

No.

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**In the Supreme Court of the United States**

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DO NO HARM,

*Petitioner,*

*v.*

WILLIAM BYRON LEE, in his official capacity as  
Governor of the State of Tennessee,

*Respondent.*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTION PRESENTED

When a civil appeal becomes moot before review is complete, the appellate court must decide whether the unreviewed judgment below should remain in place. In *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950), this Court described vacatur as the “established practice.” But the courts of appeals disagree about the governing standard when the appellant did not cause mootness. Most treat vacatur as the ordinary disposition; three others separately weigh the public interest; and the Sixth Circuit alone requires even a blameless appellant to prove that the unreviewed judgment would have preclusive effect in later litigation.

This case squarely presents the conflict. Tennessee repealed the challenged laws during the appeal. Although Petitioner did not cause mootness and Respondent did not oppose vacatur, a divided panel left the district court’s judgment in place solely because Petitioner had not shown future preclusive effect.

The question presented is:

What standard governs vacatur of an unreviewed district court judgment when a civil appeal becomes moot through no fault of the appellant?

**PARTIES TO THE PROCEEDING  
AND RULE 29.6 STATEMENT**

Petitioner Do No Harm was the plaintiff in the district court and the plaintiff-appellant in the court of appeals.

Respondent William Byron Lee, in his official capacity as Governor of the State of Tennessee, was the defendant in the district court and the defendant-appellee in the court of appeals.

Pursuant to this Court's Rule 29.6, Petitioner Do No Harm states that it is a privately owned nonprofit corporation incorporated in Virginia. It has no parent corporation, and no publicly held company owns 10% or more of its stock.

## STATEMENT OF RELATED CASES

These proceedings are directly related to the above-captioned case under Rule 14.1(b)(iii):

*Do No Harm v. Lee*, No. 24-5937 (6th Cir. June 2, 2026) (order and judgment dismissing appeal)

*Do No Harm v. Lee*, No. 3:23-cv-01175 (M.D. Tenn. Aug. 8, 2024) (memorandum and judgment dismissing for lack of standing)

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## **PETITION FOR A WRIT OF CERTIORARI**

Petitioner Do No Harm respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

### **OPINIONS BELOW**

The court of appeals' unsigned order, issued by a panel majority of Judges Bush and Nalbandian over Judge White's dissent, is unreported and is reproduced at App. 1a-4a. The court of appeals' judgment is reproduced at App. 5a.

The memorandum opinion and order of the United States District Court for the Middle District of Tennessee is not reported but is available at 2024 WL 3730623 and is reproduced at App. 9a-21a.

### **JURISDICTION**

The court of appeals entered its order and judgment on June 2, 2026. App. 1a-5a. On August 12, 2026, Justice Kavanaugh extended the time to file this petition to and including September 30, 2026. No. 26A184. This Court has jurisdiction under 28 U.S.C. § 1254(1).

**STATUTORY PROVISION INVOLVED**

Section 2106 of Title 28, United States Code, provides:

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

## INTRODUCTION

Article III prevents federal courts from deciding the merits of a moot appeal. But mootness does not erase the judgment under review. The appellate court must still decide what becomes of that unreviewed judgment. For more than seventy-five years, the answer has been guided by the “established practice” described in *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950): reversing or vacating the judgment below.

This Court later explained that vacatur is equitable and that the principal consideration is who is responsible for mootness. *U.S. Bancorp Mortg. Co. v. Bonner Mall P’ship*, 513 U.S. 18, 24-25 (1994). When the *appellant* causes mootness—such as by settling—it ordinarily has forfeited review and is not entitled to vacatur. But a party whose appeal is frustrated by the “vagaries of circumstance” or the “unilateral action” of the prevailing party should not be forced to acquiesce in the judgment. *Ibid.*; see also *Azar v. Garza*, 584 U.S. 726, 729 (2018) (per curiam) (calling mootness caused by the prevailing party a “clear example” of when vacatur is warranted).

The courts of appeals disagree about how that inquiry operates when the appellant did not cause mootness. Most treat vacatur as the ordinary disposition. Three others separately weigh the public interest. The Sixth Circuit stands alone: even a blameless appellant must show that the unreviewed judgment “would have a preclusive effect on later litigation.” App. 2a. Those rules produce different dispositions of materially similar appeals.

