No. _____

In the Supreme Court of the United States

JOSEPH SROUR,

Petitioner,

-against-

NEW YORK CITY, NEW YORK and JESSICA TISCH, in her Official Capacity as the New York City Police Commissioner,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Rescuing the People from the riptide caused by unconstitutional firearm regulations, the Southern District delivered an analytically sound legal opinion declaring New York City's moral character requirement for the possession of rifles and shotguns facially unconstitutional[1] and permanently enjoining its enforcement. While Respondents' interlocutory appeal of the permanent injunction was being briefed, they voluntarily issued Petitioner a rifle/shotgun license, then sought dismissal of their interlocutory appeal as moot, and demanded vacatur of the district court order.

Relying on *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), from which this Court departed long ago, the Second Circuit heedlessly vacated the unreviewed district court judgment in a manner starkly divergent from this Court's jurisprudence under *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship,* 513 U.S. 18 (1994).

Vacatur of judgment under *Munsingwear* is strictly limited to events beyond the control of the non-prevailing party that cause the judgment being appealed to become unreviewable. Post-*U.S. Bancorp* the central factor to be considered is "whether the

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[1] New York City prohibits its residents from possessing rifles and shotguns without a license, which is subject to an open-ended, subjective assessment of the licensee's "moral character." See, § 10-303(a)(2) of the New York City Administrative Code ("NYAC"). Pet.App.94a. Grounds to deny a license include non-payment of child support, a negative driving history, and prior arrests that terminated in favor of the accused. *Id*

party seeking relief from the judgment below caused the mootness by voluntary action." *U.S. Bancorp*, at 24. The grant of vacatur requires (i) "extraordinary circumstances," (ii) the court's due consideration of the effects of vacatur on the public interest, and (iii) the appellant to demonstrate "equitable entitlement" to such extraordinary relief [*Id.* at 22-27], none of which were implemented by the Second Circuit.

Evading the basic, fundamental protections set in motion by this Court, the decision below represents a gross departure from *U.S. Bancorp*.

The question presented is:

Whether vacatur is proper where the government's voluntary conduct causes the case to become moot in the context of the review of a successful facial constitutional challenge.

PARTIES TO THE PROCEEDING

Petitioner is Joseph Srour.

Respondents are New York City, New York and Jessica Tisch, in her Official Capacity as the New York City Police Commissioner.

The defendants-appellants in the Second Circuit were New York City, New York and Edward A. Caban in his Official Capacity as NYPD Police Commissioner. The defendants in the district court were New York City, New York and Keechant Sewell in her Official Capacity as NYPD Police Commissioner.

RELATED PROCEEDINGS

This case is directly related to these proceedings in the Southern District of New York, the U.S. Court of Appeals for the Second Circuit, and this Court:

Srour v. New York City, *New York,* No. 23A870 (May 20, 2024) (denying Petitioner's application to vacate stay).

Srour v. New York City, New York, No. 23-7549 (2d Cir. Oct. 17, 2024) [Doc. 72] (denying petition for rehearing *en banc*).

Srour v. New York City, New York, No. 23-7549 (2d Cir. Sept. 9, 2024) [Doc. 64] (vacating the district court's judgment, dismissing appeal as moot, and remanding the case to the district court);

Srour v. New York City, *New York,* No. 22-00003 (S.D.N.Y. Oct. 24, 2023) [Doc. 43] (granting plaintiff's motion for summary judgment, in part).

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Decades ago, this Court retreated from the automatic vacatur under *Munsingwear* routinely applied following a finding of mootness on appeal, requiring instead, an equitable analysis that looks principally to whether the party seeking relief caused mootness by voluntary action, and applies the principles of equity in reaching a determination. In *U.S. Bancorp,* this Court placed the burden on "the party seeking relief from the lower court judgment to demonstrate equitable entitlement to the extraordinary remedy of vacatur." *Id.* at 26 (cleaned up). In making such a determination, the court must give due weight to the public interest. *Id.* at 26-27.

