No. 19-675

IN THE
Supreme Court of the United States

BANK OF AMERICA CORP., ET AL.,
Petitioners,

v.

CITY OF MIAMI, FLORIDA,
Respondent.

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

REPLY BRIEF FOR PETITIONERS

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February 11, 2020

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RULE 29.6 STATEMENT

The disclosure statement included in the petition remains accurate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

CASES

INTRODUCTION

Just days after filing its brief in opposition, respondent, the City of Miami, voluntarily moved to dismiss the underlying lawsuit with prejudice. The district court granted that motion. *See* Suggestion of Mootness, App. A. As all agree, that dismissal renders this case moot. *See, e.g.*, *Deakins v. Monaghan*, 484 U.S. 193, 200 (1988).

When a case becomes moot while on its way to this Court, the "established practice" is to vacate the judgment below, so that the judgment does not "spawn[] any legal consequences." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39, 41 (1950). Miami asks this Court to deviate from that "established practice," asserting that it is somehow in the "public interest" for the decision to remain intact. Miami's counsel understandably would like to keep that decision as binding precedent, since they are litigating other, indistinguishable cases in the Eleventh Circuit. But the governing law on vacatur is straightforward: when a case becomes moot due to the voluntary, unilateral action of the party that prevailed in the court of appeals, the proper remedy is to vacate the underlying decision. *E.g.*, *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018).

A litigant cannot use mootness to shield a favorable decision from this Court's review *and* keep that decision on the books. Accordingly, this Court should grant the petition and vacate the Eleventh Circuit's decision.

ARGUMENT

Vacatur is the "established practice" for instances in which a case "has become moot while on its way" to this Court. *U.S. Bancorp. Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 22 (1994) (quoting *Munsingwear*,

340 U.S. at 39). "One clear example where '[v]acatur is in order' is 'when mootness occurs through . . . the 'unilateral action of the party who prevailed in the lower court.'" *Azar v. Garza*, 138 S. Ct. 1790, 1792-93 (2018) (per curiam) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71-72 (1997)). That common-sense rule exists so the party who received a favorable judgment below does not retain the benefit of that judgment while simultaneously preventing the losing party from seeking further review in this Court. *Arizonans*, 520 U.S. at 71; *Camreta v. Greene*, 563 U.S. 692, 713 (2011) ("The point of vacatur is to prevent an unreviewable decision 'from spawning any legal consequences.'" (quoting *Munsingwear*, 340 U.S. at 40-41)).

This case was mooted by the plaintiff's unilateral action, but other cases like this one remain pending, including against Bank of America. And unless the decision below is vacated, it will be cited against Bank of America as binding precedent. Because "[m]ootness has frustrated [petitioners'] ability to challenge" that decision on the merits, "the normal rule should apply" and the decision should be vacated. *Camreta*, 563 U.S. at 713.

1. This case was unilaterally mooted by Miami—no one else. "[T]he City decided, after its opposition to certiorari was filed, that it will not pursue the matter further." Suggestion of Mootness 1. Significantly, the case did not settle, and Miami does not claim that it did; Miami therefore cannot invoke the most common exception to the general rule of vacatur. *See U.S. Bancorp*, 513 U.S. at 25. Rather, this is a case in which "mootness results from unilateral action of the party

who prevailed below," and petitioners "ought not in fairness be forced to acquiesce in the judgment." *Id.*

The Court has regularly vacated judgments in this posture, most recently in *Azar*.[1] The plaintiff in that case—an undocumented minor seeking an abortion—obtained a temporary restraining order from the district court against the United States and a favorable ruling from the *en banc* court of appeals. 138 S. Ct. at 1792. But before the United States could request a stay of the *en banc* ruling from this Court, the plaintiffs "took voluntary, unilateral action"—having the "abortion sooner than initially expected"—that mooted the case. *Id.* at 1793. Following its "established practice," this Court vacated the *en banc* court's ruling. *Id.* at 1793.

The Court should do the same here. Miami took "voluntary, unilateral action"—dismissing its claims with prejudice, without reaching any settlement with Bank of America—that mooted this case. *Id.* at 1793. Without vacatur, the city would "retain[] the benefit of [the Eleventh Circuit's] favorable judgment," while petitioners are foreclosed from obtaining review of that decision in this Court. *Id.* This is a "clear example where vacatur is in order." *Id.* at 1792 (citation omitted).

2. Miami offers no valid reason for departing from this Court's "established practice." Its primary argument appears to be that letting the court of appeals' decision stand will not prejudice petitioners. Suggestion of Mootness 3-4, 6 ("Bank of America [will be]

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[1] *Accord, e.g.*, *LG Elecs., Inc. v. InterDigital Commc'ns, LLC*, 572 U.S. 1056 (2014); *al-Marri v. Spagone*, 555 U.S. 1220 (2009); *Radian Guar., Inc. v. Whitfield*, 553 U.S. 1091 (2008).

unaffected by the continued existence of the decision below"). That is simply not true.

