No. 19-6710

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS FRANKLIN BOWLING,
PETITIONER,

V.

HAROLD W. CLARKE, DIRECTOR OF VIRGINIA DEPARTMENT OF CORRECTIONS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

MARK R. HERRING
Attorney General

VICTORIA N. PEARSON
Deputy Attorney General

LAURA H. CAHILL
Assistant Attorney General

TOBY J. HEYTENS
Solicitor General

MICHELLE S. KALLEN
MARTINE E. CICCONI
Deputy Solicitors General

JESSICA MERRY SAMUELS
Assistant Solicitor General

ZACHARY R. GLUBIAK
John Marshall Fellow

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
(804) 786–7240 – Telephone
SolicitorGeneral@oag.state.va.us

QUESTION PRESENTED

Whether the court of appeals "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power," Sup. Ct. R. 10(a), when it unanimously found that petitioner had not established his "equitable entitlement to the extraordinary remedy of vacatur," *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 26 (1994).

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INTRODUCTION

"Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur." *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 26 (1994) (*Bancorp*) (internal quotation marks and citations omitted).

In this case, a panel of the court of appeals appointed counsel, heard oral argument, and ultimately issued a unanimous published opinion rejecting petitioner's constitutional claims. When petitioner's claims later became moot, petitioner filed a motion seeking "the extraordinary remedy of vacatur," *Bancorp*, 513 U.S. at 26, which the court of appeals denied in an unpublished order without recorded dissent. Petitioner sought rehearing of the vacatur issue, which the court of appeals again denied after no judge requested an en banc vote. Petitioner now asks this Court to summarily reverse the court of appeals' denial of his motion to vacate.

Certiorari is not warranted here. The Fourth Circuit's decision not to vacate its published opinion does not conflict with the decision of any

other court of appeals and petitioner makes no contention that it does. Nor can petitioner establish that, in considering the facts and weighing the equities, the court of appeals "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a).

OPINIONS BELOW

The order of the court of appeals denying petitioner's motion to vacate (Pet. App. 1a) is not reported. The opinion of the court of appeals (Pet. App. 2a–16a) addressing the merits of petitioner's case is reported at 920 F.3d 192. The opinion of the district court (Pet. App. 20a–26a) is not published in the *Federal Supplement* but is available at 2018 WL 521592.

JURISDICTION

The order of the court of appeals denying petitioner's motion to vacate was entered on May 24, 2019. A petition for rehearing was denied on June 21, 2019 (Pet. App. 27a). On August 22, 2019, the Chief Justice extended the time within which to file a petition for a writ of certiorari until November 18, 2019, and the petition was filed on that

date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. In 1988, a state trial court convicted petitioner of capital murder, robbery, marijuana possession, and two counts of using a firearm during the commission of a felony. Pet. App. 4a, 20a. For those convictions, petitioner received two consecutive life sentences and an additional sentence of six years and thirty days, with the possibility of parole. Pet. App. 4a. Petitioner was 17 years old at the time of his offenses and first became eligible for discretionary parole consideration in 2005. Pet. App. 4a–5a.

Starting in 2005, the Virginia Parole Board annually considered petitioner's case. See Pet. App. 5a. Each year, as part of that process, petitioner had the right to sit for an interview with a parole examiner, give statements, provide written materials, make arguments in support of his application for parole, and solicit statements of support from family members and counsel. See Va. Code Ann. §§ 53.1-154, 155.[1] In turn, the Parole Board considered, among other things, the "[s]erious

[1] See also Va. Parole Bd., Policy Manual, at 5, 8–10 (2006), https://vpb.virginia.gov/files/1107/vpb-policy-manual.pdf.

nature and circumstances of [petitioner's] offense," petitioner's "personal history," his "institutional adjustment," and "any other information provided by [petitioner's] attorney, family, victims, or other persons." Pet. App. 6a; see generally Pet. App. 5a–6a (detailing the factors considered by the Parole Board and its reasons for denial).

2. In 2017—having not yet been released on parole—petitioner filed suit, arguing that his parole proceedings violated the Eighth Amendment and the Fourteenth Amendment's Due Process Clause. See Pet. App. 24a–26a.

3. The district court granted respondent's motion to dismiss. Pet. App. 20a–26a. The court first concluded there had been no violation of the Eighth Amendment rules announced in *Miller* v. *Alabama*, 567 U.S. 460 (2012), and *Graham* v. *Florida*, 560 U.S. 48 (2010), because, unlike those offenders, petitioner was eligible for parole. Pet. App. 24a. The district court further determined that the Virginia Parole Board's procedures "satisf[ied] the minimum requirements of due process" and that petitioner "ha[d] not sustained the 'heavy burden' of demonstrating that the [Parole Board] violated federal law." Pet. App. 26a.

