No. 20-1047

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

REPLY BRIEF

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Respondents do not seriously contest that the State's interlocutory appeal is moot; nor that the Eleventh Circuit's decision will have profound effects outside this case for three sovereigns; nor that the decision was made unreviewable because ordinary proceedings ran their course. The conclusion then is simple. In such cases, this Court's "ordinary practice" is to vacate the unreviewed and unreviewable decision, "thereby 'clear[ing] the path for future relitigation of the issues.'" *Alvarez v. Smith*, 558 U.S. 87, 97 (2009) (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950)).

Even so, Respondents argue that vacatur is unwarranted either because (1) this case became moot due to the ordinary course of proceedings, or (2) the State "voluntarily forfeited" its right to appellate review by failing to seek an expedited appeal or stay of the district court proceedings. Neither argument has merit.

First, that mootness was due to "the ordinary, orderly administration of judicial proceedings" (BIO.3) is a prime reason why vacatur *is* appropriate. *See Alvarez*, 558 U.S. at 96 (vacating decision after case became moot due to "ordinary course of … proceedings"). Second, this Court does not require a party to take extraordinary measures to protect its appeal from mootness that might arise from ordinary proceedings. *See id.* at 96-97. Thus, because the happenstance of ordinary proceedings denied the State full appellate review of an important issue, the Eleventh Circuit's opinion should be vacated.

I. Respondents Do Not Dispute that the Panel's Decision Is Legally Consequential or that Mootness Prevented a Full Round of Appellate Review.

When an appeal becomes moot "while on its way [to this Court]," the "established practice of the Court … is to reverse or vacate the judgment below and remand with a direction to dismiss." *Munsingwear*, 340 U.S. at 39. The underlying purpose is to "prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *Id.* at 41. Respondents do not dispute that the panel's decision is legally consequential or that mootness prevents further review of it on the merits.

A. Respondents do not dispute that the panel's decision is legally consequential.

Respondents concede off the bat that, because of the Eleventh Circuit's unreviewed decision, "if future private suit is brought against a State under Section 2 of the Voting Rights Act, a district court within the Eleventh Circuit, will reject the claim of sovereign immunity." BIO.22. Respondents make only two (self-defeating) attempts to play down the significance of this concession. First, they assert that in these future cases the State could "immediately seek" interlocutory en banc or certiorari review—which (in the next sentence) they dispute "either would, or should, properly be granted." *Id.* Second, Respondents point out that other Circuits could consider the abrogation issue so that it might eventually be considered by this Court. But neither option relieves Alabama (or Florida or Georgia) from the decision's immediate consequences. And Respondents never address the point that the State has already faced consequences from the panel's

decision. *See* Pet.14-15 (citing *People First of Ala. v. Merrill*, 479 F.Supp.3d 1200 (N.D. Ala. 2020)).

B. Respondents do not—and cannot—dispute that the underlying appeal was moot.

Respondents likewise make no serious attempt to argue that the interlocutory appeal of the State's immunity from suit was not mooted by the district court's entry of final judgment. *See* BIO.12-13 (acknowledging that a "defendant ultimately prevail[ing] on the merits … may even require the dismissal of an appeal"). Nor could they, for Respondents began arguing that the State's interlocutory appeal was moot as early as 2018—more than one year before the district court's final judgment in this case. *See* Oral Argument at 21:29, *Ala. State Conf. of the NAACP v. Alabama*, No. 17-14443 (11th Cir. Dec. 14, 2018) ("The trial has already occurred.… From our perspective, any remedy in this case would be moot.").[1]

Respondents cite *Camreta v. Greene*, 563 U.S. 692 (2011), to imply that perhaps the State could have sought further appellate review. *See* BIO.16-18. But *Camreta* was an expressly narrow decision "address[ing] only [this Court's] authority to review cases in th[e] procedural posture" in which an official sought certiorari after a court of appeals held that he (1) violated a plaintiff's constitutional rights but (2) was entitled to qualified immunity. *Camreta*, 563 U.S. at 708. The procedural posture in this case is markedly different because the State *lost* before the court of appeals and was unable to seek review of that decision based solely on the unpredictable timing of the district court's final judgment. And while the State won before

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[1] *See* https://www.ca11.uscourts.gov/oral-argument-recordings?title=17-14443.

the district court, *Camreta* did "not decide if an appellate court, too, can entertain an appeal from a party who has prevailed on immunity grounds." *Id.* at 709. Rather, the Court suggested that such review would *not* be warranted because a district court's decision "is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case," *id.* at 709 n.7.

