No. 19-688

IN THE
Supreme Court of the United States

WELLS FARGO & CO.
and WELLS FARGO BANK, N.A.,
Petitioners,

v.

CITY OF MIAMI,
Respondent.

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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RULE 29.6 STATEMENT

The disclosure statement included in the petition remains accurate.

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The City of Miami filed this suit in 2013. In the intervening six-plus years, the City has defended it on the merits from the district court to the Eleventh Circuit to this Court, then back to the Eleventh Circuit, where the City prevailed. It is only after having to respond to a new petition for a writ of certiorari, backed by four *amicus* briefs, that the City suddenly threw in the towel, unilaterally dismissing its complaint in the district court with prejudice.

Wells Fargo welcomes the City's abandonment of its meritless suit and agrees with the City that the case is now moot. But the City makes the audacious claim that although its own voluntary actions have deprived Wells Fargo of the ability to obtain review

and reversal of the Eleventh Circuit's erroneous judgment and opinion, this Court should nevertheless leave them in place.

Yet it is this Court's "established practice * * * in dealing with a civil case from a court in the federal system which has become moot while on its way here" to "vacate the judgment below." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). The City has given no persuasive reason for the Court to deviate from that established practice here.

The Court should grant the petition for writ of certiorari and summarily vacate the Eleventh Circuit's opinion and judgment below.

ARGUMENT

THE ELEVENTH CIRCUIT'S DECISION SHOULD BE VACATED.

A. This Case Is Moot.

The Eleventh Circuit held that the City adequately pleaded proximate cause under the Fair Housing Act with respect to the claim for allegedly lost property taxes and remanded this case to the district court for further proceedings. Pet. App. 1a-72a. On January 29, 2020—two days after the City filed its brief in opposition to certiorari—the City moved in the district court for voluntary dismissal with prejudice under Federal Rule of Civil Procedure 41(a)(2). Unopposed Mot. for Dismissal with Prejudice, *City of Miami* v. *Wells Fargo & Co.*, No. 1:13-cv-24508-WPD (S.D. Fla. Jan. 29, 2020), ECF No. 116. The City initiated the dismissal on its own, the dismissal "is

not related to a settlement, and Wells Fargo * * * provid[ed] nothing in exchange." Evan Weinberger, *Miami Drops Fair Housing Cases Against Wells Fargo, BofA*, Bloomberg Law (Jan. 31, 2020), https://tinyurl.com/sm3ubgx. The district court granted the motion and dismissed the case with prejudice the next day. Order Granting Plaintiff's Unopposed Mot. for Dismissal with Prejudice, *City of Miami* v. *Wells Fargo & Co.*, No. 1:13-cv-24508-WPD (S.D. Fla. Jan. 30, 2020), ECF No. 117. Then the City filed a suggestion of mootness in this Court.

The City's dismissal of its suit with prejudice means that there is no longer a live dispute between the parties. *United States* v. *Microsoft Corp.*, 138 S. Ct. 1186, 1188 (2018) (per curiam). Wells Fargo therefore agrees with the City that this case is now moot. *See* Suggestion of Mootness 2-3.

B. This Court Should Vacate the Eleventh Circuit's Judgment.

"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 and remand with a direction to dismiss." *Munsingwear*, 340 U.S. at 39. Under *Munsingwear*, "[t]he principal condition to which [the Court] ha[s] looked is whether the party seeking relief from the judgment below caused the mootness by voluntary action." *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 24 (1994). When the party that prevailed in the lower court caused the mootness through its own "unilateral action," vacatur is clearly "in order." *Azar* v.

Garza, 138 S. Ct. 1790, 1792 (2018) (per curiam) (internal quotation marks omitted); *see, e.g.*, *LG Elecs., Inc.* v. *InterDigital Commc'ns, LLC*, 572 U.S. 1056 (2014).

That "principal" condition for *Munsingwear* vacatur is indisputably satisfied here. While the petition for certiorari was pending, the City unilaterally moved for dismissal, rendering all proceedings in this case moot. There was no agreement between the parties to settle or dismiss this case. There were not even any discussions between the parties regarding settlement. Indeed, Wells Fargo knew nothing of the City's decision until the City told Wells Fargo it was dropping the case, only one day after opposing certiorari and only days before a looming February 5, 2020 deadline to file an operative complaint in the district court. Wells Fargo gave the City no consideration in exchange for dismissing its suit. In fact, as Wells Fargo's petition made clear, it looked forward to vindicating its position before this Court that the City's allegations failed to satisfy the Fair Housing Act's proximate cause requirement. Pet. 21-36. Simply put, Wells Fargo played *no* role in making the Eleventh Circuit's judgment unreviewable, and the City does not contend otherwise. The City therefore "caused the mootness by voluntary," "unilateral" action. *Bonner Mall*, 513 U.S. at 24-25; *see Garza*, 138 S. Ct. at 1792. Having blocked this Court's review, the City ought not to "retain the benefit of the judgment" below in future Fair Housing Act cases it may bring. *Garza*, 138 S. Ct. at 1792 (internal quotation marks omitted). And Wells Fargo