This case squarely presents the disagreement. The district court dismissed Petitioner Do No Harm’s challenge to two Tennessee statutes for lack of standing. Tennessee repealed the challenged provisions while Do No Harm’s appeal was pending. The parties agreed that the appeal was moot, Respondent did not oppose vacatur, and the Sixth Circuit agreed that Do No Harm had not caused mootness. App. 1a-4a. A divided panel nevertheless left the district court’s judgment intact because Do No Harm had not “demonstrate[d]” that “the order would have a preclusive effect on later litigation.” App. 2a (quoting *Pavia v. Nat’l Collegiate Athletic Ass’n*, 154 F.4th 407, 415 (6th Cir. 2025)). Judge White dissented. Because the appeal “was rendered moot by appellee’s unilateral action,” she concluded that the district court’s decision “should not stand undisturbed” and would have remanded for dismissal of the case as moot. App. 3a.

The disagreement warrants review. Federal civil cases regularly become moot on appeal, and the fate of an unreviewed judgment should not depend on which circuit it arises in. This case presents the issue cleanly: mootness is undisputed, Do No Harm did not cause it, Respondent did not oppose vacatur, and the Sixth Circuit denied relief solely because Do No Harm failed to prove preclusive effect. The Court should grant the petition, resolve the conflict, and clarify the governing standard for *Munsingwear* vacatur in the circuit courts.

## STATEMENT OF THE CASE

### I. Legal Background

Article III limits the federal courts to deciding actual “Cases” or “Controversies.” U.S. Const. art. III,

§ 2, cl. 1. “A case that becomes moot at any point during the proceedings is no longer a ‘Case’ or ‘Controversy’ for purposes of Article III, and is outside the jurisdiction of the federal courts.” *United States v. Sanchez-Gomez*, 584 U.S. 381, 385-86 (2018) (internal quotation omitted).

*Munsingwear* described the “established practice” when a federal civil case becomes moot during appellate review: “reverse or vacate the judgment below and remand with a direction to dismiss.” 340 U.S. at 39; *see also* 28 U.S.C. § 2106 (empowering federal appellate courts to “vacate, set aside or reverse” lower court judgments). That procedure “clears the path for future relitigation” and prevents an unreviewable judgment from “spawning any legal consequences.” *Munsingwear*, 340 U.S. at 40-41.

Nearly half a century later, *U.S. Bancorp* explained the equitable limits of *Munsingwear*. It held that mootness caused by settlement ordinarily does not justify vacatur because by settling, the appellant voluntarily forfeits review. 513 U.S. at 24-25. The “principal condition” is whether the appellant “caused the mootness by voluntary action”; if so, vacatur is ordinarily not warranted. *Id.* at 24. By contrast, a party whose appeal is “frustrated by the vagaries of circumstance ought not in fairness be forced to acquiesce in the judgment,” and “[t]he same is true when mootness results from unilateral action of the party who prevailed below.” *Id.* at 25.

The Court has repeatedly reaffirmed that framework in its own cases: vacatur is in order when mootness results from happenstance or the prevailing party’s unilateral action. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71-72 (1997); *accord Azar*,

584 U.S. at 729. Its *Munsingwear* practice remains “well settled.” *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 5 (2023).

## **II. Tennessee’s Racial Requirement For Podiatric Board Appointments**

The six-member Tennessee Board of Podiatric Medical Examiners licenses, regulates, and disciplines podiatrists. App. 9a-10a. Until their repeal, two statutory provisions directed the Governor, when making appointments to the Board, to “strive to ensure that . . . at least one (1) person serving on the board is a member of a racial minority.” Tenn. Code Ann. § 63-3-103(b) (2023); *see also id.* § 8-1-111 (2023); App. 18a.

Petitioner Do No Harm is a nationwide membership organization of more than 6,000 medical professionals, students, and policymakers dedicated to eliminating racial discrimination in healthcare. App. 10a, 24a. In November 2023, it sued Governor Lee on behalf of two members: a licensed Tennessee podiatrist and a longtime Tennessee resident eligible for a citizen seat. The complaint alleged that both were qualified, willing, and able to serve on the Board, but neither was a member of a racial minority. App. 10a-11a, 24a-25a.

## **III. Proceedings Below**

### **A. District court proceedings**

The district court dismissed for lack of standing, concluding that the alleged injuries to Do No Harm’s members were too speculative. App. 19a-21a. Although the racial requirement set a baseline rather than a limit, the court reasoned that the Governor’s

obligation to consider race applied only when no racial minority was serving on the Board. App. 18a-19a. Because the Board then included a racial-minority member whose term was scheduled to run until 2027, the court found no sufficiently imminent injury. App. 19a-21a.

## **B. Court of appeals proceedings**

Do No Harm appealed. It argued that the challenged statutes placed its members on an unequal footing by making nonminority applicants eligible for only five of six seats, regardless of whether the Governor had to consider race for a particular appointment. *See* Br. for Appellant at 11-18, *Do No Harm v. Lee*, No. 24-5937 (6th Cir. Oct. 28, 2024), Dkt. No. 14 (citing *Ne. Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993)). It also argued that the injury was not speculative but certain, especially when the existing minority member’s term expired in 2027. *Id.* at 18-23.

