No. _____

In the Supreme Court of the United States

THE STATE OF ALABAMA, ET AL.,
Petitioners,
v.
ALABAMA STATE CONFERENCE OF THE N.A.A.C.P., ET AL.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has long held that vacatur of a court of appeals decision is warranted when the appeal becomes moot "while on its way" to this Court. *See United States v. Munsingwear*, 340 U.S. 36, 39 (1950). And an interlocutory appeal becomes moot when a district court enters final judgment in the underlying case. *See Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 314 (1998). This Court has accordingly vacated decisions in interlocutory appeals that became moot because the district court entered final judgment after the court of appeals ruled. *See Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 549 U.S. 1262, 1262 (2007).

In this case, the State of Alabama and Alabama's Secretary of State filed an interlocutory appeal from a district court ruling that the Voting Rights Act abrogated the State's sovereign immunity. More than two years later, a divided Eleventh Circuit panel affirmed, and two days after that, the appeal became moot when the district court ruled on the merits for the State. Though the Eleventh Circuit agreed that the appeal was moot, the court declined to vacate its decision.

This case presents the following question:

Whether the Eleventh Circuit's unreviewed and unreviewable decision should be vacated.

PARTIES AND AFFILIATES

The petitioners are the State of Alabama and John H. Merrill, in his official capacity as Secretary of State of the State of Alabama.

The respondents are the Alabama State Conference of the N.A.A.C.P., Sherman Norfleet, Clarence Muhammad, Curtis Travis, and John Andrew Harris.

RELATED PROCEEDINGS

United States District Court (M.D. Ala.):

Ala. Conf. of the NAACP v. Alabama, No. 2:16-CV-731-WKW (Aug. 31, 2017)

Ala. Conf. of the NAACP v. Alabama, No. 2:16-CV-731-WKW (Feb. 5, 2020)

United States Court of Appeals (11th Cir.):

Alabama v. Ala. Conf. of the NAACP, No. 17-14443 (May 14, 2020)

Alabama v. Ala. Conf. of the NAACP, No. 17-14443 (Feb. 3, 2020)

Alabama v. Ala. Conf. of the NAACP, No. 17-14443 (Oct. 29, 2020)

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PETITION FOR WRIT OF CERTIORARI

The Eleventh Circuit recently decided a critical question of federalism and state sovereignty that has divided federal courts. Though the Voting Rights Act contains no express private right of action, a divided panel held that the VRA makes it unmistakably clear that Congress intended to abrogate state sovereign immunity, thereby allowing private parties to sue States directly and to sue State officials for relief beyond that allowed by *Ex parte Young*. Before Alabama could seek further review of that decision, the State's interlocutory appeal became moot when the State prevailed on the merits of the action after trial.

The State thus asked the Eleventh Circuit to vacate its unreviewed and unreviewable decision to "clear[] the path for future relitigation of the issues between the parties and eliminate[] a judgment, review of which was prevented through happenstance." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950). Despite "the duty of the appellate court" to do just that, *id.*, a divided panel declined, App. 1a. The majority gave no reason for why it did not vacate, but Judge Branch provided several reasons why it should have. *See* App. 2a-3a. First, the decisions "would spawn immense legal consequences" not just for Alabama, but for Florida and Georgia too. App. 2a. Second, failure to vacate treats Alabama "as if there has been a review" of this issue when, in fact, the appellate review process has been cut short. App. 3a (citing *Camreta v. Greene*, 563 U.S. 692, 712 (2011)). And, finally, resolving this abrogation issue for the Circuit "is a legally consequential decision." *Id.* (quoting *Camreta*, 563 U.S. at 712).

In short, this is exactly the sort of case that demands vacatur. "A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, … ought not in fairness be forced to acquiesce in that ruling." *Camreta*, 563 U.S. at 712 (internal quotation marks omitted). And that principle should apply with special force when, as here, the unreviewed ruling dramatically alters the "constitutionally mandated balance of power between the States and the Federal Government." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (internal quotation marks omitted). To reset that balance until the abrogation issue can be fully litigated, this Court should grant the State's petition and vacate the Eleventh Circuit's abrogation decision.