should not suffer legal consequences from "a 'preliminary' adjudication" that the City unilaterally shielded from review. *Camreta* v. *Greene*, 563 U.S. 692, 713 (2011) (quoting *Munsingwear*, 340 U.S. at 40).

More generally, where the party seeking this Court's review was not responsible for mooting the case, this Court's usual practice is to vacate the lower court's judgment and opinion. *LG Electronics* v. *InterDigital Communications, LLC*, is instructive. There, the petition for writ of certiorari became moot when the respondents—who had prevailed in the Federal Circuit—withdrew the complaint that had initiated International Trade Commission proceedings against the petitioners. Brief for the International Trade Commission in Opposition at 7, *LG Elecs.*, 572 U.S. 1056 (No. 13-796). The Commission—whose judgment in the case had been appealed to the Federal Circuit—argued that denial of the petition, rather than vacatur, was the appropriate response. *Id.* at 8. Yet the Court granted certiorari anyway, vacated the Federal Circuit's judgment, and remanded the case with instructions to dismiss it as moot. *LG Elecs.*, 572 U.S. at 1056. This Court has followed that well-trod path time and again. *See, e.g.*, *Blue Water Navy Vietnam Veterans Ass'n, Inc.* v. *Wilkie*, 139 S. Ct. 2740 (2019); *Village of Lincolnshire* v. *Int'l Union of Operating Eng'rs Local 399*, 139 S. Ct. 2692 (2019); *Eisai Co.* v. *Teva Pharm. USA, Inc.*, 564 U.S. 1001 (2011); *Hollingsworth* v. *U.S. Dist. Court for N. Dist. of California*, 562 U.S. 801 (2010); *Radian Guar., Inc.* v. *Whitfield*, 553 U.S. 1091 (2008); *Lehman* v. *MacFarlane*, 529 U.S. 1106 (2000);

Teel v. *Khurana*, 525 U.S. 979 (1998); *Great W. Sugar Co.* v. *Nelson*, 442 U.S. 92, 93-94 (1979) (per curiam). There is no reason to depart from that practice here.

The City asserts that Wells Fargo is "unaffected" by the continued existence of the decision below. Suggestion of Mootness 6. But Wells Fargo is affected by the Eleventh Circuit's decision. Wells Fargo is litigating the same issue in other cases, including within the Eleventh Circuit. *See City of Miami Gardens* v. *Wells Fargo & Co.*, No. 1:14-cv-22203-FAM (S.D. Fla.);[1] *see also, e.g.*, *City of Oakland* v. *Wells Fargo & Co.*, No. 19-15169 (9th Cir.); *City of Sacramento* v. *Wells Fargo & Co.*, No. 2:18-cv-00416-KJM-AC (E.D. Cal.); *Prince George's County* v. *Wells Fargo & Co.*, No. 8:18-cv-03576-PJM (D. Md.); *County of Cook* v. *Wells Fargo & Co.*, No. 1:14-cv-09548

[1] The district court entered final judgment on the merits for Wells Fargo, *see City of Miami Gardens* v. *Wells Fargo & Co.*, 328 F. Supp. 3d 1369 (S.D. Fla. 2018), but a panel of the Eleventh Circuit has vacated the district court's judgment and remanded with instructions to dismiss for lack of subject-matter jurisdiction. *City of Miami Gardens* v. *Wells Fargo & Co.*, 931 F.3d 1274, 1277-78 (11th Cir. 2019) (per curiam). The Eleventh Circuit's mandate has been withheld pending a decision on the City of Miami Gardens' petition for rehearing en banc. *See* Order, *City of Miami Gardens* v. *Wells Fargo & Co.*, No. 18-13152-AA (11th Cir. Sept. 27, 2019). In the event that the district court proceedings in that case are reopened, Wells Fargo would be severely prejudiced by the inability to seek review of the "preliminary" adjudication that it sought to challenge in this case if this Court denies vacatur.