While Do No Harm’s appeal was pending, Tennessee enacted legislation repealing the challenged provisions. *See* App. 8a (citing H.B. 1237, 114th Gen. Assemb., Reg. Sess. (Tenn. 2025)).

After the repeal, Do No Harm moved to dismiss its appeal as moot and to vacate the district court’s decision under *Munsingwear*. App. 6a-8a. It argued that the repeal had deprived it of appellate review and that “the equities favor vacating the lower court’s decision.” App. 7a-8a (citing *Arizonans for Official English*, 520 U.S. at 71-72, and *U.S. Bancorp*, 513 U.S. at 25). The Governor did not oppose vacatur but proposed remanding with instructions to dismiss the case as moot. App. 8a.

A divided Sixth Circuit panel dismissed the appeal but declined to vacate the district court judgment. The majority agreed that the appeal was moot, that Do No Harm had not caused mootness, and that the Governor did not oppose vacatur. App. 1a-2a. Yet it held that Sixth Circuit precedent permits *Mun-singwear* vacatur only if two conditions are met: “the burdened party[] didn’t cause the order’s mootness” and “the order would have a preclusive effect on later litigation.” App. 2a (quoting *Pavia*, 154 F.4th at 415).

The majority found the first condition satisfied but faulted Do No Harm for “mak[ing] no attempt to demonstrate the second.” App. 2a. It also rejected the Governor’s proposed remand, because he offered no supporting argument. *Ibid.* The majority therefore left the district court’s judgment intact. *Ibid.*

Judge White dissented. App. 2a-4a. She emphasized that this Court has repeatedly reaffirmed *Mun-singwear* and has identified unilateral action by the prevailing party as a “clear example” warranting vacatur. *Ibid.* (citing *U.S. Bancorp*, 513 U.S. at 25 n.3; *Azar*, 584 U.S. at 729; *Acheson*, 601 U.S. at 5). Because the parties agreed that Tennessee’s repeal of the challenged statutes had mooted the appeal “by appellee’s unilateral action” and that the district court’s decision “should not stand undisturbed,” she would have remanded with instructions to dismiss the case as moot. App. 3a-4a.

## REASONS FOR GRANTING THE PETITION

When an appeal becomes moot through no fault of the appellant, the courts of appeals disagree over what becomes of the unreviewed judgment. Most treat vacatur as the ordinary disposition. Three others separately weigh the “public interest” and sometimes leave the judgment intact. The Sixth Circuit stands alone in requiring the appellant to prove that the judgment would have preclusive effect in later litigation. Cases regularly become moot on appeal, and these competing standards produce different outcomes in materially similar cases. Only this Court can resolve the conflict.

### **I. The Courts Of Appeals Are Divided Over The Governing Rule For Vacatur When An Appellant Did Not Cause Mootness**

When mootness prevents appellate review, a court “may make such disposition of the whole case as justice may require.” *U.S. Bancorp*, 513 U.S. at 21 (citation omitted). The circuits exercise that authority differently when the appellant did not cause mootness. Three approaches have emerged.

#### **A. Most courts of appeals treat vacatur as the ordinary disposition**

Most circuits treat vacatur as the ordinary disposition when the appellant did not cause mootness. The Ninth, Tenth, and Eleventh Circuits use especially categorical formulations, describing vacatur as “generally automatic” or something the court “must” do. The First, Second, Third, Seventh, and Federal Circuits use less categorical language but likewise treat vacatur as the ordinary disposition. The D.C. Circuit

follows the same rule. It has also rejected the principal rationales underlying the two competing approaches: that the public interest in preserving an unreviewed judgment’s precedential value can justify denying vacatur, and that the appellant must prove future preclusion. *See infra* Parts I.B & C.

None of these nine circuits conditions vacatur on proof that the unreviewed judgment will have preclusive effect in identified future litigation.

**1. Ninth Circuit.** In the Ninth Circuit, “vacatur is generally automatic” when a case becomes moot on appeal. *Donovan v. Vance*, 70 F.4th 1167, 1172-73 (9th Cir. 2023) (citation omitted). The court declines vacatur only when the appellant caused the mootness or, as in *Munsingwear*, failed to protect itself. *Ibid.*; *see also Munsingwear*, 340 U.S. at 40. Responsibility for mootness is thus a “threshold question.” *Chem. Producers & Distribs. Ass’n v. Helliker*, 463 F.3d 871, 878 (9th Cir. 2006), *overruled in part on other grounds by Bd. of Trs. of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019) (en banc). Vacatur follows when mootness results not from the appellant’s conduct, but from happenstance or the prevailing party’s unilateral action. *In re Patullo*, 271 F.3d 898, 902 (9th Cir. 2001).

