No. 17-1428

In The
Supreme Court of the United States

NDIOBA NIANG and TAMEKA STIGERS,

Petitioners,

v.

BRITTANY TOMBLINSON, in her official capacity as Executive Director of the Missouri Board of Cosmetology and Barber Examiners, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT SUGGESTION OF MOOTNESS AND JOINT MOTION TO VACATE THE JUDGMENT OF THE COURT OF APPEALS

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Pursuant to Rules 15.8 and 21.2(b) of the Rules of this Court, Petitioners and Respondents respectfully jointly suggest the mootness of this case and jointly move that the Court vacate the judgment of the United States Court of Appeals for the Eighth Circuit because of new legislation.

Petitioners filed their petition for writ of certiorari on April 11, 2018. Subsequently, in May and June 2018, the Missouri General Assembly passed and the Governor of Missouri signed into law H.B. 1500, which significantly amends the state's licensure laws for the hair braiders at issue in this action.[1] These amendments took effect on August 28, 2018. The amendments exempt hair braiders from cosmetology and barbering licensing by creating a separate registration process for hair braiders. Mo. Rev. Stat § 329.275 (2018). This new registration for hair braiders is now in the process of being implemented. *See* Missouri Division of Professional Regulation, Board of Cosmetology and Barber Examiners, Frequently Asked Questions (Aug. 16, 2018), https://pr.mo.gov/boards/cosmetology/FrequentlyAskedQuestions8-16-18.pdf.

Because this civil rights suit challenged Missouri's previous requirement that hair braiders obtain a cosmetology or barber license to braid hair for compensation—a requirement no longer in effect—this case is

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[1] *See* H.B. 1500, 99th Gen. Assemb., 2d Reg. Sess. (Mo. 2018), https://www.house.mo.gov/billtracking/bills181/hlrbillspdf/5205S.12T.pdf. In addition, H.B. 1719 also implements the same braiding amendments as H.B. 1500. *See* H.B. 1719, 99th Gen. Assemb., 2d Reg. Sess. (Mo. 2018).

now moot. Because the mootness arises from the State of Missouri's unilateral action in passing this legislation, and because it deprives Petitioners of an opportunity to seek certiorari, the Eighth Circuit's opinion below should be vacated. The Court's "'established practice'" in these circumstances is to "'vacate the judgment below and remand with a direction to dismiss.'" *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (quoting *United States v. Munsingwear Inc.*, 340 U.S. 36, 39 (1950)).

SUMMARY OF ARGUMENT

This case presents the Court with a familiar situation. New legislation has taken effect which has mooted a pending petition for certiorari. The Court's longstanding practice in this circumstance—which it again followed this past term—is to vacate the lower court's decision and remand with directions to dismiss. This case squarely aligns with this Court's prior practice and does not present any novel questions or reasons for exception. As a result, this Court should continue its established practice and grant Petitioners' motion for vacatur.

This case became moot on August 28, 2018, the effective date for H.B. 1500. This bill thoroughly reforms the statutory scheme challenged in this litigation. It eliminates Missouri's requirement that hair braiders obtain a cosmetology or barbering license in order to braid hair for compensation, which is the requirement

challenged in this case. Under the new law, braiders are instead subject to a separate, far less burdensome registration scheme designed specifically for hair braiders. Because the challenged statutory provisions no longer require Petitioners to get a cosmetology or barber license in order to braid hair in Missouri, this case is now moot. The Attorney General of Missouri stated earlier this month that this case "will become moot when the new law, passed by the legislature this year, is implemented," and so it waived the State's response to the Petition for Certiorari in this Court. Press Release, AG Hawley Statement on Hair Braiders Supreme Court Case (Aug. 15, 2018), https://ago.mo.gov/home/breaking-news/ag-hawley-statement-on-hair-braiders-supreme-court-case.

Because this case has become moot, vacatur is both warranted and justified. When, as here, a case becomes moot while awaiting review, the Court's established practice is to vacate the lower court's decision and remand with directions to dismiss. But reasons of equity also make vacatur necessary. Mootness frustrates Petitioners' right to have their appeal heard; it is therefore crucial for the Court to ensure that the Eighth Circuit's opinion—which now cannot be reviewed—does not prejudice the parties or spawn further legal consequences. In addition, it would be unjust to bind Petitioners to a judgment that certain Missouri statutes can be enforced against them when that judgment is now unappealable because the State of Missouri unilaterally amended those statutes following that judgment. This Court should therefore vacate the

Eighth Circuit's decision below and remand the case with directions to dismiss.