While *Munsingwear* vacatur may be appropriate where events of "happenstance" or the "unilateral action of the party who prevailed below," results in mootness [*U.S. Bancorp,* at 25], vacatur should not be granted in the absence of "exceptional circumstances." *U.S. Bancorp.* at 29. See also, *Chapman v. Doe by Rothert*, 143 S. Ct. 857, 857 (2023) (Jackson, J., dissenting) ("We have long recognized that the equities generally do not favor *Munsingwear* vacatur when the party requesting such relief played a role in rendering the case moot.") citing, *U.S. Bancorp,* at 25; *U.S. v. Hamburg-Amerikanische Packet-Fahrt-Actien Gesellschaft*, 239 U.S. 466, 478, (1916); see also, *Karcher v. May*, 484 U.S. 72, 83 (1987) (*Munsingwear* vacatur inapplicable where mootness was attributable to one or more of the parties). Even where the parties have jointly played a part in rendering the issues moot through settlement, it remains the appellant's burden, "as the party seeking relief…to demonstrate not merely equivalent

responsibility for the mootness, but equitable entitlement to the extraordinary remedy of vacatur." *U.S. Bancorp*, at 26.

Once again, the Second Circuit resists this Court's instruction. Contrary to *U.S. Bancorp* and its progeny, vacatur is all but presumed. The decision below gave no consideration to the public interest, the case involved no "exceptional circumstances," and vacatur was granted notwithstanding Respondents' failure to demonstrate entitlement to such extraordinary relief. In the Second Circuit, to avoid vacatur where the appellant's voluntary conduct causes the appeal to become moot, there must be evidence establishing that the appellant *specifically intended* to deprive the court of continuing jurisdiction over the case. Pet.App.28a ("There is no indication that the City granted Srour's rifle and shotgun permit to intentionally moot this case, or even that its action was related to this lawsuit."). And if the prevailing party played any role in a "chain of events" that ultimately led to the appellant's voluntary conduct, he forfeits the success achieved below. Pet.App.29a. The Second Circuit's disregard of *U.S. Bancorp* and vacatur of the district court's order, particularly in an interlocutory appeal of a successful facial challenge (at the appellants' request, no less) flouts the principles of equity, frustrates the judicial process, and is contrary to public policy. [2]

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[2] The decision below also creates an oddity inconsistent with the public interest. By vacating only a portion of the declaratory and injunctive relief awarded by the district court's order granting

OPINIONS BELOW

The Second Circuit order denying the petition for rehearing *en banc* is unreported and reproduced at Pet.App.1a. The Second Circuit order is reported at 117 F.4th 72 and reproduced at Pet.App.3a. The district court opinion and order is reported at 699 F. Supp. 3d 258 and reproduced at Pet.App.30a.

JURISDICTION

The Second Circuit issued its order on September 9, 2024. Pet.App.3a. The Second Circuit denied a timely petition for rehearing and rehearing *en banc* on October 17, 2024. Pet.App.1a. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are reproduced in the appendix at Pet.App.93a.

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summary judgment to Petitioner, vacatur essentially castrates a meritorious facial constitutional challenge. Moreover, the unresolved damages and attorney's fee issues pending in the district court may very well turn on, or be affected by, the district court's findings and conclusions in the permanent injunction order.

STATEMENT OF THE CASE

A. Legal Background

Vacatur must be decreed for those judgments whose review is, in the words of *Munsingwear*, "prevented through happenstance"—that is to say, where a controversy presented for review has "become moot due to circumstances unattributable to any of the parties." *U.S. Bancorp,* at 23 (cleaned up) quoting, *Karcher v. May*, 484 U.S. 72, 82 (1987).

The *principal* equitable factor to which a court must look is whether the party seeking vacatur caused the mootness by voluntary action. *U.S. Bancorp*, at 23 (emphasis added). And "it is far from clear that vacatur of the District Court's judgment would be the appropriate response to a finding of mootness on appeal brought about by the voluntary conduct of the party that lost in the District Court. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 194 n.6 (2000) citing *U.S. Bancorp*, at 18 (mootness attributable to a voluntary act of a non-prevailing party ordinarily does not justify vacatur of a judgment under review); *Walling v. James V. Reuter, Inc.*, 321 U.S. 671 (1944).