Thus, as all the parties and judges below agreed, the Eleventh Circuit's consequential abrogation decision became moot after the State prevailed in the district court.

II. The Court Should Follow Its Ordinary Practice of Vacatur.

In cases like this one, the Court's "ordinary practice" is to "clear the path for future relitigation of the issues." *Alvarez*, 558 U.S. at 97. And that ordinary practice should be followed here.

1. Respondents declare that this Court's vacatur principles do not apply to interlocutory appeals that become moot when a party that loses before the court of appeals then prevails before the district court. BIO.11-14. But like the Eleventh Circuit below, Respondents fail to provide any good reason why that should be so.

First, they note that the State did not identify any decision from this Court or the courts of appeals in which "an ultimate decision on the merits in favor of a defendant renders a case moot 'by happenstance,' and thus eligible" for vacatur. BIO.3. The Tenth Circuit, however, reached that exact conclusion in *Affiliated Ute Citizens of Utah v. Ute Indian Tribe of Uintah & Ouray Reservation*, 22 F.3d 254, 255 (10th Cir. 1994). In any event, Respondents cite no authority for

their premise that how a case became moot is relevant beyond the traditional inquiry of "happenstance" versus "settlement"/"voluntar[y] forfeit[ure]." *Alvarez*, 558 U.S. at 94.

Second, Respondents assert that ordering vacatur in cases where "a plaintiff, over the defendant's objection, prevails on the existence of subject matter jurisdiction, but the defendant nonetheless ultimately prevails on the merits" would require vacatur in "many cases." BIO.13. But vacatur isn't needed in the typical case where a defendant loses on a jurisdictional issue before the district court and then prevails on the merits, because district court decisions are not precedential. Moreover, such jurisdictional rulings do not give rise to collateral estoppel because a "district court's interlocutory ruling on sovereign immunity" that "prove[s] to be unnecessary to the final judgment" in defendant's favor "would not carry a preclusive effect." *Affiliated Ute.*, 22 F.3d at 256.

In the rare case like this one, however, where an interlocutory appeal of the jurisdictional issue is decided before the merits are resolved by the district court in the defendant's favor, vacatur is warranted because "not vacating the panel opinion would spawn immense legal consequences." App.3a (Branch, J., concurring in part and dissenting in part).

Respondents thus turn to equivocation. Quoting *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 27 (1994), they suggest that the "'orderly operation of the federal judicial system'" was not "'disturb[ed]'" here because mootness was caused by "the defendant ultimately prevail[ing] on the merits," which "is the ordinary, orderly operation of the federal system." BIO.14. But the "orderly operation of the

federal judicial system" referenced in *Bancorp* includes "appeal as of right and certiorari, through which parties may seek relief from the legal consequences of judicial judgments." *Bancorp*, 513 U.S. at 27. That process was "disturbed" when Alabama was "prevented from obtaining the review to which [it was] entitled." *Munsingwear*, 340 U.S. at 39. Respondents thus confirm that vacatur is warranted here.

Respondents quibble about why the Court in *Harper ex rel. Harper v. Poway Unified School District*, 549 U.S. 1262 (2007), vacated the Ninth Circuit's decision to affirm the denial of a preliminary injunction after the district court entered final judgment in the case. *See* BIO.14-16. According to Respondents, the Court vacated not simply because the district court's final judgment rendered the interlocutory appeal moot, but because the final judgment was based on mootness. *Id.* at 16. But respondents in *Harper* never made that distinction. Rather, they concluded that "[t]he Petitioner's interlocutory appeal is now moot because judgment has been entered in the District Court." Respondents' Suggestion of Mootness at 5, *Harper*, 549 U.S. 1262 (2007) (No. 06-595), 2007 WL 496330, at *5. What was relevant was that judgment had been entered, not why it had been entered.