OPINIONS BELOW

The district court's memorandum opinion and order denying the State's motion to dismiss (App. 38a-62a) is reported at 264 F.Supp.3d 1280. The court of appeals panel's opinion affirming that decision (App. 5a-37a) is reported at 949 F.3d 647. The panel's order dismissing the State's appeal as moot but denying the request for vacatur (App. 1a-4a) is reported at 806 F. App'x 975. The order of the en banc court of appeals denying rehearing regarding vacatur (App. 63a-64a) is unreported.

JURISDICTION

The district court had federal question jurisdiction and civil rights jurisdiction. *See* 28 U.S.C. §§ 1331, 1343. The court of appeals issued the opinion for which the State seeks vacatur on February 3, 2020. App. 5a. The State filed a motion to vacate the decision and dismiss the appeal as moot, which was granted in part and denied in part on May 14, 2020. App. 1a. The State filed a timely petition for

rehearing, which was denied on October 29, 2020. App. 63a. This petition is timely filed within 90 days of that date. This Court has jurisdiction under 28 U.S.C. § 1254(1) and may consider vacatur after an underlying case has become moot. *See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 21-22 (1994).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are set forth in the appendix to this petition. App. 65a-68a.

STATEMENT

This petition is about whether to vacate an unreviewable decision by the Eleventh Circuit holding that the sovereign immunity of the State of Alabama has been abrogated by the VRA. Just two days after the divided panel ruled, the State's interlocutory appeal became moot when the district court entered final judgment on the merits in favor of the State. The Eleventh Circuit, despite agreeing that the appeal was moot, refused to vacate its decision.

1. Alabama elects its appellate judges—those serving on the Supreme Court, Court of Criminal Appeals, and Court of Civil Appeals—through statewide elections. Candidates run in partisan elections for numbered places or for the position of Chief Justice of the Supreme Court. The staggered terms are for six years and mid-term vacancies are filled by gubernatorial appointment.

2. On September 7, 2016, Respondents—the Alabama State Conference of the NAACP, Sherman Norfleet, Clarence Muhammad, Curtis Travis, and John Andrew Harris—sued the State of Alabama and its Secretary of State in the District Court for the Middle

District of Alabama. Respondents argued that the votes of African Americans are diluted because appellate judges are not elected from single-member districts. Thus, they claimed that electing appellate judges statewide violates § 2 of the Voting Rights Act (42 U.S.C. § 10501), as well as the Fourteenth and Fifteenth Amendments to the Constitution.

The State moved to dismiss on a variety of grounds including standing, sovereign immunity, and the merits of the underlying claims. As particularly relevant here, the State argued that sovereign immunity barred the § 2 claim against the State because the VRA lacked the unmistakably clear statement required to abrogate the State's sovereign immunity. *See, e.g.*, *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by makings its intention unmistakably clear in the language of the statute.").

The district court denied the State's motion to dismiss on August 31, 2017, holding that Congress abrogated State sovereign immunity in passing § 2 pursuant to its enforcement powers under either the Fourteenth or Fifteenth Amendments. App. 56a-62a.

3. The State promptly filed an interlocutory appeal of the abrogation issue in September 2017. Briefing concluded in February 2018. Argument was set for September 2018, then later rescheduled and held in December 2018.

4. While that appeal was pending, the case went to trial in the district court. Irrespective of the appeal, the litigation would have proceeded against the Secretary of State, and Respondents sought "an expeditious trial schedule" given the then-forthcoming 2018 elections.