There are two pending lawsuits against Bank of America *in the Eleventh Circuit* in which local governments will continue to invoke the court of appeals' decision as binding authority. Miami Gardens, Miami's neighboring city, brought one of these lawsuits, alleging FHA claims virtually identical to the ones asserted by Miami. *City of Miami Gardens v. Bank of Am. Corp.*, No. 1:14-cv-22202 (S.D. Fla.). The other lawsuit, filed by three Georgia counties (Cobb, DeKalb, and Fulton), alleges FHA claims that are similar to Miami's, but differ slightly as to the facts and theories alleged. *Cobb Cty. v. Bank of Am. Corp.*, No. 1:15-cv-4081 (N.D. Ga.). Despite these small differences, the Georgia lawsuit raises the same proximate-causation issues addressed by the Eleventh Circuit's opinion and the petition here. And the plaintiffs in both of these cases also have separate lawsuits against other lenders. Each complaint is potentially subject to a motion to dismiss based on failure to allege proximate cause. And the plaintiffs will undoubtedly cite the Eleventh Circuit's ruling not just as "persuasive" authority, Suggestion of Mootness 6, 7, 8, but as *binding precedent*.

Miami's failure even to acknowledge those other actions against Bank of America would be remarkable enough by itself. But it is completely inexcusable given that Miami's counsel also represent the municipal plaintiff in one of those cases (Miami Gardens). Those counsel have an obvious stake in preserving the favorable caselaw on proximate cause that they persuaded the Eleventh Circuit panel to adopt, contrary to this Court's instructions.

Thus, even if vacatur were not the "established practice," it would be warranted here. Vacatur "prevent[s] an unreviewable decision from spawning any legal consequences," *Camreta,* 563 U.S. at 712 (citation omitted). And here there is an objective, genuine, and immediate risk that the decision below will continue to "spawn . . . legal consequences" if not vacated. This is one of the cases in which "*Munsingwear* establishes that the public interest is best served by granting relief." *U.S. Bancorp*, 513 U.S. at 27.

3. Miami also asserts that vacatur is not appropriate when the underlying decision is "interlocutory," *i.e.*, where there is no "final judgment." Suggestion of Mootness 11. That argument, however, is belied by a host of this Court's decisions, with *Azar* being only the most recent. *E.g.*, *Azar*, 138 S. Ct. at 1793 (vacating court of appeals decision involving temporary restraining order); *Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 549 U.S. 1262 (2007) (No. 06-595) (vacating court of appeals decision affirming denial of motion for preliminary injunction); *Selig v. Pediatric Specialty Care, Inc.*, 551 U.S. 1142 (2007) (No. 06-415) (vacating court of appeals decision involving interlocutory qualified immunity appeal).

For example, in *Radian Guaranty, Inc. v. Whitfield*, 553 U.S. 1091 (2008), the district court had granted summary judgment for the defendant, but the court of appeals reversed and remanded for trial. *See Whitfield v. Radian Guar., Inc.*, 501 F.3d 262, 269 (3d Cir. 2007). The defendant sought certiorari, but while its petition was pending, the plaintiff voluntarily dismissed its claims. *See* Suggestion of Mootness & Mot. to Vacate at 1-2, *Radian Guar., Inc. v. Whitfield*, No. 07-834, 2008 WL 1989683 (May 5, 2008). This Court

agreed that the case was moot and proceeded to vacate the court of appeals' decision—even though that decision was not final. *See Radian Guar.*, 553 U.S. at 1091.

The Court took the same approach in *Alvarez v. Smith*, 558 U.S. 87 (2009). The district court in that case had granted the defendant's motion to dismiss, but the court of appeals reversed. *Id.* at 91. After the defendant filed a petition for certiorari, the case became moot due to events the defendants did not cause. *Id.* at 94-97. The Court adhered to its "ordinary practice" and vacated the court of appeals' decision. *Id.* at 97.

Miami does not cite a single decision of this Court to support its position, but relies instead on court of appeals decisions that do not actually aid its argument.[2] The primary case that Miami cites, *Gjertsen v. Board of Election Comm'rs*, 751 F.2d 199 (7th Cir. 1984), in fact acknowledged the "general rule" that vacatur is the appropriate remedy "when a case becomes moot

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[2] And several courts of appeals would disagree with Miami's assertion that the "usual practice" for mooted interlocutory appeals is to dismiss the appeal and leave the underlying orders intact. *E.g.*, *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1132 (10th Cir. 2010) ("By its terms, *Munsingwear* applies to final judgments. Nonetheless, we have applied its rationale to vacate interlocutory decisions that have no collateral or preclusive effect."); *Spirit of the Sage Council v. Norton*, 411 F.3d 225, 230 (D.C. Cir. 2005) (dismissing interlocutory appeals and vacating underlying orders); *GATX/Airlog Co. v. U.S. Dist. Ct. for N. Dist. of Cal.*, 192 F.3d 1304, 1308 (9th Cir. 1999) (*Munsingwear* vacatur in mandamus proceeding); *North Carolina v. City of Va. Beach*, No. 95-1793, 1998 WL 34069374, at *1 (4th Cir. Aug. 28, 1998) (dismissing interlocutory appeal as moot and vacating interlocutory order on review).

on appeal," even when it has not proceeded to final judgment. *Id.* at 202 ("On this basis we have ordered a preliminary injunction vacated when the case became moot while the injunction was under appeal to this court."). The court then concluded that the general rule does not apply when "*only one order* in the case has become moot," and so it declined to vacate a moot preliminary injunction order because the case was still being litigated in the district court.[3] *Id.* (emphasis added). *Gjertsen* has no relevance here, where the *entire case* is moot.