2. Turning then to the traditional "happenstance" versus "voluntary forfeiture" inquiry, Respondents contend that the State forfeited its right to full appellate review by not seeking to delay the district court litigation (possibly for years) to pursue an interlocutory appeal that would not have resolved the entire case. BIO.20-21. That argument falters based on this Court's decision in *Alvarez*, which explored the line between (1) mootness caused by "voluntarily forfeit[ing]" appellate review, and (2) mootness caused by

"happenstance." 558 U.S. at 95. In *Alvarez*, plaintiffs brought a federal suit challenging Chicago's asset forfeiture regime after having a car or cash seized. *Id.* at 90. The Seventh Circuit sided with plaintiffs, and this Court granted certiorari. Before this Court could rule, the state court proceedings in all six cases had run their course, with the city returning cars to three plaintiffs, compromising with one plaintiff by returning some cash, and keeping the cash of two plaintiffs who defaulted on their claims to the money. *Id.* at 92, 95-96. Though the city could have done more to keep its federal appeal alive (e.g., by refusing to settle the state court proceedings), *Alvarez* "conclude[d] that the terminations here fall on the 'happenstance' side of the line," not the voluntary-forfeiture side. *Id.* at 95. The key factor was that the city did not engage in gamesmanship designed to moot its appeal. "[T]he presence of this federal case played no significant role in the termination of the separate state-court proceedings." *Id.* at 96-97. Thus, there was not "the kind of 'voluntary forfeit[ure]' of a legal remedy that led the Court in *Bancorp* to find that considerations of 'fairness' and 'equity' tilted against vacatur." *Id.* at 97. Because mootness occurred in "the ordinary course of … proceedings," the "ordinary practice" of vacatur was appropriate. *Id.* at 96-97.

The same is true here. As Respondents recognize, "the inability to further appeal … was the product of the ordinary course of judicial proceedings." BIO.21. And though Respondents assert that the State could have done more to try to slow down the district court or speed up the Eleventh Circuit, they never allege that the presence of this interlocutory appeal played any "role in the termination of the [district court] proceedings." *Alvarez*, 558 at 96-97. There are simply "no

grounds for assuming that the [State] was motivated by such a manipulative purpose." *Nat'l Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 352 (D.C. Cir. 1997).

3. The equities clearly support vacatur. In response, Respondents note that the State "wanted this 'very vital issue'" about judicial selection "resolved," BIO.6, but that's not a bad thing. That resolution is exactly what Respondents wanted too. *See* Dkt. 48 at 3 (Respondents arguing "that an expeditious trial schedule in this action would serve the public interest"). Respondents thus cannot show that it was inequitable for the State to litigate Respondents' claims on the merits.

And inequities would follow if Respondents' you-should-have-sought-a-stay argument is accepted. The State's decision to continue litigating the merits of Respondents' challenge, rather than trying to indefinitely delay district court proceedings, was "responsible government conduct." *McClendon v. City of Albuquerque*, 100 F.3d 863, 868 (10th Cir. 1996). That is particularly true where Respondents' claims for prospective relief against the Secretary of State would be heard no matter how the Eleventh Circuit resolved the interlocutory appeal. *See Ex Parte Young*, 209 U.S. 123 (1908). In short, "[t]his [was] clearly not a case in which a defendant has manipulated the judicial process.... Rather, defendants' conduct ... constitute[d] responsible governmental conduct to be commended" and thus "defendants should not bear any untoward consequences from their inability to contest the [decision]." *McClendon*, 100 F.3d at 868 (citations omitted). Respondents' contrary view would require a State to fight tooth-and-nail to prevent review of its statutes if the State hopes to preserve its right to full appellate

review. While States may have a *right* to litigate in that manner, surely equity doesn't *require* it.

