. The Court explained that vacatur is an "extraordinary remedy" that depends on "equitable entitlement," and that a party who voluntarily forgoes appellate review by settling while the case is on appeal cannot reasonably complain if the unreviewable judgment remains

on the books. *See id.* at 26. Significantly, *Bancorp* specifically stated that it "st[oo]d by *Munsingwear*'s dictum that mootness by happenstance provides sufficient reason to vacate" (*id.* at 25 n.3), while seemingly questioning "[w]hether that principle was correctly applied to the circumstances of that case." *Id.*; *see also Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997) (suggesting that happenstance encompasses "circumstances not attributable to the parties"). Nonetheless, the Court declined to disavow "*Munsingwear*'s implicit conclusion that repeal of administrative regulations cannot fairly be attributed to the Executive Branch when it litigates in the name of the United States." *Bancorp*, 513 U.S. at 25 n.3.

2. There is substantial confusion among the courts of appeals regarding the application of *Munsingwear* to a case like this one, where the mootness can be attributed to actions of the appellant, but those actions were not taken to influence the litigation. Consistent with the factual scenario that this Court encountered in *Munsingwear* itself, many courts of appeals either treat that factual scenario as the type of "happenstance" that imposes a "duty" to vacate or hold that the balance of the equities generally requires vacatur in those circumstances. By departing from the consistent course of decisions in this area, the Fifth Circuit exacerbated a circuit split that warrants this Court's review.

For example, "[w]here mootness [is] caused by . . . 'happenstance' or the 'vagaries of circumstance'" the Ninth Circuit "direct[s] vacatur." *Chem. Producers & Distribs. Ass'n v. Helliker*, 463 F.3d 871, 878 (9th Cir. 2006). The Ninth Circuit treats "this general approach to vacatur as 'automatic'" for all cases where "mootness result[s] from happenstance." *Pub. Utils. Comm'n v. FERC*, 100 F.3d 1451, 1461 (9th Cir. 1996) (quoting *Dilley v. Gunn*, 64 F.3d 1365, 1369 (9th Cir. 1995)); *see also Pub. Utils.*, 100 F.3d at 1461 (stating that "mootness resulting from happenstance . . . *does* require vacatur" (emphasis in original)). That approach—and its conflict with the Fifth Circuit's analysis in this case—is exemplified by *Dilley v. Gunn*.

In that case, Mr. Dilley claimed that the prison in which he was incarcerated failed to afford constitutionally sufficient access to a law library. The district court agreed and ordered the state to provide increased library access. *Dilley*, 64 F.3d at 1367. While the appeal was pending, the state transferred Mr. Dilley to a different facility with greater library offerings for reasons unrelated to the litigation, thereby mooting the appeal. After addressing these facts, the Ninth Circuit held, "Mootness resulting from such a transfer would be attributable to 'happenstance' within the meaning of *Munsingwear*, even if the defendants, as employees of the state's prison system, did play an administrative role in the transfer." *Id.* at 1372. A contrary rule, the Ninth Circuit noted, "might create an incentive for prison officials to hinder routine transfers . . . by inmates who have obtained favorable but not yet reviewed judgments in the district court." *Id.*

The Fifth Circuit's holding in this case also conflicts with the recent holding of the Third Circuit in *Rendell v. Rumsfeld*, 484 F.3d 236 (3d Cir. 2007). In that case, Pennsylvania Governor Edward Rendell brought an action challenging a decision by Donald Rumsfeld to recommend the deactivation of a unit of the Pennsylvania National Guard. The district court ruled against Mr. Rumsfeld, who then appealed. By the time the case reached the Third Circuit, the case had become moot because others within the federal government had decided against implementing Mr. Rumsfeld's recommendation. The Third Circuit recognized that the actions mooting the case did not result from an attempt to "manipulat[e] . . . the legal system" and were simply a product of the "vagaries of circumstance." *Id.* at 243. Accordingly, it held that *Munsingwear*'s "general rule of vacatur [was] specifically indicated." *Id.*; *cf. Khodara Envtl., Inc. v. Beckman*, 237 F.3d 186, 195 (3d Cir. 2001) (Alito, J.) (recognizing that although appellant's legislative amendment was factually responsible for mooting the appeal, vacatur was proper because there was no evidence that Congress intentionally sought "to frustrate an adverse judgment").

