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 IN SUPPORT OF SUGGESTION OF MOOTNESS


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# TABLE OF CONTENTS

TABLE OF CONTENTS ............................................ i

TABLE OF AUTHORITIES ..................................... iii

INTRODUCTION ...................................................... 1

ARGUMENT ............................................................... 2

I. *MUNSINGWEAR* VACATUR IS NOT AUTOMATIC. .................................................. 2

II. MOOTNESS HERE LEAVES NO CONTINUING DISPUTE OR LEGAL CONSEQUENCE BETWEEN THE PARTIES. ......................................................... 4

A. *MUNSINGWEAR* VACATUR IS ABOUT IMMEDIATE LEGAL CONSEQUENCES, NOT PRECEDENTIAL EFFECT. ................. 4

B. BANK OF AMERICA WRONGLY CLAIMS LEGAL CONSEQUENCES FOR OTHER EXISTING CASES IN THE ELEVENTH CIRCUIT INVOLVING DIFFERENT PLAINTIFFS. ........................................ 7

C. VACATUR IS INCONSEQUENTIAL OUTSIDE THE ELEVENTH CIRCUIT. ................ 7

III. PERMITTING THE ELEVENTH CIRCUIT'S DECISION TO STAND AIDS PERCOLATION AND THE DEVELOPMENT OF LAW. ............................ 8

CONCLUSION......................................................... 10

## TABLE OF AUTHORITIES

### Cases

*Camreta v. Greene*, 563 U.S. 692 (2011) ............ 3, 4, 5

*Curry v. Sullivan*, 925 F.2d 1127 (9th Cir. 1990)...... 8

*Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27 (1993) ........................... 3

*Mahoney v. Babbitt*, 113 F.3d 219 (D.C. Cir. 1997)... 7

*Taylor v. Sturgell*, 553 U.S. 880 (2008)...................... 8

*U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18 (1994) .............................................. 3, 4, 6, 9

*United States v. Clark*, 538 F.3d 803 (7th Cir. 2008).......................................................... 8

*United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950) ............................................................... 2, 4, 5

### Rules

S. Ct. Rule 10 .............................................................. 9

## INTRODUCTION

On February 3, 2020, one week after filing its Brief in Opposition, Respondent City of Miami filed a Suggestion of Mootness. In that filing, as it had informed Petitioners Bank of America Corp., *et al.*,[1] several days earlier, the City indicated that the lawsuit was moot as a result of a voluntary motion to dismiss the matter with prejudice, which the District Court granted. Bank of America does not dispute that the dismissal rendered the case moot and ends all possible litigation on the subject of the City's complaint, as well as between Miami and the Bank.

However, the parties disagree about whether the dismissal with prejudice should engender vacatur of the Eleventh Circuit's decision in this case. Bank of America favors vacatur, but does so by arguing that vacating the decision is the usual and customary practice and that the Bank should not have to litigate other cases involving other parties within the Eleventh Circuit and outside of it in the shadow of the decision rendered below.

The City submits that this Court employs vacatur from its equitable toolbox to assure that a petitioning party does not suffer legal consequences within the subject litigation, rather than to remove the precedential value of a case within the circuit or its persuasive value outside the circuit. The Eleventh Circuit's decision was on remand from this Court, as one of the "lower courts" asked to "define, in the first instance, the contours of proximate cause under the

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[1] Petitioners are Bank of America Corp. Bank of America, N.A., Countrywide Financial Corporation, and Countrywide Home Loans, Inc. (collectively, "Bank of America" or "Bank").

FHA under the FHA." B*ank of Am. Corp. v. City of Miami*, 137 S.Ct. 1296, 1306 (2017). Oral argument on the same issue has now taken place in the Ninth Circuit. It cannot be gainsaid that the issue will arise in other circuits, as Bank of America notes that other cases in which the issue may be joined exist outside the Ninth and Eleventh Circuits. It is understandable that Bank of America would prefer not to argue against the Eleventh Circuit persuasive rationale in other circuits, but that is not one of the purposes for which vacatur exists. And vacatur will not prevent that possibility, as the persuasive value of the decision remains intact even if vacated. Vacatur also does not exist to allow the Bank to reargue it in a different case brought by a different plaintiff in the hopes that it faces a different Eleventh Circuit panel.

If the Eleventh Circuit's decision is not found persuasive in other circuits, a conflict will develop that might require this Court's resolution. The decision below, then, serves a value in the public interest that is unusual and distinctive. Vacatur should not lie from these particular circumstances.