5. On February 3, 2020, a divided panel of the court of appeals affirmed the district court's ruling that § 2 abrogates State sovereign immunity. App. 5a-19a. Judge Branch dissented, concluding that "Congress did not unequivocally abrogate state sovereign immunity under Section 2 of the [VRA]." App. 20a. In her view, Congress had not made "its intention *unmistakably clear in the language of the statute*." App. 21a, 23a (quoting *Dellmuth*, 491 U.S. at 228).

6. Just two days later, on February 5, 2020, the district court entered final judgment on the merits of the case, concluding that the State's method of selecting judges did not violate § 2 or the Constitution. *Ala. State Conf. of the NAACP v. Alabama*, __F.Supp.3d__, No. 2:16-cv-731-WKW, 2020 WL 583803 (M.D. Ala. Feb. 5, 2020). This decision thus mooted the interlocutory appeal regarding the State's sovereign immunity before either the en banc court of appeals or this Court could consider the panel majority's decision. *See, e.g.*, *Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 549 U.S. 1262, 1262 (2007).

The State accordingly moved to dismiss its interlocutory appeal as moot and to vacate the panel decision. But although all three panel members agreed that the appeal was moot, two opted (without explanation) to deny the State's request for vacatur. App. 1a-2a.

Judge Branch dissented from the majority's decision not to vacate. She explained that the majority was wrong because (1) "not vacating the panel opinion would spawn immense legal consequences for Florida, Georgia, and Alabama;" (2) not vacating "treat[s] [the opinion] as if there has been a review when, as it stands," it has not been and cannot now be reviewed; and (3) the abrogation of State sovereign immunity "is

certainly a legally consequential decision," further counseling that the panel should have vacated its unreviewable decision. App. 2a-4a.

7. The State petitioned for rehearing by the en banc court of appeals. That petition was denied on October 29, 2020. App. 63a-64a.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari to vacate the Eleventh Circuit's consequential and unreviewable decision. The decision implicates a key question of federalism and—as binding precedent throughout the Circuit—has profound effects on the sovereignty of not just Alabama, but Florida and Georgia as well. Although the Voting Rights Act provides no express private right of action, the Eleventh Circuit held that the text of that statute makes it unmistakably clear that Congress intended to abrogate State sovereign immunity, allowing private parties to sue States and State officials directly under § 2 (42 U.S.C. § 10501). The State understandably had an interest in seeking further review of this decision. But the State's interlocutory appeal became moot just two days after the divided panel ruled, when the district court entered final judgment in favor of the State following a trial.

The State thus asked the panel to vacate its unreviewed and now-unreviewable decision to "clear[] the path for future relitigation of the issues between the parties and eliminate[] a judgment, review of which was prevented through happenstance." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950). Though "the duty of the appellate court" is to do just that, *id.*, two members of the panel refused (without explanation) to vacate the decision, App. 2a. The en banc court of appeals likewise summarily denied the State's petition for rehearing. App. 63a-64a.

The divided panel's unreviewable, precedent-setting opinion has already created (and will continue to create) significant consequences for the State. Indeed, just last year, the State was subjected to preliminary and permanent injunctions in litigation regarding COVID-19 and the 2020 elections. *Merrill v. People First of Ala.*, 141 S. Ct. 25 (2020) (staying permanent injunction); *People First of Ala. v. Merrill*, __F.Supp.3d__, No. 20-cv-00619, 2020 WL 4747641, at *3 (N.D. Ala. Aug. 17, 2020) (holding that State's immunity was abrogated by the VRA (citing *Ala. State Conf. of the NAACP v. Alabama*, 949 F.3d 647, 655 (11th Cir. 2020)). And now that the State and its officials may be sued directly, they may soon face the prospect of relief that goes beyond the prospective injunctive relief that is available in suits brought under *Ex parte Young*.

The Eleventh Circuit's failure to vacate its abrogation decision forces Alabama (and Florida and Georgia) to face claims "as if there has been a review" of this issue when, in fact, the appellate review process has been cut short. App. 3a (citing *Camreta v. Greene*, 563 U.S. 692, 712 (2011)). Vacatur exists and is routinely used to prevent such unfairness. This Court therefore should grant certiorari and vacate the Eleventh Circuit's decision.