Likewise, the District of Columbia Circuit recognizes that while *Bancorp* confirmed that "vacatur is an equitable remedy," that case "did not thereby undo the established precedential backdrop of *Munsingwear*, in which the Supreme Court affirmed that vacatur is 'the duty of the appellate court' when a case has become moot through happenstance while appeal was pending." *Columbian Rope Co. v. West*, 142 F.3d 1313, 1318 n.5 (D.C. Cir. 1998) (quoting *Munsingwear*, 340 U.S. at 40); *see also Pharmachemie B.V. v. Barr Labs., Inc.*, 276 F.3d 627, 634 (D.C. Cir. 2002) ("Where happenstance has made a matter moot, the standard practice is to vacate the decision of the district court.").

In *National Black Police Ass'n v. District of Columbia*, 108 F.3d 346 (D.C. Cir. 1997), the plaintiff challenged the constitutionality of campaign contribution limits enacted by the District of Columbia. While the appeal was pending, the District of Columbia Council passed new legislation that raised the contribution limits and mooted the appeal. The D.C. Circuit acknowledged that the new legislation "[c]learly" represented "voluntary action" and therefore "the *Bancorp* presumption might seem to govern." *Id.* at 351. Yet the court held that the "application of the *Bancorp* presumption in this context is not required by the *Bancorp* opinion's rationale and would be inappropriate, at least if there is no evidence indicating that the legislation was enacted in order to overturn an unfavorable precedent." *Id.* Moreover, the court asserted that "the respect that courts owe to other organs of government" should make courts "wary of impugning the motivations" of other government actors. *Id.* at 352.[2]

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[2] Similarly, in *American Family Life Assurance Co. of Columbus v. FCC*, 129 F.3d 625 (D.C. Cir. 1997), AFLAC's appeal became moot after AFLAC sold its interests in certain television stations. *Id.* at 628. The FCC argued that vacatur should not be ordered because "AFLAC caused th[e] dispute to become moot through its 'unilateral, voluntary action.'" *Id.* at 630. The court, however, rejected the FCC's argument because it "misinterpret[ed] *U.S. Bancorp*" (*id.*), which "concern[ed] . . . settle-

The Fourth Circuit also vacated a case mooted by the government's conduct in *Brooks v. Vassar*, 462 F.3d 341 (4th Cir. 2006), *cert. denied*, 127 S. Ct. 2251 (2007). In that case, plaintiffs challenged the constitutionality of a wine importation and distribution law. After the district court enjoined enforcement of the law, the state legislature "virtually codified . . . portions of the district court's decision" by amending the offensive statute so as to "track almost completely the district court's order." *Id.* at 347-48. Though this enactment rendered the appeal moot, plaintiffs argued that the district court's judgment should have remained intact because the state was factually responsible for the mootness. The Fourth Circuit disagreed, described the case as one mooted by happenstance, and held that, for vacatur purposes, a "legislature's amendment of a challenged law is not 'voluntary cessation' attributable to the State's executive officials defending a challenge to that law." *Id.* at 349.