The decision in *Teter v. Lopez*, 125 F.4th 1301 (9th Cir. 2025) (en banc), is closely analogous. After the plaintiffs lost their challenge to a Hawaii statute, the legislature amended the statute and mooted their appeal. *Id.* at 1309-10. Because neither party caused mootness, the court followed its “normal practice” and vacated. *Id.* at 1309. It did not require proof of preclusion, observing simply that because the plaintiff “lost in the district court . . . any ongoing effect the

judgment *might* have could only be harmful to him.” *Id.* at 1310 (emphasis added).

**2. Tenth Circuit.** The Tenth Circuit also uses categorical language, with responsibility for mootness the central consideration: “When the appeal becomes moot based on the prevailing party’s unilateral action, we must vacate . . . .” *Am. Charities for Reasonable Fundraising Regul., Inc. v. O’Bannon*, 909 F.3d 329, 334 (10th Cir. 2018); *see also United States v. Jenks*, 129 F.3d 1348, 1352 (10th Cir. 1997) (“Because the government prevailed below . . . and then caused th[e] issues to become moot, effectively barring appellate review, we cannot permit the district court’s decision on those issues to stand.”). The court may deny vacatur when the appellant itself caused or contributed to mootness. *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 355 F.3d 1215, 1221 (10th Cir. 2004).

**3. Eleventh Circuit.** The Eleventh Circuit likewise applies a “must vacate” standard: “when a case becomes moot on appeal, the Court of Appeals must not only dismiss the case, but also vacate the district court’s order.” *Soliman v. United States ex rel. INS*, 296 F.3d 1237, 1243 (11th Cir. 2002) (per curiam); *accord De La Teja v. United States*, 321 F.3d 1357, 1364 (11th Cir. 2003); *BankWest, Inc. v. Baker*, 446 F.3d 1358, 1368 (11th Cir. 2006).

In *League of Women Voters v. Florida Secretary of State*, the Florida legislature repealed a challenged provision when the Secretary of State’s appeal was pending. 66 F.4th 905, 949-51 (11th Cir. 2023). The court rejected the contention underlying the minority approach, *see infra* Part I.B, that the precedential value of the unreviewed judgment justified denying

vacatur. *Id.* at 951. If a generalized interest in providing guidance to the legal community sufficed, *Munsingwear* “would be all but a nullity.” *Ibid.* Because mootness was not attributable to the parties, the court vacated without requiring proof of preclusion. *Ibid.*

**4. First, Second, Third, Seventh, and Federal Circuits.** The First, Second, Third, Seventh, and Federal Circuits use less categorical language but treat vacatur as the normal result when the appellant did not cause mootness. None makes proof of future preclusion a prerequisite.

- **First Circuit:** Vacatur is “ordinarily granted” unless the appellant was responsible for making the case unreviewable. *Diffenderfer v. Gomez-Colon*, 587 F.3d 445, 451 (1st Cir. 2009); *see also Arevalo v. Ashcroft*, 386 F.3d 19, 21 (1st Cir. 2004).
- **Second Circuit:** Whether the appellant caused mootness is the “touchstone” of the vacatur analysis, and the court ordinarily vacates unless the appellant deliberately mooted the appeal. *FDIC v. Regency Sav. Bank, F.S.B.*, 271 F.3d 75, 77 (2d Cir. 2001) (per curiam); *Am. Ass’n of Univ. Professors v. U.S. Dep’t of Just.*, 175 F.4th 413, 416 (2d Cir. 2026) (“[c]ourts grant vacatur liberally” when a case becomes moot on appeal); *Srouer v. New York City*, 117 F.4th 72, 86 (2d Cir. 2024) (calling vacatur the “general” or “standard” practice and granting it

even though the appellant caused mootness because it did not “act[] in bad faith to purposefully moot [the] case”).<sup>1</sup>

- **Third Circuit:** When mootness is not attributable to the appellant, “*Munsingwear* controls” and the “general rule” favors vacatur. *Rendell v. Rumsfeld*, 484 F.3d 236, 243 (3d Cir. 2007); see also *Khodara Env’t, Inc. ex rel. Eagle Env’t L.P. v. Beckman*, 237 F.3d 186, 194-95 (3d Cir. 2001) (vacating when Congress repealed the challenged law during the appeal).
- **Seventh Circuit:** The court “ordinarily vacate[s]” when mootness prevents appellate review, unless the appellant settled or otherwise caused the appeal to become moot. *In re Rinaldi*, 778 F.3d 672, 675-76 (7th Cir. 2015).
- **Federal Circuit:** Vacatur “is appropriate if the mootness arises from external causes over which the parties have no control, or from the unilateral act of the prevailing party, but not when the mootness is due to a voluntary act by the losing party.” *Tafas v. Kappos*, 586 F.3d 1369, 1371 (Fed. Cir. 2009); accord *Tessera, Inc. v. Int’l Trade Comm’n*, 646 F.3d 1357, 1371 (Fed. Cir. 2011).