Munsingwear vacatur "does not apply to mootness achieved by purchase." *Izumi v. U.S. Philips Corp.,* 510 U.S. 27, 41 (1994) (Stevens, J., dissenting). An aggrieved party who abandons the path to a merits-based challenge of the judgment by

its voluntary conduct has declared the right was not *really worth* insisting upon."[3]

When weighing the public interest, the district court judgment should not be lightly cast aside. Recounting Justice Steven's dissent in *Izumi*,[4] this Court acknowledged the "presumptive" correctness and value of judicial precedent "to the community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur." *U.S. Bancorp*, at 26-27 (emphasis added). "The voluntary forfeiture of review constitutes a failure of equity that makes the burden decisive, whatever the winning party's share in the mooting of the case might have been." *U.S. Bancorp*, at 26.

The perils of departing from the "foundational moorings" of *U.S. Bancorp*, discussed relatively recently in Justice Jackson's dissent in *Chapman*, underscore the need for this Court to grant review here. Justice Jackson spotlights the "extraordinary" circumstances prerequisite to vacatur when the losing party's voluntary acts have caused the case to become moot. Relaxing the vacatur requirements of *U.S. Bancorp* presents considerable risk of harm to the legal system, which presumes that "judicial decisions are valuable and should not be cast aside lightly, especially because judicial precedents are not merely the property of private litigants, but also belong to the

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[3] *D.C. v. Heller*, 554 U.S. 570, 634 (2008) (discussing the rejection of mean-end scrutiny in Second Amendment cases).

[4] Granting certiorari based on split in the circuit courts, but dismissing the writ as improvidently granted due to petitioner's lack of standing.

public and legal community as a whole." *Chapman,* at 858 (Jackson, J., dissenting) quoting, *U.S. Bancorp*, at 21, 26-27 (cleaned up).[5] "The public interest in preserving the work product of the judicial system should always at least be weighed in the balance before such a motion is granted." *Izumi*, at 40 (Stevens, J. dissenting).[6]

The decision below is an example of such a departure. The district court's analysis and opinion has far-reaching constitutional implications for millions of New York City residents, and the legal community in general. Yet, the vacatur of the declaratory and permanent injunctive relief was awarded without consideration of the public interest and absent "exceptional" circumstances.

Under a precedent that squarely contradicts *U.S. Bancorp - presumed* vacatur where an appeal become moot - the circuit court strayed further by requiring evidence that the non-prevailing party *intended to* moot the appeal essentially improvidently placing the burden on the prevailing party to prove why the judgment *should not* be vacated. Pet.App.28a. Explaining that the absence of an "indication that the City granted Srour's rifle and shotgun permit to

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[5] Justice Jackson also points to the risk of damage to "first principles of appellate review" including, general lack of jurisdiction of an appellate court to "review a moot case, much less an order awarding relief in the matter" and the principle that *Munsingwear* vacatur is an *exception* to the statutorily prescribed path for obtaining relief from adverse judgments (namely, appeals as of right and certiorari). *Chapman*, at 858.

[6] The majority opinion in *Izumi* observed the circuit split on the issue of whether vacatur in the event of settlement. *Izumi*, at 30, n. 2.)

intentionally moot this case, or even that its action was related to this lawsuit" the court ignored Respondents' announcement just months before issuing a license to Petitioner that "…the License Division believes [Petitioner] is both 'dangerous' and not law-abiding" [D.C. ECF 45 at 3, n. 3]. Though the evidence of intent exists, no such burden exists under *U.S. Bancorp*; voluntariness, not fault and bad intentions, is the touchstone under *U.S. Bancorp*. Even where mootness results from the voluntary acts of *both* parties – for example, settlement of the claims – "the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim to the equitable remedy of vacatur." *U.S. Bancorp,* at 25 (cleaned up) quoting, *Sanders v. United States*, 373 U.S. 1, 17 (1963) (citing *Fay v. Noia*, 372 U.S. 391, 438 (1963)).