3. In contrast, the Fifth Circuit in this case refused to vacate despite finding that "the bottom-line cause of the removal was related to the ongoing renovations." App., *infra*, 10a. Instead, the Fifth Circuit claimed that vacatur should be "determined on a case-by-case basis" and not governed by "inflexible rules." *Id.* 7a. Accordingly, the Fifth Circuit based its refusal to vacate on a broad mix of factors, many of which had nothing to do with the relevant inquiry under *Munsingwear* and *Bancorp*. The factors examined by the Fifth Circuit included: (1) Ms. Staley had received favorable judgments from both the district court and court of appeals before the case was mooted; (2) the actions mooting the case were temporary; (3) the district court's judgment would (purportedly) not have a great effect on non-parties to the litigation; and (4) the County's counsel did not keep the court ap-

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ments," and "ha[d] no application," to circumstances where AFLAC "did not sell the stations in order to moot the case." *Id.* at 630-31.

prised of the status of the renovations and how those renovations might affect the case's status. *Id.* 12a-14a.

None of those factors speaks to the relevant question, which is whether the County's attempt to appeal was "frustrated by the vagaries of circumstance." *Cf. Bancorp*, 513 U.S. at 25. By considering irrelevant "equitable factors," the true inquiry was lost. And, by refusing to vacate a case where the events that mooted the case were unrelated to the litigation, the Fifth Circuit reached a result that conflicts with decisions of this Court and of virtually every other circuit to consider the issue, although at least one other circuit also uses this flawed approach. *See, e.g., Kerkhof v. MCI Worldcom, Inc.*, 282 F.3d 44, 53-54 (1st Cir. 2002) (explaining that mootness arising from voluntary actions unrelated to the litigation falls into a "gray-area" where vacatur will depend on the particular circumstances).

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.

II. Vacatur Is Particularly Important In Cases Like This One, When An Untested Judgment Will Force The Public To Bear The Burden Of Fees And The Dead Hand Of An Erroneous Judgment Could Chill The Exercise Of First Amendment Rights.

The Fifth Circuit's refusal to vacate the district court's judgment imposes significant consequences upon the County and its citizens. These consequences flow from an erroneous judgment based on outdated case law. The three-judge panel opinion of the Fifth Circuit explained that the constitutionality of the display should be informed by this Court's decisions in *McCreary County* and *Van Orden*, and it rejected the district court's holding that the Monument violated the Establishment Clause before its 1995 rededication. *See* App., *infra*, 42a; *id.* 52a (Smith, J., dissenting). Nevertheless, the en banc Fifth Circuit refused to vacate the district court's

judgment, thereby preserving an opinion that a panel of the Fifth Circuit had largely rejected and that the entire Fifth Circuit had called into question through its grant of rehearing en banc. *Cf.* Fed. R. App. P. 35(b).

1. Aside from its preservation of suspect precedent, the ruling below also subjects the County to an award of attorneys' fees based upon a judgment that is only "preliminary" in our system of appellate review (*Munsingwear*, 340 U.S. at 40), and that the County is powerless to challenge. *Cf. Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 480 (1990) ("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."). Had the County ultimately prevailed on appeal, no fees could have been awarded to the plaintiff. *See Sole v. Wyner*, 127 S. Ct. 2188, 2192 (2007); *Kentucky v. Graham*, 473 U.S. 159, 165, 170-71 (1985); *Cruz v. Town of Cicero*, 275 F.3d 579, 592 (7th Cir. 2001). Nevertheless, the Fifth Circuit treated this "preliminary" and suspect decision as if it were both final and clearly correct.

The Fifth Circuit erred by awarding attorneys' fees in this case. "Exposure of any party to [liability for his opponent's attorneys' fees] when mootness deprives him of the appeal authorized by law which he had already initiated should result only from a clear authorization by Congress or settled precedent of this Court." *Alioto v. Williams*, 450 U.S. 1012, 1013-14 (1981) (Rehnquist, J., dissenting from denial of certiorari, joined by White, J.). In this case, the Fifth Circuit's refusal to vacate directly conflicts with this Court's instructions that vacatur is "commonly utilized in *precisely this situation* to prevent a judgment, unreviewable because of mootness, from spawning *any legal consequences*." *Munsingwear*, 340 U.S. at 41 (emphases added); *see also supra* pp. 8-10. As a result of the Fifth Circuit's failure to follow *Munsingwear*, the County has "unquestionably been 'prejudiced by a decision which in the statutory scheme was only preliminary.'" *Alioto*, 450 U.S. at 1014 (Rehnquist, J., dissenting from denial of certiorari, joined by White, J.) (quoting *Munsingwear*, 340 U.S. at 40); *cf. Lewis*, 494 U.S.