(N.D. Ill.). If the Eleventh Circuit's opinion is not vacated by this Court, it will be binding precedent on Wells Fargo (and everyone else) in any cases that have been or will be filed in the Eleventh Circuit. That is precisely the sort of harm that *Munsingwear* and its progeny seek to avoid.[2] *See Camreta*, 563 U.S. at 713 ("The point of vacatur is to prevent an unreviewable decision 'from spawning *any* legal consequences,' so that no party is harmed by what we have called a 'preliminary' adjudication." (emphasis added) (quoting *Munsingwear*, 340 U.S. at 40)).

As the *amicus* briefs attest, the Eleventh Circuit's decision threatens to unleash a wave of meritless litigation under the Fair Housing Act and other statutes. Br. for Amici Curiae Chamber of Commerce of the United States et al. 8-14. If the Eleventh Circuit's now-unreviewable opinion stands, municipalities are likely to bring additional suits against financial institutions, including against

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[2] Bank of America, which also petitioned for a writ of certiorari to review the Eleventh Circuit's decision, would also be unfairly prejudiced if the Eleventh Circuit's judgment is not vacated. It, too, is litigating similar issues against other plaintiffs, including within the Eleventh Circuit. *See Cobb County* v. *Bank of Am. Corp.*, No. 1:15-cv-04081-LMM (N.D. Ga.); *City of Miami Gardens* v. *Bank of Am. Corp.*, No. 1:14-cv-22202-KMW (S.D. Fla.); *see also County of Cook* v. *Bank of Am. Corp.,* No. 1:14-02280 (N.D. Ill.). Other banks are facing similar suits. *See, e.g.*, *City of Miami Gardens* v. *JPMorgan Chase & Co.*, No. 1:14-22206-KMW (S.D. Fla.); *City of Miami Gardens* v. *Citigroup Inc.*, No. 1:14-22204-MGC (S.D. Fla.).

Wells Fargo. Br. for Amici Curiae American Bankers Ass'n et al. 8.

Wells Fargo need not demonstrate a likelihood of harm; the possibility of legal consequences suffices. Vacatur, indeed, is proper even where legal consequences for the losing party are less likely than they are here. For instance, in *Camreta*, the Court vacated the Ninth Circuit's ruling that a warrant is required before interviewing a suspected child-abuse victim at school where one of the petitioners remained as a child-protective-services worker, even though the plaintiff became an adult and therefore could not have brought a similar suit again. 563 U.S. at 710-711, 713-714. And in *Alabama* v. *Davis*, 446 U.S. 903, 903-904 (1980), the Court summarily vacated a court of appeals' judgment over a dissent's objection that there was no realistic possibility that the judgment would spawn any legal consequences. The Court should take a similar approach here and vacate the judgment below.

C. The City's Arguments Against Vacatur Are Wrong.

1. The City's principal argument against vacatur appears to be that vacatur would frustrate the percolation process prescribed by this Court. Suggestion of Mootness 4-8; Pet. App. 86a-87a. But the Court rejected essentially that argument in *Camreta*. The plaintiff in that Section 1983 case argued that mootness should not lead to vacatur of the court of appeals' constitutional holding because it would " 'undermine' the Court of Appeals' choice to 'decide [a] constitutional questio[n]' to govern future cases."

563 U.S. at 713 (alterations in *Camreta*). The Court found that the plaintiff's argument "reveal[ed] the necessity of" vacatur. *Id.* Because the decision would become the law of the circuit and bind future parties, "[v]acatur * * * rightly 'strips the decision below of its binding effect.' " *Id.* (quoting *Deakins* v. *Monaghan*, 484 U.S. 193, 200 (1988)).

Moreover, vacatur will not inhibit percolation in the lower courts. If anything, vacatur would further it because district courts in the Eleventh Circuit and future panels of the Eleventh Circuit would be able to afford the vacated opinion whatever persuasive value it merits without needing to treat it as binding precedent. Affording courts liberty to depart from the Eleventh Circuit's reasoning encourages further judicial analysis of the issues raised in this case—it does not stifle it.[3]

The City cites *Bonner Mall* for the unremarkable proposition that, where both parties cause a case to become moot, judicial precedents should generally not be vacated unless the public interest would be served by vacatur. Suggestion of Mootness 5. In

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[3] Indeed, another plaintiff city in a similar case (represented by the same counsel) cited the value of allowing percolation in the district courts unencumbered by binding circuit precedent when it urged a district court not to certify its order denying Wells Fargo's motion to dismiss for interlocutory review. *See* Opposition to Mot. to Amend at 7-8, *City of Oakland* v. *Wells Fargo Bank, N.A.*, No. 3:15-cv-04321-EMC (N.D. Cal. July 27, 2018), ECF No. 159 (arguing that "the issue has barely begun the process of percolation in the nation's District Courts").