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<sup>1</sup> *Hassoun v. Searls*, 976 F.3d 121, 133-34 (2d Cir. 2020), vacated the district court’s merits decisions but declined to vacate a nonfinal stay opinion incapable of producing “binding legal consequences regarding the merits.” *Id.* at 134. That categorical distinction differs from the Sixth Circuit requirement that the appellant prove that the particular judgment would have preclusive effect. App. 2a.

**5. D.C. Circuit.** Vacatur is the “standard practice” in the D.C. Circuit when mootness is not attributable to the parties. *Columbian Rope Co. v. West*, 142 F.3d 1313, 1317-18 (D.C. Cir. 1998). It has also expressly rejected the rationales underlying both competing approaches. *Am. Fam. Life Assurance Co. of Columbus v. FCC*, 129 F.3d 625, 630 (D.C. Cir. 1997). First, the court rejected the contention that an unreviewed order’s “continuing precedential force” justified preserving it: “[s]uch a rule would swallow *Munsingwear*.” *Id.* at 631. Second, although it was “speculative” whether the order would have future preclusive effects, the court vacated to eliminate the “lingering though remote possibility of residual collateral harm.” *Id.* at 630. Future harm may be “speculative,” but vacating the order “puts the speculation to rest.” *Ibid.* The first holding rejects the minority circuits’ reliance on the perceived public value of precedent; the second is incompatible with the Sixth Circuit’s demand for proof of preclusive effect. *See infra* Parts I.B-C.

## **B. A minority of circuits additionally weigh the “public interest”**

The Fourth, Fifth, and Eighth Circuits separately consider both responsibility for mootness and the public interest. Thus, an appellant’s lack of fault does not end the inquiry, and this approach can deny vacatur even to a blameless appellant based on “the public interest alone.” But unlike the Sixth Circuit, none requires proof that the judgment will have preclusive effect.

**1. Fourth Circuit.** The Fourth Circuit separately analyzes the “twin considerations of fault and public interest.” *Valero Terrestrial Corp. v. Paige*, 211

F.3d 112, 118 (4th Cir. 2000). In practice, it typically vacates when mootness is not due to the losing party's voluntary action. *Brooks v. Vassar*, 462 F.3d 341, 348-49 (4th Cir. 2006). But it separately weighs the public interest even in those cases. For example, in *Hirschfeld v. ATF*, mootness was not attributable to the parties, yet the court stated there were "strong reasons to avoid vacatur" because "there is a strong public interest in this precedent." 14 F.4th 322, 327 (4th Cir. 2021). Ultimately, after balancing the equities, the court concluded that "the public interest . . . favor[ed]" vacatur. *Ibid.*

**2. Fifth Circuit.** In the Fifth Circuit, vacatur generally follows appellate mootness but "is not automatic." *DeOtte v. Nevada*, 20 F.4th 1055, 1064-65 (5th Cir. 2021) (quoting *Staley v. Harris Cnty.*, 485 F.3d 305, 310 (5th Cir. 2007) (en banc)). The court separately considers fault and the public interest, although fault plays a dominant role. *See id.* at 1070-71 (granting vacatur because Nevada "did not cause the case to become moot" and the public interest favored relief); *Staley*, 485 F.3d at 313-14 (denying vacatur and emphasizing the appellant's voluntary conduct); *Freedom From Religion Found., Inc. v. Abbott*, 58 F.4th 824, 836-37 (5th Cir. 2023) (preserving part of the judgment because appellants were "at least somewhat responsible" for mootness and the judgment was "particularly valuable" as precedent). *DeOtte* nevertheless recognized that a preclusion injury "may not be necessary." 20 F.4th at 1070 n.3.

**3. Eighth Circuit.** Although vacatur is "the appropriate and customary treatment," *Anastasoff v. United States*, 235 F.3d 1054, 1056 (8th Cir. 2000) (en banc), it is "not an automatic right" and is "informed

... by the twin considerations of fault and public interest.” *Moore v. Thurston*, 928 F.3d 753, 758 (8th Cir. 2019) (quoting *Valero*, 211 F.3d at 118). *Moore* denied vacatur even where the appellant had not caused mootness because the public interest was “best served by a substantial body of judicial precedents” addressing Arkansas’s ballot-access requirements. *Id.* at 758-59; see also *SD Voice v. Noem*, 987 F.3d 1186, 1190 (8th Cir. 2021) (holding that regardless of fault, “the public interest alone defeats vacatur” because of the importance of preserving judicial precedents in an area of “core political speech”); *In re CenturyLink Sales Practices & Securities Litig.*, 843 F. App’x 825, 828 (8th Cir. 2021) (denying vacatur “because Movants have not shown that vacatur is in the public interest”); cf. *Panera, LLC v. Dobson*, 999 F.3d 1154, 1159 (8th Cir. 2021) (granting vacatur because there was “minimal” public interest in judicial precedent about the specific agreements at issue).