4. Finally, Miami suggests that vacatur is not warranted because this Court would have denied certiorari. *See* Suggestion of Mootness 5, 8-10. But it would be particularly unfair to consider certworthiness as part of the vacatur inquiry here, given that it is Miami's unilateral action that not only forecloses this Court's opportunity to consider the petition for certiorari on its merits, but also prevents Bank of America from responding to Miami's certworthiness

[3] The other court of appeals decisions cited by Miami (at 11) also involved situations where the order on appeal was moot, but the underlying case was not. *See McLane v. Mercedes-Benz of N. Am., Inc.*, 3 F.3d 522, 524 (1st Cir. 1993) (declining to vacate decision denying preliminary injunction and noting that "[t]he district court has not yet ruled on the merits of [the plaintiff's] claims"); *In re Tax Refund Litig.*, 915 F.2d 58, 58-59 (2d Cir. 1990) (declining to vacate mooted interlocutory decisions where "[l]itigation . . . continued in the district court" while the appeal was pending); *Fleming v. Gutierrez*, 785 F.3d 442, 444, 449 (10th Cir. 2015) (declining to vacate mooted preliminary injunction where district court proceedings continued "over the need for a permanent injunction"); *Brooks v. Ga. State Bd. of Elections*, 59 F.3d 1114, 1119, 1121-22 (11th Cir. 1995) (declining to vacate decision rejecting a settlement agreement where litigation persisted in the district court).

arguments. Miami moved to dismiss its complaint just days after it filed a full-fledged brief in opposition. Miami put its certworthiness objections on the record, mooted the case so that the question of certworthiness was no longer a live one, and asserted that the Eleventh Circuit's opinion should not be vacated because the case is not certworthy. At this point, Bank of America cannot effectively respond to Miami's certworthiness arguments, as it is compelled to devote this reply brief to addressing *Munsingwear* rather than underscoring the case for certworthiness. That is exactly why it would not make sense for vacatur, which depends on Article III jurisdiction and principles of equity, to turn on how the Court thinks it would have voted on the merits of the question presented, now that the Court can no longer answer that question.

In any event, Miami's simplistic argument—that in the absence of a circuit split, vacatur should be denied—ignores the compelling reasons why this case warranted certiorari. Petitioners sought *and obtained* review of the Eleventh Circuit's first decision before a split developed. *See* Pet. 31-32. And as explained in the petition (at 18-31), the Eleventh Circuit's second decision flatly contradicts this Court's decision in *Bank of America Corp. v. City of Miami*, 137 S. Ct. 1296 (2017), and conflicts with other circuits' approaches to proximate causation under other federal statutes.[4] That is not just petitioners' view: As Judge

[4] Miami suggests that because the Court denied petitioners' application for a stay of the mandate (No. 19A429), certiorari would have been denied. Suggestion of Mootness 10. That baseless speculation ignores the four-part stay standard (which requires irreparable harm, not just a likelihood of certiorari), not to

Feinerman recently observed, "the Eleventh Circuit's opinion does not faithfully implement the proximate cause principles announced in [this Court's decision in] *Bank of America Corp. v. City of Miami*." Order, ECF No. 322, *Cty. of Cook v. Wells Fargo & Co.*, No. 14-C-9548 (N.D. Ill. Feb. 6, 2020). That would have been ample justification for review, and now that Miami has mooted the case, is ample justification for vacatur.

* * *

There is thus no merit to Miami's effort to create a new exception to this Court's "established practice" and avoid vacatur of the Eleventh Circuit's decision. *Azar*, 138 S. Ct. at 1792. "[P]ivotally," this case became moot because of Miami's action, not Bank of America's. *Anderson v. Green*, 513 U.S. 557, 560 (1995) (per curiam). And that "voluntary, unilateral action" by the respondent makes this a "clear example where vacatur is in order." *Azar*, 138 S. Ct. at 1792-1793 (citation omitted).

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mention the large number of cases in which a stay application is denied but certiorari is later granted. *See, e.g.*, *Conkright v. Frommert*, 556 U.S. 1401 (2009) (Ginsburg, J., in chambers); *Conkright v. Frommert*, 559 U.S. 506 (2010).

CONCLUSION

The Court should grant the petition and vacate the decision of the court of appeals.

Respectfully submitted.

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