Moreover, the panel's opinion leaves the States of the Eleventh Circuit in a unique bind. For example, imagine if Respondents next sue Alabama and its Secretary of State on the theory that the VRA requires the State's executive branch to be run by a multimember council rather than a single governor. As Respondents acknowledge (at 22), precedent would require the district court to hold that Section 2 abrogates sovereign immunity, and the district court would be unlikely to grant a stay of proceedings while the State appeals because the State would be unlikely to prevail on its sovereign immunity argument due to the panel's decision in this case. *See Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1293 n.12 (11th Cir. 2010). Thus, the State would have to litigate before both the district court and the Eleventh Circuit, while also having to convince the en banc Eleventh Circuit or this Court to hear the case. And if the district court were to rule in the State's favor before the appeal could conclude, the State's appeal would *again* be moot.

Further, the Circuit decisions Respondents rely on are neither on point nor persuasive, and each preceded the guidance from the *Alvarez* Court on what constitutes voluntary forfeiture versus happenstance. For example, *Community Stabilization Project v. Martinez* involved a city's proposal to purchase and demolish low-income housing that a nonprofit had subsidized. 31 F.App'x 340, 341 (8th Cir. 2002). The nonprofit sued to stop the sale and demolition but lost at the district court and then waited until nine days before the sale to seek a stay. *Id.* The stay was denied and the building was demolished, mooting the appeal.

Id. Because the nonprofit "waited for five months" for no apparent reason "before seeking a stay or an injunction" or an expedited appeal, the court declined to vacate the district court's decision. *Id.* at 342. Respondents' reliance on *In re Western Pacific Airlines, Inc.* is also inapposite as it dealt with a specific bankruptcy provision, 11 U.S.C. §364(e), requiring a party to obtain a stay to challenge a bankruptcy court's order. 181 F.3d 1191, 1195, 1198 (10th Cir. 1999).

Here, in contrast, the State made the responsible decision not to seek a stay. Moreover, the State had reason to think its one-issue appeal would resolve before the district court litigation concluded. Respondents' challenge to the State's longstanding judicial selection system would clearly take time to resolve—indeed, over 28 months elapsed between the State filing the underlying appeal (September 2017) and the district court rendering final judgment (February 2020). Moreover, the most current data then-available showed that the Eleventh Circuit disposed of the median civil appeal within 9.7 months of its filing.[2] Although it was obvious in *Community Stabilization Project* that a stay and/or expedited proceedings were needed to preserve appellate rights, and there was no good reason not to seek that relief, the same is simply not true in this case.

4. Respondents suggest that the posture of this case makes it somehow inappropriate for this Court's review. *See* BIO.22-23. But *Munsingwear* made clear that "[d]enial of a motion to vacate could bring the

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[2] *See* U.S. Courts of Appeals—Median Time Intervals in Months for Civil and Criminal Appeals Terminated on the Merits, by Circuit, During the 12-Month Period Ending September 30, 2016, https://bit.ly/2x4Pyl1.

case here." 340 U.S. at 40. The Court bolstered this conclusion by noting that the Court's "supervisory power over the judgments of the lower federal courts is a broad one." *Id.* That power allows this Court to "make such disposition of [a] case as justice requires"—including, where "a judgment has become moot," to order vacatur. *Walling v. James V. Reuter, Inc.*, 321 U.S. 671, 676-77 (1944).

Further, this Court has ordered vacatur even where the court of appeals has first—in summary fashion—declined to do so. *See Great W. Sugar Co. v. Nelson*, 442 U.S. 92, 93-94 (1979) (per curiam) (granting certiorari and ordering vacatur "[b]ecause the fact of mootness is clear, and indeed is relied upon by the Court of Appeals as its reason for dismissing petitioner's appeal"); *see also Eisai Co. Ltd. v. Teva Pharms. USA, Inc. ex rel. Gate Pharms Div.*, 564 U.S. 1001, 1001 (2011); *Dillon v. Alleghany Corp.*, 499 U.S. 933, 933 (1991). Accordingly, Respondents' assertion that vacatur is somehow improper based on the posture of this case defies this Court's precedent and established practice.

Respondents close by asserting that the Eleventh Circuit majority's failure to write an opinion when denying vacatur "makes this an especially inapt case for certiorari." BIO.23. But here, Judge Branch persuasively explained in dissent why vacatur was required. The majority's refusal to respond with an explanation for its decision is no reason to let that inexplicable decision stand.

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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