ARGUMENT

I. Missouri's new registration requirement for hair braiders renders this case moot.

A case becomes moot when, as here, the issues it raises are "no longer live or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (internal quotation marks omitted). Issues in controversy are eliminated when a legislature substantially amends or repeals the statutes from which relief was requested. *See United States v. Microsoft Corp.*, 138 S. Ct. 1186, 1187–88 (2018); *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477–78 (1990); *U.S. Dep't of Treasury v. Galioto*, 477 U.S. 556, 559 (1986) (holding a challenge to a firearms law moot after Congress amended the statute's language); *Kremens v. Bartley*, 431 U.S. 119, 126, 129 (1977) (holding that Pennsylvania's enactment of a statute that "substantially alter[ed]" its voluntary admission procedures mooted plaintiffs' claims); *Diffenderfer v. Cent. Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412, 414–15 (1972) (per curiam) (holding petitioner's case moot following Florida's repeal of a challenged religious tax-exemption law); *see also Uqdah v. D.C. Bd. of Cosmetology*, No. 92-7022, 1993 U.S. App. LEXIS 14569 (D.C. Cir. Apr. 30, 1993) (vacating mooted district court decision regarding constitutionality of requiring braiders

to obtain cosmetology license following D.C.'s revision of challenged law).

Microsoft, this Court's most recent case involving mootness due to legislative amendment, is instructive. There, federal law enforcement obtained a warrant under 18 U.S.C. § 2703 to require Microsoft to disclose electronic communications within its "control" that were associated with a customer's account. 138 S. Ct. at 1187. Microsoft determined that it stored the information overseas but believed § 2703 did not authorize extraterritorial warrants and therefore moved to quash the warrant. *Id.* After oral arguments before this Court about whether § 2703 warrants require disclosure of information stored abroad, Congress amended § 2703 to make clear that electronic information located outside of the United States could still be in a company's "control." *Id.* at 1187–88. The Government then obtained a new warrant pursuant to the amended law, and Microsoft dropped its objection. This Court subsequently declared that no live dispute remained between the parties and that the case had become moot. It then vacated the lower court's judgment and remanded with instructions to dismiss the case. *Id.* at 1188.

This case is analogous to those in which the court has determined a petition to be moot. Here, Petitioners, who are hair braiders, sought prospective relief under the Fourteenth Amendment against Missouri's requirement that they acquire a cosmetology or barbering license to braid hair. Attaining a cosmetology or barbering license entails completing a 1,500- or

1,000-hour curriculum, respectively; passing written and practical exams; and paying a license application fee. *See* Mo. Rev. Stat. §§ 328.070–.080, 329.045, 329.050, 329.100; Mo. Code Regs. Ann. tit. 20, § 2085-10.010. Completion of these requirements is not only very time consuming, but also quite expensive; the cost of tuition at a Missouri cosmetology or barber school averages nearly $12,000 and can cost as much as $21,450. Pet. App. 95-96. The parties disputed the degree to which those requirements were relevant to hair braiding. Pet. App. 7.

However, just as Congress' statutory amendments removed the issue in controversy in *Microsoft*, the Missouri General Assembly's enactment of H.B. 1500 resolves the issues presented by this case. The H.B. 1500 amendments exempt hair braiders from the requirement to acquire a cosmetology or barbering license. Instead, under the new law, hair braiders need only register, pay a small fee, and watch a four-to-six-hour instructional video. Mo. Rev. Stat. § 329.275 (2018). Consequently, Missouri's amendments to the licensing laws are so substantial that the laws subject to challenge below effectively no longer exist.

II. Longstanding practice and equity dictate that this Court should vacate the Eighth Circuit's decision and remand with a direction to dismiss.

This Court can vacate any judgment lawfully brought before it for review and can remand the cause

and direct entry of appropriate judgment "as may be just under the circumstances." 28 U.S.C. § 2106. As explained in part A, this case squarely fits within both recent and longstanding precedent for vacating a lower court's decision when a case has become moot while on appeal. But beyond following "established practice," vacatur is warranted here for two additional reasons. As explained in part B, mootness prevents Petitioners from being able to fully exercise their right to appeal and has prevented this Court from giving the Eighth Circuit's decision appropriate review, meaning that "preliminary" decision may improperly "spawn[] . . . legal consequences." *Munsingwear*, 340 U.S. at 40–41. This is particularly important here, because the constitutionality of regulations restricting African-style hair braiding continues to be actively litigated nationwide, with outcomes differing among the lower courts. Finally, as explained in part C, mootness was a consequence of the unilateral action of the Missouri General Assembly and not the Petitioners.