Bonner Mall, this Court declined to vacate the Ninth Circuit's judgment where the losing party voluntarily abandoned its request for Supreme Court review by agreeing to settle the case. 513 U.S. at 26, 29. The mootness in that case was of the petitioner's own design. Having forfeited the ability to seek certiorari review, the petitioner was not entitled to "the secondary remedy of vacatur." *Id.* at 27. Here, by contrast, Wells Fargo could not have prevented the City from mooting the case. Because the City's actions to moot the case were unilateral, vacatur is Wells Fargo's sole available remedy to rid itself of the Eleventh Circuit's opinion and judgment. *Bonner Mall* supports vacatur in this case.

2. Next, the City asserts that this Court "would have" denied certiorari had the City not rendered this case moot. Suggestion of Mootness 8-10. Although Wells Fargo believes the Court would have granted certiorari had this case not become moot, *see* Pet. 2-5, 13-39, the parties' predictions are irrelevant to whether certiorari should be granted now. *See Garza*, 138 S. Ct. at 1793 ("[T]he fact that the relevant claim here became moot before certiorari does not limit this Court's discretion."). The Court need not discern whether it would have granted certiorari in a counterfactual world, and attempting to do so would waste the Court's efforts. This Court routinely grants certiorari for the limited purpose of vacating the lower court's judgment without ever finding that certiorari would have been granted had the case not become moot. *E.g.*, *Blue Water Navy Vietnam Veterans Ass'n*, 139 S. Ct. 2740; *Village of Lincolnshire*,

139 S. Ct. 2692; *LG Elecs.*, 572 U.S. 1056; *Eisai*, 564 U.S. 1001; *Hollingsworth*, 562 U.S. 801; *Radian Guar.*, 553 U.S. 1091; *Lehman*, 529 U.S. 1106; *Teel*, 525 U.S. 979; *Nelson*, 442 U.S. at 93-94.

3. Relying only on lower-court precedent, the City next asserts that *Munsingwear* vacatur is reserved for final judgments. Suggestion of Mootness 11-12. No such rule exists in this Court. Nor would such a rule make sense. Unlike interlocutory district court orders, published opinions of the courts of appeals constitute binding precedent if not vacated. The supposed "consensus" (Suggestion of Mootness 11) among the courts of appeals regarding vacatur of interlocutory district court orders is inapposite.

Unsurprisingly, then, this Court has routinely vacated decisions in an interlocutory posture that became moot. That happened in *Radian Guaranty*, 553 U.S. 1091, where the district court had granted summary judgment for the defendant, the court of appeals reversed and remanded, the defendant petitioned for certiorari, and then the plaintiff voluntarily dismissed its claims; this Court then vacated the decision below. *See Whitfield* v. *Radian Guar., Inc.*, 501 F.3d 262, 270-271 (3d Cir. 2007); Suggestion of Mootness at 1-2, *Radian Guar.*, 553 U.S. 1091 (No. 07-834). Likewise in *Alvarez* v. *Smith*, 558 U.S. 87, 90-91, 97 (2009), where the district court had granted a motion to dismiss, the court of appeals reversed, and this Court then vacated after determining that the case had become moot. *See also, e.g.*, *Garza*, 138 S. Ct. at 1793; *Harper ex rel. Harper* v. *Poway Unified Sch. Dist.*, 549 U.S. 1262 (2007).

4. Finally, the City's preemptive opposition to vacatur is itself revealing. As Wells Fargo and *amici* make clear, the practical effects of the Eleventh Circuit's decision could be staggering. Pet. 37; Br. for Amici Curiae Chamber of Commerce of the United States et al. 8-14; Br. for Amici Curiae American Bankers Ass'n et al. 8; Br. for Amicus Curiae Cato Institute 19-22; Br. for Amicus Curiae DRI–The Voice of the Defense Bar 19-21. If the Eleventh Circuit's opinion is not vacated, the City may well stand to benefit as a plaintiff in other cases under the Fair Housing Act or other statutes that encompass similar proximate-cause principles. Having unilaterally insulated that judgment from this Court's review, equity demands the City not be allowed to retain the benefit of that judgment at Wells Fargo's expense. *Garza*, 138 S. Ct. at 1792 ("It would certainly be a strange doctrine that would permit a plaintiff to obtain a favorable judgment, take voluntary action that moots the dispute, and then retain the benefit of the judgment." (internal quotation marks omitted)). That the City would spend so much time protesting vacatur when it claims that vacatur is irrelevant tells the Court all it needs to know about the practical importance of the decision below.

CONCLUSION

The Court should grant the petition for writ of certiorari and vacate the Eleventh Circuit's judgment below.

Respectfully submitted,

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