at 483 ("Whether [a plaintiff] can be deemed a 'prevailing party' in the District Court, even though its judgment was mooted after being rendered but before the losing party could challenge its validity on appeal is a question of some difficulty.").

The Fifth Circuit's refusal to vacate this questionable decision imposes very real consequences upon the County. The judgment—which the County will never have the full opportunity to litigate—subjects the County to an award of attorneys' fees and will impede future litigation, should the County decide to redisplay the Monument. Moreover, although the en banc majority favored leaving the judgment intact because it would have little effect on non-parties to the litigation, *see* App., *infra*, 14a, Judge DeMoss correctly observed that, "[t]his will come as a big surprise to millions of Harris County residents who have had a possibly constitutional public monument removed at the request of one individual." *See id.* 25a n.2 (DeMoss, J., dissenting).

2. Vacatur is particularly warranted when suspect, untested judgments will chill the exercise of activities protected by the First Amendment. As a result of this judgment, governmental authorities will likely curtail their tolerance for religious speech, for fear of being subjected to litigation, an injunction, and an order requiring the payment of attorneys' fees. This Court should grant this petition to underscore the importance of vacatur in cases where the dead hand of an erroneous judgment will chill the exercise of activities protected by the First Amendment.

This Court has consistently recognized the need for "expansive remed[ies]" where constitutionally protected speech may be chilled, *see Virginia v. Hicks*, 539 U.S. 113, 119 (2003), based on the "fundamental proposition . . . that an erroneous limitation of speech has, by hypothesis, more social disutility than an erroneous overextension of freedom of speech." Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. Rev. 685, 688 (1978). The same fundamental commitment

to eliminating erroneous limitations of speech recommends automatic vacatur in cases where an unreviewed district court judgment might chill speech or conduct protected by the First Amendment. *See also Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 634 (1980).

Our system of federal courts relies upon appellate review of district court decisions. Professors Wright and Miller have explained that "[t]he lower courts and their procedure . . . have been designed as part of a structure in which appellate review is available." 13A Charles Alan Wright et al., FEDERAL PRACTICE & PROCEDURE § 3533.10 (2d ed. 1984); *cf. Munsingwear*, 340 U.S. at 40 (characterizing a district court's decision as "preliminary" in the "statutory scheme"). Appellate review is the federal courts' error-checking mechanism, with review especially critical "to test the precedent" in difficult cases. Wright et al., *supra*, FEDERAL PRACTICE & PROCEDURE § 3533.10. An unreviewed district court judgment has a higher risk of error than one that has been tested on appeal.

In the First Amendment context, such risk is unacceptable because "the First Amendment enjoys a special status in the constitutional scheme" such that "[a]ny substantial 'chilling' of constitutionally protected expression is intolerable." Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 Yale L.J. 853, 867 (1991). The risk of error is especially high in the Establishment Clause context, where appellate review is particularly important to check a district court judgment against evolving case law. When mooted by non-strategic action, a district court judgment that enjoins the exercise of First Amendment rights should be vacated to prevent an erroneous ruling from unduly chilling protected speech.

This Court's commitments to safeguarding litigants from consequences arising from preliminary judgments and to protecting the public from undue limitations on speech and religious exercise recommend a rule of automatic vacatur for a case such as this, where an appellant's challenge to a suspect

order enjoining conduct protected by the First Amendment was mooted by events unrelated to the litigation.

CONCLUSION

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

Respectfully submitted.

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