I. The Interlocutory Appeal on the Merits Is Now Moot.

Article III of the U.S. Constitution limits federal courts to deciding only "actual, ongoing controversies." *Honig v. Doe*, 484 U.S. 305, 317 (1988). "[W]hen the issues presented are no longer 'live,'" *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980), and "it is impossible for a court to grant any effectual relief whatever," *Chafin v. Chafin*, 568 U.S. 165, 172 (2013),

the controversy becomes moot and the court thus loses jurisdiction. When a district court enters a final judgment before an interlocutory appeal has concluded, the interlocutory appeal merges into the final judgment, thus mooting the interlocutory appeal and requiring dismissal of the appeal. *See Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 549 U.S. 1262, 1262 (2007); *see also Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 314 (1998).

Here, the State's interlocutory appeal became moot when the district court entered a final judgment in its favor. Because the district court's interlocutory order merged with its final decree, the merits of this appeal became moot. Each member of the Eleventh Circuit panel agreed, summarily dismissing the appeal as moot. App. 2a. Thus, neither the en banc court of appeals nor this Court had an opportunity to pass upon the merits, and the State lost its ability to vindicate its sovereign immunity from suit.

The State, through no fault of its own, was deprived of appellate review of the panel's decision. And though this Court now lacks jurisdiction to consider the underlying issue of abrogation, the Court retains jurisdiction to vacate the panel's decision. *See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 21-22 (1994). As explained below, vacatur is proper.

II. Vacatur Is the Proper Remedy Under This Court's Precedent.

When—as in this case—an appeal becomes moot "while on its way [to this Court] or pending [this Court's] decision on the merits," the "established practice of the Court … is to reverse or vacate the judgment below and remand with a direction to dismiss."

United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950); *see also, e.g.*, *id.* at 39 n.2 (collecting cases illustrating this to be "the standard disposition in federal civil cases"); *N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525, 1526 (2020) (per curiam); *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (per curiam); *Alvarez v. Smith*, 558 U.S. 87, 94-97 (2009); *Burke v. Barnes*, 479 U.S. 361, 365 (1987); *Great W. Sugar Co. v. Nelson*, 442 U.S. 92, 93 (1979) (per curiam); *Duke Power Co. v. Greenwood County*, 299 U.S. 259, 267 (1936) (per curiam).

Vacatur is the longstanding "normal rule" when mootness occurs on appeal, *Camreta v. Greene*, 563 U.S. 692, 713 (2011), and the Court has applied the rule since at least as early as the late 1800s, *see S. Spring Hill Gold Min. Co. v. Amador Medean Gold Min. Co.*, 145 U.S. 300, 301-02 (1892) (reversing lower court's judgment where Article III jurisdiction was lost pending appeal); *cf. Snow v. United States*, 118 U.S. 346, 354-55 (1886) (vacating this Court's own judgment in a prior case where jurisdictional issue relating to appeals from territorial courts came to this Court's attention "in order that the reported decision may not appear to be a precedent for the exercise of jurisdiction by this court in a case of the kind"). "Congress has prescribed a primary route, by appeal as of right and certiorari, through which parties may seek relief from the legal consequences of judicial judgments," and "*Munsingwear* establishes that the public interest is best served by granting relief when the demands of 'orderly procedure' cannot be honored" through no fault of the party seeking vacatur. *Bancorp*, 513 U.S. at 27 (quoting *Munsingwear*, 340 U.S. at 41). Accordingly, this Court has explained that vacatur is "the duty of the appellate court" where a

decision becomes moot before the party that lost below can seek full appellate review. *Munsingwear*, 340 U.S. at 40 (quoting *Duke Power Co.*, 299 U.S. at 267). This "course of action … has been followed in countless cases in this Court." *Great W. Sugar Co.*, 442 U.S. at 93.