A. This case is procedurally analogous to numerous precedents in which this Court vacated the lower court's judgment after a case became moot while on appeal.

When, as here, a federal civil case becomes moot while on appeal to this Court, the Court's " 'established practice' " is to " 'vacate the judgment below and remand with a direction to dismiss.' " *Azar*, 138 S. Ct. at 1792 (quoting *Munsingwear*, 340 U.S. at 39); *see also, e.g.*, *Microsoft*, 138 S. Ct. at 1188 (vacating and

remanding with directions to dismiss the case, which became moot while on appeal); *LG Elecs., Inc. v. Inter-Digital Commc'ns, LLC*, 572 U.S. 1056 (2014) (same); *Eisai Co. v. Teva Pharms. USA, Inc.*, 564 U.S. 1001 (2011) (same); *Hollingsworth v. U.S. Dist. Ct. N. Dist. of Cal.*, 562 U.S. 801 (2010) (same); *Alvarez v. Smith*, 558 U.S. 87, 97 (2009) (same); *Radian Guar., Inc. v. Whitfield*, 553 U.S. 1091 (2008) (same); *Lehman v. MacFarlane*, 529 U.S. 1106 (2000) (same); *Teel v. Khurana*, 525 U.S. 979 (1998); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71–72, 80 (1997) (same); *Burke v. Barnes*, 479 U.S. 361, 365 (1987) (same); *Great W. Sugar Co. v. Nelson*, 442 U.S. 92, 93–94 (1979) (same); *Duke Power Co. v. Greenwood Cty.*, 299 U.S. 259, 267 (1936) (explaining that it is the "duty of the appellate court" to vacate and remand with directions to dismiss when a case becomes moot while on appeal).

This practice includes regularly granting certiorari in order to vacate the judgment and remand with instructions to dismiss the case as moot. *See*, *e.g.*, *LG Elecs.*, 572 U.S. at 1056; *Eisai*, 564 U.S. at 1001; *Hollingsworth*, 562 U.S. at 801; *Radian Guar.*, 553 U.S. at 1091; *Lehman*, 529 U.S. at 1106; *Teel*, 525 U.S. at 979. Most recently, in *Azar*, a pregnant minor, Jane Doe, sought prospective relief from the Office of Refugee Resettlement's policy that prohibited shelter personnel from facilitating an abortion without the director's approval. 138 S. Ct. at 1791. After the D.C. Circuit addressed Doe's claim for relief, but before the government could file a petition in this Court, Doe obtained an abortion. *Id.* at 1792. Recognizing that Doe's

claim became moot after the abortion, the Court followed "established practice" by vacating the D.C. Circuit's order and remanding with instructions to dismiss the case. *Id.* at 1793.

Likewise, Petitioners here argued that Missouri's former cosmetology and barbering licensure laws were unconstitutional as applied to African-style hair braiders. After the Eighth Circuit affirmed judgment for the State, but before this Court could review Petitioners' appeal, Missouri passed a new law that allows Petitioners to complete a relatively simple registration process designed for hair braiders, rather than the more onerous licensing requirements for cosmetologists or barbers. With Petitioners' claims for declaratory and injunctive relief now moot, this Court should again follow "established practice" and vacate the Eighth Circuit's opinion and remand with directions to dismiss.

B. Mootness extinguishes Petitioners' ability to have their appeal heard, which will allow the Eighth Circuit's decision to escape proper review and improperly serve as binding precedent unless it is vacated.

It is "normal" for the Court to vacate a lower court's decision when mootness prevents a party's appeal from being heard. *Camreta v. Greene*, 563 U.S. 692, 698 (2011). The Court uses the equitable remedy of vacatur in such circumstances to stop an unreviewable

decision "from spawning any legal consequences," and to ensure that no one is prejudiced "by a decision which . . . was only preliminary." *Munsingwear*, 340 U.S. at 40–41.