## ARGUMENT

### I. *MUNSINGWEAR* VACATUR IS NOT AUTOMATIC.

Bank of America relies heavily on the argument that vacatur is the "'established practice'" of this Court when a civil case becomes moot while on appeal. Bank of Am. Resp. Br. 1 (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)). However, as this Court has noted, the "established practice" language in *Munsingwear* was both dictum and inaccurate because vacatur was not a uniform practice

either before or after the decision in *Munsingwear*. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 23-24 (1994). Thus, while *Munsingwear* declared it to be "established practice" and expressed no exceptions to vacating decisions once a case is moot during the course of an appeal, this Court wryly noted that the "established practice" is "not exceptionless." *Camreta v. Greene*, 563 U.S. 692, 712 (2011).

In fact, this Court previously found the automatic invocation of *Munsingwear* vacatur to comprise a "prime occasion for invoking our customary refusal to be bound by dicta, and our customary skepticism toward per curiam dispositions that lack the reasoned consideration of a full opinion." *Bonner Mall,* 513 U.S. at 24 (citations omitted).

Instead of a knee-jerk invocation of vacatur where disputed, this Court has long relied upon an evaluation of what would be "'most consonant to justice ... in view of the nature and character of the conditions which have caused the case to become moot." *Id*. (citations and internal quotation marks omitted). While considering the petitioner's role in causing the mootness "the principal condition," *id*., it is also not the sole consideration. For example, the public interest is another consideration and may advise in favor of letting a decision stand. *Id*. at 26. That public interest may well include, as the City submits is the case here, the public interest in judicial precedent. *Id*. *See also Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp*., 510 U.S. 27, 40 (1993) (Stevens, J., dissenting) ("[j]udicial 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.") (cited with approval in *Bonner Mall*, 513 U.S. at 26-27).

## II. MOOTNESS HERE LEAVES NO CONTINUING DISPUTE OR LEGAL CONSEQUENCE BETWEEN THE PARTIES.

Bank of America disputes the City's assertion in its Suggestion of Mootness that the Bank as a party is unaffected by the continued existence of the Eleventh Circuit's decision. It argues that it is still litigating the same issue in other cases involving other parties, several of which are within the Eleventh Circuit and, there, comprise binding precedent. Resp. Br. 4.

### A. *Munsingwear* Vacatur is About Immediate Legal Consequences, Not Precedential Effect.

The argument that the Bank would have to deal with the precedential effect of the decision below, either as persuasive precedent outside the Eleventh Circuit or binding precedent within it, provides no justification for vacatur. *Munsingwear* rationalized vacatur as necessary to "clear[] the path for future relitigation of the issues *between the parties*." 340 U.S. at 40 (emphasis added). It and its progeny did not seek to protect a party from possible application of the principles in other cases involving other parties.

*Camreta,* cited by the Bank (Resp. Br. 2, 5), demonstrates some of the limitations on vacatur, even though it was granted there. *Camreta* involved the "special category" of review sought by a prevailing party. 563 U.S. at 704. The Ninth Circuit had found the petitioning government officials had violated constitutional rights, but still found qualified

immunity applied because the violation had not been clearly established before the decision. The case was mooted because the minor plaintiff in the case had reached adulthood and moved from the state where the incident had occurred.

Although leaving the decision in place would have had the salutary effect of putting government officials on notice of the violation in the future and conformed to the public interest, this Court nevertheless vacated the Ninth Circuit's ruling because the petitioners were obliged to conform to the ruling or "risk a meritorious damages action." *Id.* at 702. The Court recognized that "[o]nly by overturning the ruling on appeal can the official gain clearance to engage in the conduct in the future." *Id.* at 703. Thus, the case continued to have a real legal consequence for how the defendants continued to conduct their governmental duties, even if the original plaintiff could not sue them again.

Vacatur was necessary, then, because the decision remained legally consequential for a party in a rather unique way. Vacatur "prevent[s] an unreviewable decision 'from spawning any legal consequences,' so that no party is harmed by what we have called a 'preliminary' adjudication." *Id.* at 713 (quoting *Munsingwear*, 340 U.S., at 40-41). In quoting *Camreta*, Bank of America leaves out the reference to "no party" in a "'preliminary adjudication.'" See Resp. Br. 2, 5). In that rare type of case where the future behavior of a government official discharging duties controlled by the decision with liability automatically following a violation, vacatur was justified because a final determination had been denied after certiorari was granted. That meant the inability to decide a Question Presented that had been accepted for review

left open a continuing legal consequence to a party, thereby justifying vacatur in that instance.

Here, however, the same consequentialness does not obtain. The decision below does not decide a constitutional issue and does not require any change in behavior by the Bank. It simply decides a purely legal issue of a preliminary nature that provides importance guidance to future FHA cases unlikely to ever involve the same parties. It does not have the kind of legal consequences that justifies vacating the decision below.