Accordingly, the Court routinely cites *Munsingwear* when granting petitions for writs of certiorari and summarily vacating decisions of the lower courts. *See, e.g.*, *Beers v. Barr*, 140 S. Ct. 2758 (2020); *Bank of Am. Corp. v. City of Miami*, 140 S. Ct. 1259 (2020); *Dep't of Com. v. U.S. Dist. Ct. for S. Dist. of N.Y.*, 139 S. Ct. 2779 (2019); *Blue Water Navy Vietnam Veterans Ass'n, Inc. v. Wilkie*, 139 S. Ct. 2740 (2019); *Vill. of Lincolnshire v. Int'l Union of Operating Eng'rs Local 399*, 139 S. Ct. 2692 (2019); *Berninger v. F.C.C.*, 139 S. Ct. 453 (2018); *Niang v. Tomblinson*, 139 S. Ct. 319 (2018); *PNC Bank Nat'l Ass'n v. Secure Axcess, LLC*, 138 S. Ct. 1982 (2018); *Trump v. Hawaii*, 138 S. Ct. 377 (2017); *Ivy v. Morath*, 137 S. Ct. 414 (2016); *Amanatullah v. Obama*, 575 U.S. 908 (2015).

Indeed, the Court did so in four cases just this week. *See, e.g.*, *Planned Parenthood v. Abbott*, No. 20-305, 2021 WL 231539 (U.S. Jan. 25, 2021); *Trump v. Crew*, No. 20-330, 2021 WL 231541 (U.S. Jan. 25, 2021); *Trump v. District of Columbia*, No. 20-331, 2021 WL 231542 (U.S. Jan. 25, 2021); *Att'y Gen. of Tenn. v. Adams & Boyle, P.C.*, No. 20-482, 2021 WL 231544 (U.S. Jan. 25, 2021).

Many of these summary rulings vacated appellate decisions in a posture identical to that presented here—where mootness occurred *after* the court of appeals entered judgment. *See, e.g.*, *Amanatullah,* 575 U.S. at 908 (acknowledging mootness occurring "[s]ubsequent to decisions of the court below" and

vacating with a citation to *Munsingwear*). Although these summary dispositions typically do not include discussion of the mootness timeline, Wright & Miller have collected examples of such cases. *See* 13C Charles A. Wright et al., *Federal Practice & Procedure* § 3533.10.3, at n.6 (3d ed. Oct. 2020 Update).[1]

Vacatur of otherwise unreviewable decisions "ensures that 'those who have been prevented from obtaining the review to which they are entitled [are] not … treated as if there had been a review." *Camreta*, 563 U.S. at 712 (quoting *Munsingwear*, 340 U.S. at 39). In other words, "[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *Bancorp*, 513 U.S. at 25. Vacatur thus "'clears the path for future relitigation' by eliminating a judgment the loser was stopped from opposing on direct review." *Arizonans for Off. English v. Arizona*, 520 U.S. 43, 71 (1997) (quoting *Munsingwear*, 340 U.S. at 40). The Court has cited this logic to support vacatur even where the appellate judgment arose from an interlocutory appeal that became moot due to the entry of final judgment in the trial court, *see Harper*, 549 U.S. at 1262; *Dillon v. Alleghany Corp.*, 499 U.S. 933, 933 (1991), and where the court of appeals below had expressly refused to vacate its own decision, *see Eisai Co., Ltd. v.*

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[1] *See, e.g.*, *Dep't of Commerce*, 139 S. Ct. at 2779; *Gray v. Wilkie*, 139 S. Ct. 2764, 2764 (2019); *Blue Water*, 139 S. Ct. at 2749; *Lincolnshire*, 139 S. Ct. at 2692; *Robertson v. United States*, 139 S. Ct. 1543, 1543 (2019); *PNC Bank*, 138 S. Ct. at 1982; *Amanatullah*, 575 U.S. at 908; *Eisai*, 564 U.S. at 1001; *Hollingsworth v. U.S. Dist. Ct. for N. Dist. of Cal.*, 562 U.S. 801, 801 (2010).