B. Factual Background

New York City bans the possession of rifles and shotguns in one's home without a license. See, New York City Administrative Code (NYAC) 10-303. No license will be issued unless the New York City Police Department's License Division determines that the applicant possesses "good moral character." NYAC 10-303(a)(2) [Pet.App.94a]. The grounds used by the License Division to deny an application for lack of good moral character[7] include prior arrests that were

[7] 38 RCNY 3-03 contains the NYPD police commissioner's internal policies setting forth the factors to determine "good moral character."

dismissed and sealed[8], a poor driving history[9], failure to disclose dismissed charges on the application[10] and, *inter alia,* an undefined "lack of candor."[11]

Petitioner Joseph Srour, is a resident of Brooklyn, New York. 699 F.Supp.3d 258, 262. He has no disqualifiers to the possession of firearms, and has never been convicted of a crime.[12] D.C. ECF 27-1. In 2018, Petitioner applied to the License Division for a permit to possess rifles and shotguns in his home. In 2019, his application was denied by the License Division based on (i) arrests in 1995 and 1996 that were dismissed and sealed by the court[13], (ii) a poor driving history, (iii) and failing to disclose the dismissed/sealed charges on his application.[14] D.C. ECF 27-1; 27-2, 27-4.

In its Notice of Disapproval, the License Division explained: "The circumstances surrounding your actions exhibited in your past question your ability to abide by the rules and regulations to possess a rifle/shotgun permit." 6/13/19 Notice of Application Disapproval. The Notice proceeded to explain: "Based

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[8] 38 RCNY 3-03(a).
[9] 38 RCNY 3-03(h).
[10] 38 RCNY 3-03(e).
[11] 38 RCNY 3-03(n).
[12] Citations to the district court docket sheet are listed as D.C. ECF [document number] at [page]. Citations to the Second Circuit's docket are listed as C.A. ECF [document number] at [page].
[13] Petitioner's charges were dismissed and sealed pursuant to N.Y. Crim. Proc. Law § 160.50 entitled, "Order upon termination of criminal action in favor of the accused." D.C. ECF 27-4 at 1.
[14] During the application investigation process, Petitioner did disclose the sealed charges and submitted a written statement describing the arrests. D.C. ECF 27-4.

on your prior arrests for [redacted] you have shown poor moral judgment and an unwillingness to abide by the law. The above circumstances, as well as your derogatory driving record (twenty-eight moving violations and thirty license suspensions), reflect negatively on your moral character and casts [sic] grave doubt upon your fitness to possess a firearm." 699 F.Supp.3d at 262. Petitioner's federal lawsuit followed.

C. Procedural History

Petitioner filed suit in the Southern District of New York on January 2, 2022 challenging various firearm regulations, including NYAC 10-303(a)(2) controls the possession of rifles and shotguns in one's home for self-defense under the Second and Fourteenth Amendments. Petitioner's Complaint sought a declaration that requiring the People to succumb to a discretionary assessment of their 'moral character' to possess rifles and shotguns violates the Second Amendment, the permanent injunction of NYAC 10-303(a)(2)[15] and, among other relief, compensatory damages for the constitutional violations, and "such other, further, and different relief as the Court deems just and proper." [D.C. ECF 1].

At or around the time Petitioner filed his motion for summary judgment in December 2022, the NYPD

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[15] Petitioner challenged other regulations including NYAC 10-303(a)(9), which allows denial of a rifle/shotgun license for "where good cause exists for the denial." Pet.App.96a. Subsection (a)(9) was also permanently enjoined by the district court, which Respondents did not appeal. Pet.App.91a.

amended the preamble to the rules that list the factors used by the License Division to assess and determine "moral character." The enumerated factors remained intact. D.C. ECF 40-1, at 3-4.

On October 24, 2023, the district court granted Petitioner's motion for summary judgment, in part, declaring NYAC 10-303(a)(2) and (9) facially unconstitutional in violation of the Second Amendment under the test announced in *Bruen* and issued an order permanently enjoining the statutes. Pet.App.91a. Petitioner's claims for monetary damages on his Second Amendment claims and attorney's fees, remain to be assessed by the district court. D.C. ECF 11/26/24 Text Order.

Respondents moved for a stay of the declaratory judgment and permanent injunction of NYAC 10-303(a)(2) and (9) pending appeal. D.C. ECF 45. According to Respondents, a stay was necessary for "public safety and well-being because it directly implicates the City's ability to review firearm applicants to ensure that they are 'responsible and law-abiding."[16] D.C. ECF 45 at 3, n. 3. Respondents declared, "…the [NYPD] License Division believes that Plaintiff is both "dangerous" and not law-abiding." D.C. ECF 45 at 3, n. 3.

Petitioner then applied to the License Division for a rifle/shotgun license, handgun license (home), and concealed carry license, and immediately filed suit against Respondents seeking to enjoin Respondents from enforcing the December 16, 2022 amendments to

[16] D.C. ECF 45 at 2.