### **C. The Sixth Circuit uniquely requires appellants to prove the unreviewed judgment’s preclusive effect**

The Sixth Circuit adds a requirement no other circuit has adopted: a blameless appellant may be denied vacatur unless it shows that the judgment “would have a preclusive effect on later litigation.” App. 2a (quoting *Pavia*, 154 F.4th at 415).

That requirement originated in cases involving mooted preliminary injunction appeals. See *Mktg. Displays Int’l v. Shaw*, 93 F.4th 967, 971 (6th Cir. 2024); *Radiant Glob. Logistics, Inc. v. Furstenau*, 951 F.3d 393, 397 (6th Cir. 2020). *Marketing Displays* identified three factors that courts “must consider” in

deciding whether to vacate: whether the appellant requested vacatur; “most importantly,” whether the underlying order would have a preclusive effect; and whether the appellant was responsible for mootness. 93 F.4th at 971-72. The court denied vacatur because “there’s no chance” the preliminary injunction order would have preclusive effect and because the appellant had “contributed” to mootness by requesting briefing extensions. 93 F.4th at 971-72; *see also Am. Coll. of Pediatricians v. Becerra*, No. 23-5053, 2024 WL 3206579, at \*3 (6th Cir. June 27, 2024) (denying vacatur because the order posed no threat of preclusion).

*Pavia* reiterated the test and held that the appellant bears the burden of showing both that the order would have “a preclusive effect on later litigation” and that the appellant did not cause mootness. 154 F.4th at 415. The *Pavia* court denied vacatur because the appellant had caused mootness. *Id.* at 411-15.

*Marketing Displays* and *Pavia* are published decisions, and the preclusion requirement is settled circuit law. The Sixth Circuit has since extended that rule beyond preliminary injunction appeals to final standing judgments, including in the decision below. App. 1a-2a; *see also Am. Coll. of Pediatricians*, 2024 WL 3206579, at \*3 (declining to vacate a standing dismissal because it would not have a preclusive effect). Here, the majority held that Do No Harm failed to satisfy its burden because it had not “demonstrate[d]” a preclusive effect. App. 2a. The Sixth Circuit has thus transformed the risk of future legal consequences from a reason to vacate into a prerequisite that the appellant must prove.

## II. The Question Is Important And Recurring, And The Conflict Is Outcome-Determinative

Whenever mootness prevents appellate review, the disposition of the unreviewed judgment determines whether a diligent appellant must live with that judgment and whether the prevailing party retains its benefit. The issue recurs throughout federal civil litigation, and the circuits’ competing standards produce different dispositions of materially identical cases.

### A. Appellate mootness is a recurring feature of federal litigation

Although precise statistics are not readily available,<sup>2</sup> courts must confront *Munsingwear* vacatur whenever a civil case becomes moot during appellate review. The issue frequently arises when the government repeals a challenged law, changes a policy, or otherwise effectively grants relief while an appeal is pending. *See, e.g., Teter*, 125 F.4th at 1309-10; *O’Ban-non*, 909 F.3d at 334; *League of Women Voters*, 66 F.4th at 949-51; *Srour*, 117 F.4th at 86.

### B. The courts of appeals’ disagreement is outcome-determinative

The circuits’ competing standards produce different results in cases like this one. Under the ordinary

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<sup>2</sup> Official court statistics do not separately report the number of appeals dismissed as moot. *See, e.g.,* Administrative Office of the U.S. Courts, Judicial Business 2025 Tables, <https://tinyurl.com/3k4wyccu> (Table B-5). But the frequency with which the courts of appeals address *Munsingwear* vacatur—often in “brief, nonprecedential orders”—confirms that the issue regularly recurs. *Banyee v. Bondi*, 131 F.4th 823, 826 (8th Cir. 2025) (Stras, J., concurring in denial of rehearing en banc).

rule applied in the majority circuits, the district court's judgment would have been vacated because Do No Harm did not cause or contribute to mootness. *See* App. 2a.