Teva Pharms. USA, Inc., 564 U.S. 1001, 1001 (2011) (vacating decision of Federal Circuit); *Dillon*, 499 U.S. at 933.

Vacatur of the Eleventh Circuit's unreviewable decision is likewise warranted here for at least three reasons.

A. Mootness occurred by happenstance.

"Vacatur is in order when mootness occurs through happenstance—circumstances not attributable to the parties …." *Arizonans for Off. English*, 520 U.S. at 71. Such is the case here. The event causing mootness was the district court entering final judgment in favor of the State more than two years after the State filed its appeal and just two days after the Eleventh Circuit's abrogation decision. The timing of the district court's decision is not attributable to the State. Nor does the fact that proceedings continued in the district court during the pendency of the interlocutory appeal alter this conclusion, as the same claims brought against the State would have ultimately proceeded against the Secretary of State regardless of the outcome of this appeal. Thus, this case is unlike those where the party seeking vacatur voluntarily settled or chose not to appeal, *see Bancorp*, 513 U.S. at 25-26, because here the State never abandoned review of the adverse ruling. Accordingly, vacatur is appropriate here because "the vagaries of circumstance" caused the State's interlocutory appeal to become moot. *Id.* at 25.

B. The Eleventh Circuit's decision creates significant legal consequences for three States and their officials.

"The point of vacatur is to prevent an unreviewable decision 'from spawning any legal consequences,' so that no party is harmed by what [this Court] ha[s] called a 'preliminary adjudication.'" *Camreta*, 563

U.S. at 713 (quoting *Munsingwear*, 340 U.S. at 40-41). In *Camreta*, this Court considered a decision of the Ninth Circuit that held that defendants—who had interrogated a minor at school in the absence of a warrant, court order, exigent circumstances, or parental permission—enjoyed qualified immunity because of the lack of clearly established law, but then went on to hold that their conduct had violated the Fourth Amendment. *Id.* at 699-700. However, after this Court granted certiorari, the case became moot because the plaintiff moved from Oregon to Florida and was nearing graduation, thus "fac[ing] not the slightest possibility of being seized in a school in the Ninth Circuit's jurisdiction." *Id.* at 710. This Court vacated the Ninth Circuit's decision because "a constitutional ruling in a qualified immunity case is a legally consequential decision" and mootness prevented full review. *Id.* at 713.

Here, it is indisputable that a decision holding that a sovereign State's immunity from suit has been abrogated is "legally consequential." *Id.* Unlike the qualified immunity at issue in *Camreta*, State sovereign immunity is a form of absolute immunity. The States enjoy "immunity from suit" as "a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States.)" *Alden v. Maine*, 527 U.S. 706, 713 (1999). Although sometimes mistakenly referred to as "Eleventh Amendment immunity," the States' sovereign immunity "neither derives from, nor is limited by, the terms of the Eleventh Amendment." But regardless of origin, "immunity from private suits [is] central to sovereign dignity." *Id.* Put another way, "[t]he ultimate guarantee of the Eleventh Amendment is that nonconsenting

States may not be sued by private individuals in federal court." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001).

Abrogation of sovereign immunity not only subjects the State to the indignity of being haled into court against its will, but also has practical consequences such as subjecting the State to discovery, injunctive and monetary relief, and even contempt. *See Alabama v. Pugh*, 438 U.S. 781, 782 (1978). Likewise, though State officials may be forced to subject to litigation and a court's injunction under *Ex parte Young*, 209 U.S. 123 (1908), abrogation removes the limitations of that doctrine—thus allowing otherwise-unavailable retrospective and monetary relief against State officials.