38 RCNY 3-03 and 38 RCNY 5-10 [handguns][17] against his applications. *Srour v. New York City, New York,* 1:23-cv-09489-JPC ("*Srour II*") ECF 5-8. The district court denied the application. *Srour II,* ECF at 19.

Respondents sought a stay of the district court's injunctive and declaratory relief. D.C. ECF 45. Detailing the implausibility that Respondents would succeed on the merits of their appeal, the district court denied the motion. *Srour v. New York City, New York*, No. 22 CIV. 3 (JPC), 2023 WL 7091903, at *1 (S.D.N.Y. Oct. 26, 2023). The Second Circuit summarily granted Respondents' motion for a stay without conducting any analysis. C.A. ECF 3.

Petitioner filed an application in this Court to vacate the Second Circuit's stay of the district court's permanent injunction, which was denied by Justice Sotomayor [23A870]. Petitioner refiled and submitted his application to Justice Thomas, which was distributed for Conference, referred to the Court, and denied. *Id.*

Respondents filed an interlocutory appeal in the Second Circuit seeking review of the permanent injunction and declaratory judgment of NYAC 10-303(a)(2). After Petitioner's brief was filed, Respondents issued Petitioner a rifle/shotgun license, then asked the Second Circuit to dismiss their appeal as moot and vacate the district court's judgment.

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[17] *Srour v. New York City,* 1:23-cv-09489-JPC ("*Srour II*").

At oral argument on June 10, 2024, Respondents' counsel confirmed that the License Division will continue to enforce the "moral character" requirement, including against Petitioner to deny a renewal of his license should he violate even the most innocuous law.[18]

On September 9, 2024, the Second Circuit granted Respondent's motion, and issued an order vacating that portion of the district court's judgment permanently enjoining NYAC 10-303(a)(2) and declaring it facially unconstitutional, dismissing Respondents' appeal as moot, and remanding the case to the district court with instructions to dismiss Petitioner's declaratory and injunctive relief claims.[19] Pet.App.3a. Petitioner timely sought *en banc* review of the order, which was denied. Pet.App.1a. Petitioner's petition for a writ of certiorari to this Court followed.

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[18] C.A. Oral Argument, at 35:20-36:05 (""…if new facts come to light…his character is not reassessed unless he…again decides to violate laws. It's not just driving history, it's ignoring direct instructions about not doing certain things for public safety reasons. So he was told "this is illegal, don't do this," and then he did it again, so he was charged with violations of the Navigational Law, so if that kind of thing happens again, then his character could be reassessed…").
https://1drv.ms/u/c/88f4a2f0843fc612/ERLGP4TwovQggIhZ8wAAAAABIq45kiw0jwgZbIFG2NrTxw?e=zvJIlB

[19] The Second Circuit concluded, *inter alia*, that because Petitioner was issued a rifle/shotgun license, he "has been granted the very relief he sought…the case before us is moot, and we lack jurisdiction to hear the merits." Pet.App.5a. Actually, the issuance of a license to Petitioner granted him *none* of the relief sought in the Complaint. D.C. ECF 1.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD SUMMARILY REVERSE THE DECISION BELOW AS A GROSS DEPARTURE FROM *U.S. BANCORP*

A. Vacatur is the exception now, not the rule.

Before *Munsingwear,* the established practice of the Supreme Court in dealing with a civil case which became moot, while on its way to the Court or pending a decision on the merits, was to reverse or vacate the judgment below and remand with a direction to dismiss. *Munsingwear*, at 39 citing, *Duke Power Co. v. Greenwood County, S.C.*, 299 U.S. 259, 267 (1936). This practice was rooted in the belief that litigants should not be bound by a judgment whose merits-based review was foreclosed by events beyond their control; *see id,* at 41 ("As already indicated, it is commonly utilized in precisely this situation to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences.").

In *U.S. v. Bancorp*, this Court set a new course for vacatur when a case becomes moot, departing from the general practice of "automatic" vacatur. "Vacatur must now be decreed for those judgments whose review is, in the words of *Munsingwear*, prevented through happenstance—that is to say, where a controversy presented for review has become moot due to circumstances unattributable to any of the parties." *U.S. Bancorp*, at 23 (1994) (cleaned up) quoting, *Karcher v. May*, 484 U.S. 72, 82 (1987).