The minority circuits would conduct a different inquiry. In addition to Do No Harm's lack of fault, they would separately weigh the public interest, including the perceived value of preserving the district court's decision as precedent. That inquiry sometimes defeats vacatur, *e.g.*, *Moore*, 928 F.3d at 758-59, and sometimes supports it, *e.g.*, *Hirschfeld*, 14 F.4th at 327. The result here would therefore depend, in part, on the court's assessment of the perceived public interest in preserving the district court's standing decision as persuasive authority.

The Sixth Circuit followed a third—and unique—path. Although it agreed that Do No Harm had not caused mootness, it denied vacatur because Do No Harm had not proved that the district court's decision would have a preclusive effect in future litigation. App. 2a.

Vacatur was thus denied because this case arose in the Sixth Circuit. In most circuits, vacatur would have followed the ordinary rule; in three others, the result would depend on a separate public-interest inquiry. Whether an appellant is “forced to acquiesce” in a judgment for which it sought appellate review, *U.S. Bancorp*, 513 U.S. at 25, should not depend on geography.

### **III. The Sixth Circuit's Rule Departs From This Court's Precedents**

This Court need not write on a blank slate. Its decisions addressing cases that become moot while awaiting *this Court's* review establish the governing

principles. But the lower courts' disagreement shows that this Court must confirm how those principles apply in the courts of appeals.

**A. The Court treats mootness not attributable to the appellant as sufficient reason to vacate**

This Court's cases draw a clear line. On one side is mootness caused by the appellant's voluntary action. In those cases, vacatur is not warranted because the appellant "has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari"; the judgment "is not unreviewable, but simply unreviewed by his own choice." *U.S. Bancorp*, 513 U.S. at 25. On the other side is mootness caused by "the vagaries of circumstance" or "unilateral action of the party who prevailed below." *Ibid.* In those cases, the appellant "ought not in fairness be forced to acquiesce in the judgment." *Ibid.* Thus, whether the appellant is responsible for mootness is the "principal condition" on which vacatur rests. *Id.* at 24.

Accordingly, the Court has repeatedly indicated that the appellant's absence of fault is by itself sufficient reason to vacate. *Arizonans for Official English* rejected the "strange doctrine that would permit a [party] to obtain a favorable judgment, take voluntary action that moots the dispute, and then retain the benefit of the judgment." 520 U.S. at 75 (citation modified). *Azar* similarly identified mootness caused by the appellee's unilateral action as a "clear example where vacatur is in order." 584 U.S. at 729 (citation modified).

The reason is straightforward. Vacatur prevents an unreviewable judgment from "spawning any legal consequences," and ensures that the appellant is not

“prejudiced by a decision which in the statutory scheme was only preliminary.” *Munsingwear*, 340 U.S. at 40-41. The remedy protects “those who have been prevented from obtaining the review to which they are entitled.” *Id.* at 39; *Camreta v. Greene*, 563 U.S. 692, 712 (2011). A litigant whose appeal was frustrated through no fault of its own is just such a party.

That rationale is regularly applied in this Court and should apply with special force in the courts of appeals. This Court’s *Munsingwear* dispositions generally arise during its exercise of discretionary jurisdiction, whereas review is typically as of right in the courts of appeals. When mootness forecloses that review through no fault of the appellant, *Munsingwear*’s fairness concerns are at their strongest.

**B. This Court does not require proof of preclusive effect—as its recent vacatur of a Sixth Circuit judgment confirms**

Given this Court’s focus on fault, it is no surprise that it does not require proof of future preclusive effect when considering whether to vacate a court of appeals decision. That is evident in the Court’s recent disposition of a Sixth Circuit judgment. *Tennessee v. Kennedy*, No. 25-162, 2026 WL 135717 (U.S. Jan. 20, 2026).

In *Kennedy*, the district court denied Tennessee’s motion for a preliminary injunction against the termination of federal funding, and the Sixth Circuit affirmed. *Tennessee v. Becerra*, 131 F.4th 350 (6th Cir. 2025). While Tennessee was preparing a petition for this Court’s review, the Department of Health and Human Services restored the funding and disavowed enforcement of the challenged requirements, mooting

the case. Tennessee sought vacatur because the prevailing party's unilateral action had deprived it of appellate review. Pet. for Writ of Cert. at i, 13-34, *Tennessee v. Kennedy*, No. 25-162, 2025 WL 2324062 (U.S. Aug. 7, 2025).

Neither Tennessee nor the federal government argued that the Sixth Circuit's judgment would have preclusive effect. *See id.*; Br. for Resp'ts at 10-14, *Tennessee v. Kennedy*, No. 25-162, 2025 WL 3176008 (U.S. Nov. 10, 2025). Yet this Court granted the petition, vacated the Sixth Circuit's judgment, and remanded with instructions to dismiss the case as moot. *Kennedy*, 2026 WL 135717, at \*1. Even Justice Jackson, who would require a party seeking vacatur to "establish equitable entitlement to that remedy," concurred because of the Court's "established practice when the mootness occurs through the unilateral action of the party that prevailed in the lower court." *Ibid.* (Jackson, J., concurring).