Indeed, the dramatic consequences for States and their officials are precisely why federal courts do not assume they have jurisdiction over private party claims against States unless Congress's intent to abrogate State sovereign immunity is "unmistakably clear in the language of the statute" underlying plaintiff's claim. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). Mere prohibitions on State conduct do not signal abrogation. *See* App. 27-28a, 37a (Branch, J., dissenting) (citing *Dellmuth*, 491 U.S. at 232).

The State has already faced legal consequences traceable to the Eleventh Circuit's unreviewed decision. In *People First of Alabama v. Merrill*, the district court allowed § 2 claims challenging voting procedures in the context of the COVID-19 pandemic to proceed directly against the State even though the claims could not proceed against the Secretary of State for lack of standing. __F.Supp.3d__, No. 2:20-cv-00619, 2020 WL 4747641, at *3 (N.D. Ala. Aug. 17, 2020)

(holding that State's immunity was abrogated by the VRA) (citing *Ala. State Conf. of the NAACP v. Alabama*, 949 F.3d 647, 655 (11th Cir. 2020)); *see also People First of Ala. v. Merrill*, 467 F.Supp.3d 1179, 1204-05 (N.D. Ala. 2020) (same). That case consumed considerable time and resources and subjected the State (in the span of less than six months) to a preliminary injunction and a full trial on the merits resulting in a permanent injunction—both of which required emergency appellate review that culminated in stays from this Court. *Merrill v. People First of Ala.*, 141 S. Ct. 25, 25 (staying permanent injunction of voting procedures for November 2020 general election); *Merrill v. People First of Ala.*, 141 S. Ct. 190 (2020) (staying preliminary injunction of voting procedures for July 2020 primary runoff election).

Lastly, the divided panel's unreviewed decision spawns legal consequences not only for the State of Alabama, but also for the States of Florida and Georgia. This new, unreviewed Eleventh Circuit precedent subjects these States to the same significant consequences faced by Alabama, though they never had even Alabama's limited opportunity to litigate the abrogation issue. The Eleventh Circuit's decision thus creates "immense legal consequences for Florida, Georgia, and Alabama" and by any measure constitutes "a legally consequential decision." App. 3a (Branch, J., dissenting). Vacatur by this Court is warranted.

C. The equities favor vacatur.

In conjunction with the significant legal consequences explained above, the equities necessarily favor vacatur. Vacatur would advance the public interest, because "Congress has prescribed a primary route, by appeal as of right and certiorari, through

which parties may seek relief from the legal consequences of judicial judgments," and "*Munsingwear* establishes that the public interest is best served by granting relief when the demands of orderly procedure cannot be honored" through no fault of the party seeking vacatur. *Bancorp*, 513 U.S. at 27 (quoting *Munsingwear*, 340 U.S. at 41). Other factors favoring vacatur include: the opinion's constitutional- and immunity-based rulings, *Camreta*, 563 U.S. at 713; the opinion's "broad implications," *Clarke v. United States*, 915 F.2d 699, 700 (D.C. Cir. 1990) (en banc); the opinion's creation of "federalism concern[s]," *Arizonans for Off. English*, 520 U.S. at 75-80; and the State's status as "a repeat player before the courts," *Motta v. Dist. Dir. of I.N.S.*, 61 F.3d 117, 118 (1st Cir. 1995); *see also Arevalo v. Ashcroft*, 386 F.3d 19, 20-21 (1st Cir. 2004); *Hartford Cas. Ins. Co. v. Crum & Forster Specialty Ins. Co.*, 828 F.3d 1331, 1335 (11th Cir. 2016). Therefore, even if precedent does not automatically require vacatur, equity clearly favors it.

CONCLUSION

The Court should grant the State's petition for a writ of certiorari and vacate the judgment of the court of appeals. Alternatively, the Court should grant the petition and order briefing on whether the Eleventh Circuit had discretion to decline to vacate its decision under the circumstances presented here.

Respectfully submitted,

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