Declaring that the equitable relief of vacatur is reserved for "extraordinary" circumstances, this Court instructed that vacatur is to be determined by weighing the equities on a case-by-case basis – the "principal" condition being "whether the party seeking relief from the judgment below caused the mootness by voluntary action." *U.S. Bancorp*, at 24 (emphasis added).

As with any consideration of equitable relief, the court's decision must also take the public interest into account because of the importance of judicial precedents to the public and legal community as a whole. *U.S. Bancorp*, at 26. "To allow a party who steps off the statutory path to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would—quite apart from any considerations of fairness to the parties—disturb the orderly operation of the federal judicial system." *U.S. Bancorp*, at 26. The "public interest is best served by granting relief when the demands of "orderly procedure" cannot be honored [and] the public interest requires those demands to be honored when they can." *Id.* at 26-27.

And even where a case has been rendered moot by both parties – for example, through settlement of the claims – the burden is on the party seeking relief from the lower court judgment to demonstrate "equitable entitlement to the extraordinary remedy of vacatur." *Id.* at 26 ("[Appellant's] voluntary forfeiture of review constitutes a failure of equity that makes the burden decisive, whatever [the prevailing party's share in the mooting of the case might have been.").

B. The Second Circuit misunderstands *U.S. Bancorp* and applied *none* of the factors required thereunder in the decision below.

The decision below exemplifies the Second Circuit's gross misunderstanding of the fundamental premise of *U.S. Bancorp*, including which party bears the burden of proof for vacatur to be granted, balancing the equities, and giving consideration of the effect on the public interest if vacatur is granted. Arguably, the only similarity between the decision below and *U.S. Bancorp* is a citation to a quote that references *Munsingwear* 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 the judgment" [Pet.App.27a]. The court proceeds to quote *Camreta v. Greene*, 563 U.S. 692, 713 to, again, award vacatur "[w]hen happenstance prevents…review from occurring…" [Pet.App.27a[20]], as if vacatur is still the "general practice" for resolving a moot appeal.

The Second Circuit employs a "determination of fault" rule: if the appellant acted voluntarily, but had no *intention* to cause the case to become moot, vacatur is required.[21] Although Respondents' issuance of a

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[20] Interestingly, the decision below cites *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 5 (2023), which vacated the district court judgment after finding that the non-prevailing party's voluntary conduct – dismissal of her case – rendered the case moot.

[21] See, *FDIC v. Regency Sav. Bank, F.S.B.*, 271 F.3d 75, 77 (2d Cir. 2001) (if appellant's conduct deprives the court of continuing jurisdiction under circumstances suggesting an intention to do so, appellant is deemed to have forfeited the benefit of the equitable remedy of vacatur of the judgment of the lower court).

license is voluntary, discretionary, and within their control, weighing against vacatur, the court determined that, because it could not identify any evidence that Respondents' issued a license with the *intention* of causing their own appeal to become moot, vacatur was warranted. Pet.App.27a-28a. The court goes on to suggest Petitioner himself is at fault for applying for a license in the first instance. Pet.App.29. Under *U.S. Bancorp*, however, the burden rests with the party seeking relief from the lower court judgment to demonstrate "equitable entitlement to the extraordinary remedy of vacatur" [*U.S. Bancorp*, at 26] which did not happen below.

The Second Circuit also disregarded sound jurisprudence requiring consideration of the effects that vacatur of a presumptively correct district court order will have on the public. *U.S. Bancorp*, at 26 ("As always when federal courts contemplate equitable relief, our holding must also take account of the public interest."). It is always in the public interest to protect constitutional liberties. Vacating an unreviewed final order with wide-reaching constitutional implications, as in this case, deprives the public of protection from a tyrannical government and divests the legal community of valuable precedent from which to launch future constitutional challenges.

The Second Circuit's inability (or unwillingness) to abide by the instructions of this Court as set forth in *U.S. Bancorp* – i.e., failing to hold the appellant to its burden of establishing entitlement to vacatur, facilitating the collateral attack on the judgment through the "at-fault" escape hatch, foregoing a

balance of the equities, and avoiding consideration of the public interest, warrants consideration of the petition.