The contrast with the Sixth Circuit's rule is especially stark because the vacated judgment was a ruling on a preliminary injunction—a type of ruling the Sixth Circuit has said ordinarily lacks preclusive effect. *See Mktg. Displays*, 93 F.4th at 971. Had the Sixth Circuit's preclusion requirement governed, Tennessee would have had to demonstrate a preclusive effect. This Court vacated without asking about preclusion.

*Kennedy* accords with this Court's longstanding practice. Although the Court has not expressly considered the Sixth Circuit's requirement, it regularly vacates judgments without demanding proof of preclusion. *See, e.g., Acheson*, 601 U.S. at 5; *Azar*, 584 U.S.

at 729-30 (collecting cases). Put simply, this Court has never made proof of preclusion a prerequisite.

The resulting anomaly is striking: this Court vacates Sixth Circuit judgments without requiring proof of preclusion, while the Sixth Circuit refuses to vacate district court judgments unless a blameless appellant supplies that proof. The Court should grant review and decide whether *Munsingwear* permits that additional prerequisite.

### **C. The Sixth Circuit's rule inverts *Munsingwear*'s equitable premise**

The Sixth Circuit's rule reverses the logic of *Munsingwear*, placing on a blameless party an evidentiary burden that can effectively reward a party whose action mooted the appeal. Unless the appellant can prove how the unreviewed judgment will operate in hypothetical future litigation, the judgment remains intact. That inverts the incentives *Munsingwear* was designed to create. As Judge VanDyke observed, *Munsingwear* vacatur is "meant to prevent procedural gamesmanship from parties hoping to secure a favorable judgment, take voluntary action that moots the dispute, and then retain the benefit of the judgment." *Teter*, 125 F.4th at 1311 (VanDyke, J., dissenting in part) (citation modified). Although such gamesmanship did not occur here, the Sixth Circuit's rule permits exactly that.

### **D. The Sixth Circuit's preclusion requirement is more demanding than even Justice Jackson's approach**

Justice Jackson has urged perhaps this Court's narrowest approach to *Munsingwear* vacatur. In her view, contemporary practice "has drifted away from

the doctrine’s foundational moorings” and should be limited “to truly exceptional cases.” *Chapman v. Doe*, 143 S. Ct. 857, 857-58 (2023) (Jackson, J., dissenting). She would generally require the party seeking vacatur to “explain what harm—other than having to accept the law as the lower court stated it—flows from the inability to appeal.” *Acheson*, 601 U.S. at 19 (Jackson, J., concurring in the judgment).

Yet even Justice Jackson has accepted vacatur based on the prevailing party’s unilateral action, without requiring proof of preclusion. In *Acheson*, she concurred because the respondent’s voluntary dismissal was the sort of “unilateral action” this Court has deemed “adequate for vacatur.” *Id.* at 22. And in *Kennedy*, she again concurred based on the Court’s “established practice when the mootness occurs through the unilateral action of the party that prevailed in the lower court.” 2026 WL 135717, at \*1 (Jackson, J., concurring). The Sixth Circuit’s rule is thus not merely more demanding than this Court’s settled practice; it is more demanding than Justice Jackson’s critique of that practice.

#### **IV. This Case Is An Excellent Vehicle**

Do No Harm’s appeal is indisputably moot because Tennessee repealed the challenged statutes, and Do No Harm played no role in the repeal. App. 1a-2a, 7a-8a. Respondent did not oppose vacatur. App. 2a, 8a. The Sixth Circuit nevertheless denied vacatur solely because Do No Harm had not proved that the district court’s judgment would have preclusive effect in later litigation. App. 2a. Resolving the governing standard does not require review of Do No Harm’s underlying equal-protection claim or the merits of the district court’s standing analysis.

Nor does the majority's statement that Do No Harm made "no attempt to demonstrate" preclusion create a forfeiture problem. App. 2a. Do No Harm argued that its lack of responsibility for mootness made vacatur proper under *Arizonans for Official English* and *U.S. Bancorp.* App. 7a-8a. The Sixth Circuit majority rejected that argument as legally insufficient because Do No Harm had not made the additional showing of future preclusion. App. 1a-2a.

This case presents the conflict in its starkest form. A blameless appellant was deprived of appellate review because of legislative change, yet the adverse judgment remains because the case happened to arise in the only circuit that conditions vacatur on proof of future preclusion. *Munsingwear's* "established practice" should not vary by circuit. The Court should grant review and hold that when mootness forecloses review by the courts of appeals through no fault of the appellant, vacatur is the ordinary disposition.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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