4. After full briefing and argument, the court of appeals unanimously affirmed in a published opinion. Pet. App. 2a–16a. The court rejected petitioner's Eighth Amendment claims on two different grounds: first, that *Graham* and *Miller* did not apply to petitioner because he was eligible for parole; and, second, that even if those decisions did apply, petitioner's parole proceedings were constitutionally sufficient because petitioner had not shown that he lacked "a meaningful opportunity for release after sentencing." Pet. App. 12a; see *id.* at 10a–13a. The court further held that Virginia's parole proceedings satisfied due process requirements. Pet. App. 15a–16a.

5. The court of appeals issued its published opinion on April 2, 2019, and the mandate issued on April 24, 2019. ECF Dkt. Nos. 44, 45. On April 30, 2019—28 days after the court of appeals issued its decision and 6 days after the mandate issued—the Virginia Parole Board notified Bowling that it "granted [his] 2019 parole application." Pet. 4. Petitioner filed a motion asking the court of appeals to vacate its opinion, which was denied without recorded dissent. Pet. App. 1a. Petitioner sought rehearing of the vacatur issue, which the court of

appeals denied once again after no judge requested a poll. Pet. App. 27a.

ARGUMENT

Petitioner asserts (Pet. 5–12) that the court of appeals abused its discretion in declining to vacate its published opinion in light of events that occurred after the court issued that opinion. Further review is unwarranted. Petitioner does not contend that the court of appeals' unpublished and unanimous order denying his request for vacatur conflicts with any other federal court of appeals or state court of last resort. Nor can petitioner establish that the court of appeals' case-specific action conflicts with this Court's decision in *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), or "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a).

1. Petitioner makes no claim that the court of appeals' vacatur decision implicates a conflict among the lower courts. Nor could he. The order denying vacatur is unpublished and contains no reasoning whatsoever, see Pet. App. 1a, so it would be incapable of creating or deepening a split. What is more, it is well-settled that the *Munsingwear*

doctrine is "rooted in equity" and that "the decision whether to vacate turns on the conditions and circumstances of the particular case." *Azar* v. *Garza*, 138 S. Ct. 1790, 1792 (2018) (per curiam) (internal quotation marks and citation omitted); accord *Staley* v. *Harris Cty.*, 485 F.3d 305, 312 (5th Cir. 2007) (en banc) (emphasizing that vacatur "requires that we look at the equities of the individual case").

2. Petitioner likewise has not established that the court of appeals' case-specific decision to deny vacatur has "so far departed from the accepted and usual course of judicial proceedings," Sup. Ct. R. 10(a), to warrant "the strong medicine of summary reversal," *Dudley* v. *Stubbs*, 489 U.S. 1034, 1039 (1989) (O'Connor, J., dissenting from the denial of certiorari).[2]

a. Federal law authorizes courts to "vacate . . . any judgment, decree, or order of a court lawfully brought before it for review." 28 U.S.C. § 2106. The Court has emphasized that vacatur based on post-decision events is an "extraordinary remedy" that is governed by "equitable" principles. *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*,

[2] Petitioner's assertion (at 13) that the Fourth Circuit's denial of the motion to vacate here was inconsistent with its own precedent is a matter for that court, not this one. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

513 U.S. 18, 26 (1994) (*Bancorp*). The "burden" lies with "the party seeking relief from the status quo of an appellate judgment." *Id.* In deciding whether to grant vacatur, courts make a wide range of fact-bound and case-specific determinations, focusing both on the parties' conduct (to ensure "fairness to the parties") and the public interest (to avoid "disturb[ing] the orderly operation of the federal judicial system" or undermining "the demands of orderly procedure"). *Id.* at 26–27.

b. Petitioner cannot establish that the court of appeals abused its discretion in denying the extraordinary equitable remedy of vacatur. See *eBay Inc.* v. *MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (noting that "act[s] of equitable discretion" are "reviewable on appeal for abuse of discretion"); accord Pet. 2 (acknowledging that the abuse-of-discretion standard applies here). Indeed, petitioner does not cite a single case—and we have found none—where this Court reversed a lower court's decision to decline vacatur.[3]

[3] In *Munsingwear* and *Bancorp*, there was no vacatur at all. See *Bancorp*, 513 U.S. at 29; *Munsingwear*, 340 U.S. at 40. And in *Azar* v. *Garza*, 138 S. Ct. 1790 (2018) (per curiam), this Court ordered vacatur in the first instance when a case became moot after the en banc court of appeals had already ruled.

Instead, petitioner frames his case for vacatur around the claims that "the Commonwealth . . . unilaterally controlled the parole decision that mooted the case" and that "the public interest weighs in favor of vacating" the Fourth Circuit's particular decision here. Pet. 5. But those claims are intensely fact-bound and do not merit this Court's review in any event.