Bank of America suggests that, rather than deal with a binding precedent in case involving other parties, allowing the issue to remain open in the Eleventh Circuit will encourage further examination of it. Resp. Br. 5. This Court, however, has already rejected that argument. In *Bonner Mall*, the petitioner suggested that "[v]acating a moot decision, and thereby leaving an issue ... temporarily unresolved in a Circuit, can facilitate the ultimate resolution of the issue by encouraging its continued examination and debate." 513 U.S. at 27 (quoting Brief for Petitioner 33). Instead, this Court said "that debate among the courts of appeals sufficiently illuminates the questions that come before us for review." *Id.* It added that the "value of additional intra-circuit debate seems to us far outweighed by the benefits that flow to litigants and the public from the resolution of legal questions." *Id.* The same is true here.

### B. Bank of America Wrongly Claims Legal Consequences for Other Existing Cases in the Eleventh Circuit Involving Different Plaintiffs.

Bank of America asserts that the decision below has potential binding consequences in two cases brought by different parties in which it faces litigation over similar issues, even while acknowledging that the Georgia case "differ[s] slightly as to the facts and theories alleged." Resp. Br. 4. It argues that "[e]ach complaint is potentially subject to a motion to dismiss based on failure to allege proximate cause."

The speculative potential for the issue being joined demonstrates why *Munsingwear* vacatur is about the consequential decisions involving only the parties to the litigation. It is not intended to assist one of the parties if that party is sued by someone not involved in the instant litigation avoid the legal principle declared. As solely a matter of legal principle to be applied in the future, rather than a preclusive determination of facts, Bank of America stands in the same shoes as any future litigant, not as a party likely to suffer legal consequences because certiorari was not granted and the decision reversed.

### C. Vacatur is Inconsequential Outside the Eleventh Circuit.

Outside the Eleventh Circuit, where Bank of America may be litigating similar issues, the Eleventh Circuit decision serves only as persuasive precedent, a status it will hold regardless of the decision on vacatur. *See, e.g.*, *Mahoney v. Babbitt*, 113 F.3d 219, 222 (D.C. Cir. 1997) ("it is not self-evident that the precedential effects of a mooted judgment should be

any less persuasive than if the mooting events had not occurred."). *See also* Suggestion of Mootness 6-8.

Bank of America does not question the continued persuasive potential of the Eleventh Circuit's decision, regardless of this Court's action on mootness. Instead, it seems to invoke cases involving other jurisdictions and other parties as though the decision might have more impact than the persuasiveness of its reasoning. The decision below certainly cannot have preclusive effect. Preclusion is normally based on a decision as to the controversy between the litigating parties. *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). Here, no such claim or issue qualifies.

In *City of Oakland v. Wells Fargo & Co.*, No. 19-15169 (9th Cir.), where Wells Fargo argued the issue presented in the Petition on February 10, the Ninth Circuit has the opportunity to make its own determination, because it is not bound by its sister court's decision. *Curry v. Sullivan*, 925 F.2d 1127, 1131 (9th Cir. 1990). Instead, the Eleventh Circuit's decision will be read for the strength of its reasoning.

The same non-binding status of the decision below is true of the other cases pending outside the Eleventh Circuit. *See, e.g., United States v. Clark*, 538 F.3d 803, 812 (7th Cir. 2008) ("While we carefully and respectfully consider the opinions of our sister circuits, we are not bound by them.").

## III. PERMITTING THE ELEVENTH CIRCUIT'S DECISION TO STAND AIDS PERCOLATION AND THE DEVELOPMENT OF LAW.

As the City explained in its Suggestion of Mootness, the dismissal of the action in the District

Court in its parallel proceedings was based on a ruling by that court, not subject to interlocutory appeal, that rendered continuation of the case infeasible. The City was not concerned about the possibility that certiorari might be granted or that the Eleventh Circuit might be reversed, as evidenced by its vigorous and successful opposition to a stay pending the filing of the petition in this case, the lack of a circuit conflict, and the arguments it mustered in its Brief in Opposition.

Nonetheless, the City regards the Eleventh Circuit's decision as an important expression of the principles it fought for during six years of litigation, even if the City is unlikely to ever bring new litigation that can invoke it as precedent. It is "valuable to the legal community as a whole" and "not merely the property of private litigants." *Bonner Mall*, 513 U.S. at 26.

This Court does not sit as a court of error, but one that decides issues of great national importance or resolves circuit conflicts to assure uniformity to the law throughout the nation. *See* S. Ct. Rule 10. In its 2017 decision in this case, this Court set up a process of percolation by which it awaited the analysis of the lower courts on the contours that FHA lawsuits must plead to survive motions to dismiss. *City of Miami*, 137 S.Ct. at 1306. There is no reason to short-circuit that conversation among the lower courts by vacating this well-considered analysis of that question, an analysis that continues to occur in other courts. Should the circuits split on that question, there will be ample opportunity for this Court's intervention. Vacatur does not advance that process.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied, and the decision below should not be vacated.

Respectfully submitted,

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