

No. 21-724

IN THE
Supreme Court of the United States

NEW YORK UNIVERSITY,
Petitioner,

v.

DR. ALAN SACERDOTE, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Court is considering nearly identical legal issues in this case and *Hughes v. Northwestern University*, No. 19-1401. Indeed, this case was discussed at the *Hughes* oral argument. *Hughes* Oral Arg. Tr. 56 (Dec. 6, 2021). The Court’s decision in *Hughes* will affect, and potentially determine, the outcome here. Consequently, NYU took the unremarkable step of asking the Court to follow its “regular[]” practice of holding this case pending decision in *Hughes*. *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 181 (1996) (Scalia, J., dissenting); *see also id.* at 166-167 (per curiam opinion).

Rather than consenting to this typical practice, respondents try to sow confusion. They do not deny that the cases are closely related. Instead, they distort the record in service of a misguided claim that NYU has waived its request to the Court or is estopped from seeking this relief. Respondents’ objection is misplaced. The Court has ample reason to grant the petition now; NYU’s request for a hold is merely to avoid unnecessary duplication of efforts by the parties and the Court. In any event, even a cursory review of the record shows the absurdity of respondents’ contentions.

Respondents further claim that “[h]olding the petition would be inefficient and unnecessarily delay resolving this 2016 case.” Opp. 2. Again, respondents’ arguments miss the mark: Holding the petition will have no effect on the proceedings below because they are already stayed pending the Court’s decision in *Hughes*.

Finally, respondents discourage this Court from using its typical practice of granting the petition, vacating the decision below, and remanding the case for further

proceedings once it issues its decision in *Hughes*. But respondents offer no sensible reason not to GVR in light of *Hughes*. In any event, the Court need not decide now how to dispose of this case; it can do so after it decides *Hughes*. The only decision to be made now is whether this case should be held pending *Hughes*, and clearly it should.

ARGUMENT

Respondents oppose NYU's request on three grounds. First, they assert a hybrid waiver-estoppel defense based on NYU's prior statements about the relationship between *Hughes* and this case. Second, they argue that a hold would be inefficient. Third, they claim a GVR would be inappropriate. All of these arguments are meritless.

1. Respondents cite no authority indicating that it is even possible for waiver or estoppel to apply to a request that the Court hold a certiorari petition pending its disposition of another pending case. The notion makes little sense, given that a hold is simply a deferral of the decision on a petition for the convenience of the Court and the parties. But assuming those doctrines could apply here, NYU's request is neither waived nor estopped. NYU did not waive the right to ask the Court to hold its petition pending *Hughes* because it never denied the similarities between this case and *Hughes*. And none of the factors that guide the estoppel analysis favor barring NYU from seeking a hold pending *Hughes*.

a. Respondents claim that NYU "opposed Plaintiffs' motion [for a stay pending *Hughes*] and asserted that *Hughes* would have no bearing on the proper resolution of the appeal." Opp. 10. This misrepresents

the proceedings below in two fundamental respects. First, although NYU opposed respondents' motion, it never took the position that a stay would be inappropriate due to differences between this case and *Hughes*. Indeed, NYU never had a chance to respond on the merits to respondents' motion for a stay pending *Hughes*—the Second Circuit acted without calling for a response. *See* C.A. Dkt. 233.¹

Second, NYU never denied the similarities between this case and *Hughes*, but rather argued only that a decision in *Hughes* would not affect the case for reasons that have since been superseded. The discussion of *Hughes* arose in the context of two 28(j) letters filed by respondents. The two letters argued that the Solicitor General's brief in support of certiorari and this Court's subsequent grant of certiorari "support[ed] Plaintiffs' arguments for reversal." C.A. Dkt. 225-1 at 1.

In response, NYU pointed out two key differences between this case and *Hughes*. While both of these differences precluded any decision in *Hughes* from requiring reversal *at that time*, neither is relevant any longer, given the Second Circuit's ruling.

The first of these differences was the procedural posture. As NYU explained, "plaintiffs' loss at trial on their overarching claim ... renders harmless any error in the dismissal of plaintiffs' per se claim." C.A. Dkt. 229 at 1. If successful, that argument would have required affirmance regardless of how *Hughes* was eventually decided. Only now that the Second Circuit has

¹ "C.A. Dkt." refers to the ECF document number in Second Circuit No. 18-2707. "D.C. Dkt." refers to the ECF document number in S.D.N.Y. No. 16-6284.

rejected that argument can the outcome of *Hughes* affect this case. See Pet. App. 20a-28a.