First, the relevant action here was neither unilateral nor by respondent. Petitioner's constitutional challenge to Virginia's parole process became moot when the Virginia Parole Board "granted [respondent's] 2019 parole application." Pet. 4. Petitioner actively participated in the parole process—as was his right, see *supra*, note 1. See, *e.g.*, ECF Dkt. No. 33, at 5 (petitioner's appeal of Parole Board's 2016 decision). Accordingly, "*[t]his* controversy did not become moot due to circumstances unattributable to" petitioner, *Karcher* v. *May*, 484 U.S. 72, 83 (1987) (emphasis added), which matters because "[t]he denial of vacatur is merely one application of the principle that a suitor's conduct in relation to the matter at hand may disentitle him to

the relief he seeks," *Bancorp*, 513 U.S. at 25 (internal quotation marks and citation omitted).[4]

Moreover, the entity that granted petitioner parole—the Virginia Parole Board—is not, and has never been, a party to this suit. Although petitioner insists he "sued the Virginia Parole Board," Pet. i, the respondent here is the Director of the Virginia Department of Corrections and the Director has been the only named party aside from petitioner involved at any stage of this litigation, see Pet. App. 2a (court of appeals), 20a (district court).[5] For that reason, the relevant "action"

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[4] Petitioner's reliance on *Azar* is therefore misplaced. In *Azar*, the respondent's request for a court order allowing her to obtain an abortion became moot when, after prevailing in the court of appeals, her lawyers "took voluntary, *unilateral* action to have [her] undergo an abortion sooner than initially expected, and thus retained the benefit of that favorable judgment." 138 S. Ct. at 1793 (emphasis added). Here, in contrast, the mootness was caused by a process (a successful parole application) that involved active participation by the party now seeking vacatur. See Pet. 4. What is more, the source of the mootness in *Azar* benefited the opposite party. The *prevailing* party in *Azar* mooted that action by obtaining her desired relief (an abortion), 138 S. Ct. at 1793, whereas the conduct at issue here—a non-party's decision to release petitioner on parole—provided petitioner (as the *non-prevailing* party) the exact relief he has sought all along.

[5] Virginia law specifically charges the Parole Board with determining who is "suitable for parole," Va. Code Ann. § 53.1-136.2(a), a determination in which respondent has no say. And even petitioner acknowledges that it was the Parole Board's decision to grant his 2019 parole application—rather than any action taken by respondent—that

mooting petitioner's case was simply not the "action of the party who prevailed in the lower court." *Bancorp*, 513 U.S. at 23.

Second, the court of appeals' decision likewise appropriately accounted for the public interest. See *Bancorp*, 513 U.S. at 26 (stating that all vacatur decisions must "take account of the public interest"). Judicial opinions "are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur." *Id.* (internal quotation marks and citation omitted). And because "[j]udicial precedents are presumptively correct and valuable to the legal community as a whole," *id.*, the public interest "is generally better served by leaving appellate judgments intact," *Alvarez* v. *Smith*, 558 U.S. 87, 98 (2009) (Stevens, J., concurring in part and dissenting in part).

This case illustrates the point. The court of appeals invested significant resources in this appeal, including appointing counsel to represent petitioner, ordering full briefing, hearing oral argument, and issuing a published opinion. See ECF Dkt. Nos. 9, 12, 41, 42. Vacatur would have erased these efforts and eliminated the "the benefits that

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mooted his action. See Pet. 6 ("The *Board alone* controlled the decision to grant parole." (emphasis added)).

flow to litigants and the public from the resolution of legal questions," *Bancorp*, 513 U.S. at 27. The court of appeals' decision not to vacate its own decision is consistent with this Court's reasoning that "the public interest requires" that courts not "disturb the orderly operation of the federal judicial system" whenever possible. *Id.*

Petitioner's discussion of the public interest factors relies heavily on his arguments about the strength of his underlying case, see Pet. 7–11, and the further suggestion that, had his case not become moot, the Court "may well have summarily granted, vacated, and remanded" in light of the Court's forthcoming decision in *Mathena v. Malvo*, No. 18-217 (argued Oct. 16, 2019). But this Court has emphasized that it is "inappropriate" to make vacatur decisions "on the basis of assumptions about the merits." *Bancorp*, 513 U.S. at 27. It is no more appropriate to make vacatur decisions based on conjecture about whether the Court would have granted a petition for a writ of certiorari that was never filed and vacated a lower court's decision in light of a decision that has not yet been issued.[6]

[6] Such conjecture is especially unwarranted here because *Malvo* involves consideration of youth at *sentencing*, whereas this case involves consideration of youth during *parole* proceedings.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

MARK R. HERRING
Attorney General

VICTORIA N. PEARSON
Deputy Attorney General

LAURA H. CAHILL
Assistant Attorney General

TOBY J. HEYTENS
Solicitor General

MICHELLE S. KALLEN
MARTINE E. CICCONI
Deputy Solicitors General

JESSICA MERRY SAMUELS
Assistant Solicitor General

ZACHARY R. GLUBIAK
John Marshall Fellow

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
(804) 786–7240 – Telephone
(804) 371–0200 – Facsimile
SolicitorGeneral@oag.state.va.us

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