The Second Circuit's gross departure from *U.S. Bancorp* calls out for an exercise of this Court's supervisory power. This case presents an excellent vehicle for clarifying the accepted grounds for vacatur when the government's voluntary conduct causes the case to become moot in the context of the review of a successful facial constitutional challenge.

II. EVEN IF *U.S. BANCORP* DOES NOT REQUIRE SUMMARY REVERSAL, PUBLIC POLICY WARRANTS PLENARY REVIEW

A. Vacatur of a voluntarily unreviewed judgment is contrary to the public interest, particularly after a successful facial constitutional challenge.

The vacatur of the declaratory and permanent injunctive relief granted by the district court was granted without any consideration of the public interest.[22] This tragic omission contravenes the most basic considerations of a court undertaking determinations of equity. Perhaps, in some cases, the public interest is negligible or does not weigh heavily enough against vacatur. Not so here – or presumably in any case involving the successful facial constitutional challenge. This category of judgments affects entire communities, states, and sometimes the entire nation, and is of great import and value to the

[22] *U.S. Bancorp*, at 26.

legal community. Striking an unconstitutional statute restores freedoms that were improperly stripped by the government,[23] and judgments of that nature should stand.

B. The government's abandonment of review in a successful constitutional facial challenge precludes vacatur as a matter of public policy.

Where the government abandons its right to appeal a successful facial constitutional challenge, public policy outweighs vacatur. Judicial precedents are presumptively correct and valuable to the legal community as a whole, not merely the property of private litigants, and they should stand unless a court has properly concluded that the public interest would be served by a vacatur. *U.S. Bancorp*, at 26–27 citing *Izumi*, at 40 (cleaned up). In such circumstances, it would be inappropriate to dispose of a case, "whose merits are beyond judicial power to consider." *Id.* at 28.

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[23] The district court's judgment grants respite and hope to millions of New York City residents. The Second Circuit's disinterest in considering the constitutional rights - more pointedly, the Second Amendment rights - of 'the People' comes as no great shock considering the Second Amendment jurisprudence in this circuit.

C. The government should not be rewarded for voluntarily forfeiting the right to appellate review of a successful facial challenge.

New York City is no stranger to the gamesmanship of avoiding constitutional review by its own voluntary conduct.

Not long ago, in *New York State Rifle & Pistol Ass'n, Inc. v. City of New York, New York*, 590 U.S. 336 (2020) this Court held that the plaintiffs' appeal was rendered moot by Respondents' amendment of the police commissioner's rule regarding the transportation of firearms. After claiming for years that the regulation was necessary for "public safety," Respondents' default position, they swiftly abandoned their position and amended the regulation to avoid a loss in this Court.[24]

Respondents have a history of spontaneously issuing a license to individuals who they previously denied for "lack of good moral character." For instance, in *Abekassis v. New York City, New York*, No. 20-3038, 2021 WL 852081, at *1 (2d Cir. Mar. 4, 2021) shortly before their opposing brief was scheduled to be filed in the Second Circuit, Respondents spontaneously issued a license to the

[24] "When the case was argued, counsel for the City was asked whether the repeal of the travel restriction had made the City any less safe, and his unequivocal answer was no." *Id.* at 350–51 (2020) (Kavanaugh, J., dissenting) citing, Tr. of Oral Arg. 52.

plaintiff/appellant (previously deemed to lack good moral character); the Second Circuit dismissed the appeal and remanded with instructions to dismiss.

In *Taveras v. New York City, New York*, No. 20 CIV. 1200 (KPF), 2023 WL 3026871 (S.D.N.Y. Apr. 20, 2023) the district court found plaintiff's claims for declaratory and injunctive relief moot after New York City spontaneously mailed a license to plaintiff's previous home address; the City then served a Rule 68 offer of judgment compelling settlement and, thus avoiding review of NYAC 10-303(a)(2) and (a)(9), and 3 RCNY 3-03(f) and (g). Mr. Taveras was initially denied a license because of "the serious nature of [dismissed allegations] raise[d] safety concerns…" Case No. 1:20-cv-01200-AS, ECF 39-1.

Respondents' gamesmanship warrants review of the petition and stern correction of the Second Circuit's application of rules applied to vacatur.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari.

Respectfully submitted,

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