No. 19-688

IN THE

Supreme Court of the United States

WELLS FARGO & CO., 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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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 Wells Fargo & Co. *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. Wells Fargo does not dispute that the dismissal rendered the case moot and ends all possible litigation on the subject of the City's complaint.

However, the parties disagree about whether the dismissal with prejudice should engender vacatur of the Eleventh Circuit's decision in this case. On February 7, Wells Fargo responded on the vacatur issue.[2] Just days later, on February 10, the same counsels of record as in this case, argued the same issue presented in the Petition to the Ninth Circuit.

Wells Fargo favors vacatur, but does so by arguing that it 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.

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[1] Petitioners are Wells Fargo & Co. and Wells Fargo Bank, N.A. (collectively, "Wells Fargo" or "Bank").

[2] Although Wells Fargo denominated its response a Reply Brief in Support of Certiorari, the reply is actually a response to the City's argument against vacatur, which is the only issue it addresses. As such, after consultation with the Clerk's Office, the City has elected to file this reply in support of its suggestion of mootness. The Wells Fargo "Reply Brief" will be cited here as "Resp. Br." to convey its actual purpose.

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 FHA under the FHA." Pet. App. 86a-87a. With oral argument having now taken place in the Ninth Circuit on the same issue and Wells Fargo's description of potential for the same issue to arise in the Fourth and Seventh Circuits, the Eleventh Circuit's decision, which will have persuasive influence regardless of this Court's action on vacatur, and will therefore only contribute to either harmony or conflict in the circuits, assisting this Court in determining whether it should grant one of the inevitable petitions for certiorari that arises from one of those other cases. It therefore 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.

Wells Fargo relies heavily on the argument that vacatur is the "'established practice of this Court'" when a civil case becomes moot "while on its way here." Wells Fargo Resp. Br. 3 (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 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 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.

Wells Fargo disputes the City's assertion in its Suggestion of Mootness that Wells Fargo 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 throughout the country, only one of which is situated in the Eleventh Circuit. Resp. Br. 6.

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, 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 announced in other cases involving other parties.

Wells Fargo invokes *Camreta* to argue otherwise because vacatur was still ordered even after there was "no realistic possibility that the judgment would spawn any legal consequences." Resp. Br. 8. The City, in contrast, submits that the facts and decision support the City's position. *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 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, a final determination that had been denied after certiorari was granted, rendered the decision a

questionable basis for continuing legal consequence to a party, thereby justifying vacatur.

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.

Wells Fargo also asserts that allowing the issue to remain open in the Eleventh Circuit will encourage further examination of it, just as *Munsingwear* anticipated. Resp. Br. 7. 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.

Finally, Wells Fargo makes the disingenuous claim that leaving the decision in place would benefit the City in future FHA cases. Resp. Br. 4, 11. In support it cites *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018), but *Garza* was unconcerned with future

litigation. Like all instances of *Munsingwear* vacatur, it only expressed concern about the benefit of the judgment between the parties in the case actually brought. There is no reason to speculate about future FHA future litigation that is plainly outside any contemplation the City currently entertains.

B. Wells Fargo Cannot Claim Legal Consequences for Another Existing Case in the Eleventh Circuit.

Wells Fargo asserts that the decision below has potential binding consequences on another case brought by a different party in which Wells Fargo faces litigation over similar issues. The facts do not support the Bank's assertion.

The case referenced, *City of Miami Gardens v. Wells Fargo & Co.*, No. 931 F.3d 1274 (11th Cir. 2019) (per curiam),[3] held that, at the summary judgment stage, Miami Gardens failed to produce evidence of injury and therefore lacked Article III standing. The mandate has not issued on that decision because the city's petition for rehearing en banc remains pending. *See* Order, *City of Miami Gardens v. Wells Fargo & Co.*, No. 18-13152-AA (11th Cir. Sept. 27, 2019). If denied, the litigation is over unless the city petitions for certiorari. If granted, the City's contention is that it was wrongfully denied discovery on the issue of Article III standing that the panel decided *sua sponte*, and the case would return to the District Court for discovery. *See* Petition for Rehearing En Banc, *City of*

[3] Wells Fargo cites the trial level case number for the case in the body of its brief, but explains in a footnote that the Eleventh Circuit had ruled in its favor and, absent reversal of the Eleventh Circuit, instructed the District Court to dismiss for lack of subject-matter jurisdiction. Resp. Br. 6 & n.1. Resp. Br.

Miami Gardens v. Wells Fargo & Co., 18-13152 (11th Cir. Sept. 13, 2019). The proximate-cause pleading standard, then, is unlikely to figure in continued litigation in that case, if it occurs at all, and Wells Fargo cannot claim that the decision at issue here has any immediate legal consequences for it.

C. Vacatur is Inconsequential Outside the Eleventh Circuit.

Outside the Eleventh Circuit, where Wells Fargo claims it is 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.

Wells Fargo 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 it 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 that was actually litigated. *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.), another case Wells Fargo raises to support vacatur, Resp. Br. 6, the parties argued the proximate cause issue presented in the Bank's

petition on February 10, 2020. The Ninth Circuit 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, as both parties cited it, for the strength of its reasoning.

The same non-binding status of the decision below is true of the other cases cited by Wells Fargo that are outside the Eleventh Circuit. *See* Resp. Br. 6-7 (citing cases in the Fourth, Ninth, and Seventh Circuits). *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.").

D. The False Specter of New Litigation Based on the Eleventh Circuit's Decision Does Not Support Vacatur.

Wells Fargo, citing its *amici*, also raises a false specter of "a wave of meritless litigation under the Fair Housing Act and other statutes." Resp. Br. 7. The lack of merits in that assertion was fully briefed in the City's Brief in Opposition, at 33-35, and Wells Fargo makes no response in its "Reply Brief" to the City's arguments that new cases based on the City's allegations cannot meet the statute of limitations unless the Bank engages in new discriminatory lending practices. In fact, the Bank has repeated represented to the U.S. Government and to courts that it has stopped the actions that have brought about these lawsuits, proffering the certification it received from the Department of Justice. *See* Joint Motion for Terminating the Consent Order and Statement of Points and Authorities, *United States v. Wells Fargo Bank, N.A.*, Civ. Action No. 1:12-cv-01150 (D.D.C. Sept. 14, 2016).

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, it regards the Eleventh Circuit's decision as an important expression of the principles it fought for during six years of litigation, even it 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. Pet. App. 86a-87a. 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,

February 13, 2020

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