For example, in *Alvarez v. Smith*, individuals who owned property forfeited by Illinois law enforcement brought a federal civil rights action seeking declaratory and injunctive relief against Illinois' civil forfeiture laws on the grounds that those laws provided insufficient procedural due process protections. 558 U.S. at 90-91. Before this Court could review the Seventh Circuit's decision in that case, however, Illinois returned the seized property. *Id.* at 89, 91. This Court determined this act mooted the case because the property owners would no longer benefit from the declaratory and injunctive relief sought and the Court was therefore left only with an abstract dispute over the law's meaning. *Id.* at 93. Accordingly, this Court vacated the Seventh Circuit's decision to "'clear the path for future litigation on the issues.'" 558 U.S. at 97 (quoting *Munsingwear*, 340 U.S. at 40) (internal alteration omitted).

Similarly here, Petitioners remain firm in their conviction that Missouri's former licensure requirements were unconstitutional despite the Eighth Circuit's contrary opinion. *Cf. Clayton v. Steinagel*, 885 F. Supp. 2d 1212 (D. Utah 2012) (finding nearly identical requirements unconstitutional in nearly identical application); *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101 (S.D. Cal. 1999) (same). However, before this Court could act on Petitioners' appeal, Missouri thoroughly

altered its licensure laws with respect to hair braiders such that Petitioners no longer must obtain a cosmetology or barber license to braid hair—the very licensure requirement they challenged. This moots Petitioners' case and leaves only an abstract question of law on which the Court cannot grant relief, thereby thwarting Petitioners' opportunity to have the Court hear their appeal. As in *Alvarez*, the Court should vacate the circuit court's judgment to prevent a decision that has not been properly reviewed from serving as binding precedent and hindering future litigation.

Keeping the "path for future litigation on the issues" clear is all the more important here because Petitioners allege that federal courts are currently split as to the issues presented in this case. As set forth in the Petition for Certiorari, Petitioners argue that the Eighth Circuit's decision below is in an acknowledged split with other federal court decisions declaring nearly identical regulations unconstitutional as applied in nearly identical circumstances, Pet. App. 8 n.3; *see also* Pet. at 21-25, and also reflects a split amongst the circuits about this Court's precedents regarding the constitutionality of occupational licensing, Pet. at 16-21, 25-29. This Court should ensure that other litigants may continue to argue these important issues unencumbered by the lower courts' "preliminary" decisions.

C. The State of Missouri's unilateral action in amending the challenged laws after a favorable judgment below caused this case to be moot.

Vacatur is further justified here because the Missouri General Assembly passed the licensure amendments after the Eighth Circuit's decision but before this Court could hear Petitioners' appeal. "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. The same is true when mootness results from unilateral action of the party who prevailed below." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994) (internal citation omitted). Specifically, vacatur is warranted when the losing party is not responsible for the passage of legislation that moots a case. *See Lewis*, 494 U.S. at 483; *Galioto*, 477 U.S. at 559–60; *Kremens*, 431 U.S. at 136–37; *Diffenderfer*, 404 U.S. at 414–15.

In this case, Petitioners challenged the constitutionality of certain Missouri statutes adopted by the Missouri General Assembly. After the Eighth Circuit's decision upholding the constitutionality of those statutes, but before this Court could hear Petitioners' appeal, the General Assembly amended those statutes. The amendments moot Petitioners' claims by creating a separate registration process for hair braiders. It would be unjust to force Petitioners to acquiesce in the judgment now that the General Assembly has unilaterally mooted it. The Court therefore should vacate the lower court's opinion here too.

III. The rare exceptions that can preclude the grant of vacatur are inapplicable to this case.

When a case becomes moot due to a settlement between the parties, or because a losing party fails to properly appeal an adverse judgement, vacation of the decision under review is not justified. *Bancorp*, 513 U.S. at 29. *See also Karcher v. May*, 484 U.S. 72, 82–83 (1987) (explaining that this Court will not grant vacatur when a losing party fails to appeal). In *Bancorp*, parties in a bankruptcy dispute agreed to a reorganization plan while the case was on appeal to this Court. The Court determined that because the appellant mooted the case through the voluntary action of reaching a settlement, it forfeited the equitable remedy of vacatur. 513 U.S. at 20, 24–25, 29. Unlike in *Bancorp*, Petitioners have made no effort to settle the dispute. Rather, the Missouri General Assembly's passage of H.B. 1500 caused the mootness and has frustrated Petitioners' timely appeal to this Court. As a result, exceptions that could preclude vacatur do not apply.

CONCLUSION

For the foregoing reasons, this Court should vacate the Eighth Circuit's decision in *Niang v. Carroll* and remand with directions to dismiss.

Respectfully submitted,

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