The second difference was that, unlike Northwestern in *Hughes*, NYU had emphasized that “the complaint itself” alleges that “[t]he Plans relied on retail shares to pay recordkeeping fees.” C.A. Dkt. 229 at 1. Northwestern had not embraced that “apparent justification for [its] failure to’ offer institutional shares.” *Id.* Again, now that the Second Circuit has rejected that argument for dismissal (at this stage of the proceedings), *Hughes* can affect this case. Pet. App. 22a-23a.

In sum, neither of the reasons NYU gave for why *Hughes* would not control remains. By rejecting those additional arguments, the Second Circuit’s ruling cleared a path for *Hughes* to affect the outcome of this. NYU has thus not waived its argument that this case should be held pending *Hughes*.

b. Nor is NYU estopped from seeking a hold. Respondents say that the Court’s estoppel analysis is not bound by “inflexible prerequisites or an exhaustive formula.” Opp. 11 (quoting *New Hampshire v. Maine*, 532 U.S. 742, 751 (2001)). But they entirely neglect the “several factors” that this Court has explained “*typically* inform the decision whether to apply the doctrine in a particular case.” *New Hampshire*, 532 U.S. at 750 (emphasis added). Each of those three factors “firmly tip[s] the balance of equities” against finding NYU estopped. *Id.* at 751.

First, NYU’s current position is not “‘clearly inconsistent’ with its earlier position.” *New Hampshire*, 532 U.S. at 750. As explained above, NYU has not taken the position that this case, as presently before this Court, should not be stayed pending *Hughes* or denied

the similarity between the two cases; NYU merely argued that *Hughes* would not affect the outcome of its appeal in the Second Circuit *at that time* because NYU had alternative arguments for why respondents' complaint should be dismissed, arguments that have since been rejected by the Second Circuit.

Second, NYU did not “succeed[] in persuading a court to accept [its] earlier position.” *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 170 (2010) (quoting *New Hampshire*, 532 U.S. at 750). As noted, NYU never took the position that differences between the present case and *Hughes* militated against entering a stay. And as this Court has explained, “[a]bsent success in a prior proceeding, a party’s later inconsistent position introduces no ‘risk of inconsistent court determinations’ and thus poses little threat to judicial integrity.” *New Hampshire*, 532 U.S. at 750-751 (citation omitted).

Third, NYU would not “derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.” *Zedner v. United States*, 547 U.S. 489, 491 (2006) (quoting *New Hampshire*, 532 U.S. at 751). Respondents identify no harm they would suffer if this Court held NYU’s petition pending its decision in *Hughes*. In fact, respondents acknowledge (Opp 1-2) that the district court proceedings are already stayed pending *Hughes*, and respondents did not oppose that stay, D.C. Dkt. 404 at 1. Given that stay, granting NYU’s request will have no effect on respondents whatsoever.

Respondents discuss none of these factors. And although “[a]dditional considerations may inform the doctrine’s application in specific factual contexts,” respondents have pointed to no such considerations. *New Hampshire*, 532 U.S. at 751.

2. Respondents next claim that NYU's petition should be denied because "[i]t would be more efficient for the lower courts to address all remaining claims together in the first instance rather than a piecemeal approach." Opp. 12. They add that "[h]olding the petition would be inefficient and unnecessarily delay resolving this 2016 case." Opp. 2. But again, the district court proceedings have been stayed pending this Court's decision in *Hughes* (without respondents' objection). That ensures that holding this petition pending *Hughes* will not add any delay to the resolution of this case or otherwise create inefficiencies.

3. Finally, respondents oppose NYU's suggestion that the Court may use its standard practice of granting certiorari, vacating the judgment below, and remanding the case for reconsideration in light of its decision in *Hughes*. Respondents quote this Court's admonition that the "GVR power should be exercised sparingly." Opp. 10 (quoting *Lawrence*, 516 U.S. at 173 (per curiam)). But in *Lawrence*, the Court never suggested that an intervening on-point decision by the Court was not a proper and routine basis for GVR; the circumstances it identified as "counsel[ing] against undisciplined GVR'ing" were all far afield. 516 U.S. at 173-174 (per curiam).

In any event, there is no need for the Court to decide now whether it will exercise its GVR power after it decides *Hughes*; as long as this petition is held pending decision in *Hughes*, the Court can decide whether GVR, plenary review, or some other disposition is appropriate at that time. See *Lawrence*, 516 U.S. at 181 (Scalia, J., dissenting); see also *id.* at 166, 169 (per curiam opinion).

CONCLUSION

The petition for certiorari should be held pending the Court's decision in *Hughes*.

Respectfully submitted.

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