ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STANDING ROCK SIOUX TRIBE, Plaintiff–Appellant, CHEYENNE RIVER SIOUX TRIBE, Intervenor for Plaintiff–Appellant, v. UNITED STATES ARMY CORPS OF ENGINEERS, Defendant–Appellee, DAKOTA ACCESS LLC, Intervenor for Defendant–Appellee.	Case No. 16-5259

REPLY IN SUPPORT OF MOTION BY DAKOTA ACCESS LLC TO DISMISS APPEAL AS MOOT OR FOR SUMMARY AFFIRMANCE IN THE ALTERNATIVE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

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* Authorities on which this motion chiefly relies are marked with an asterisk.

Treatise

INTRODUCTION

Appellant, Standing Rock Sioux Tribe, concedes that its appeal is moot. The sole issue is whether to vacate the opinion below. This Court should not do so. The purpose of vacating lower-court decisions mooted while on appeal is to ensure that "[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance," is not "forced to acquiesce in the judgment." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994); *see also United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950) (noting that this procedure prevents parties from being "prejudiced by a decision which in the statutory scheme was only preliminary"). That purpose is inapplicable here for multiple reasons. First, as explained in the argument supporting summary affirmance in the alternative, the Tribe has *already obtained* "review of the merits of [the] adverse ruling [below]." *U.S. Bancorp*, 513 U.S. at 25. Second, as the government suggests in its Response to this Motion, it is inappropriate to vacate an *interlocutory* decision like the one at issue here, because the mere denial of preliminary relief, as such, generally carries no preclusive effect. *See* 13C Charles Alan Wright & Arthur R. Miller et al., *Federal Practice & Procedure*. § 3533.10.3 (3d ed. 2008). Third, the Tribe voluntarily declined to seek a stay from the Supreme Court after this Court denied its emergency motion, which strongly weighs in favor of permitting the district court's decision to stand. *See Mahoney v. Babbitt*, 113 F.3d 219, 221–22 (D.C. Cir. 1997).

In the end, the balancing of the equities weighs heavily in favor of retaining the district court's decision.

ARGUMENT

THIS APPEAL SHOULD BE DISMISSED AS MOOT WITHOUT VACATING THE DISTRICT COURT'S INTERLOCUTORY DECISION.

The Tribe concedes that this "appeal from the denial of preliminary injunctive relief" has been "mooted." Opp. 1. It argues, however, that under *Munsingwear*, "the underlying preliminary injunction must be vacated." *Id.* This argument fails to account for the procedural posture of this case and the consequences of the Tribe's own strategic decisions. It should be rejected.

In *Munsingwear*, the Court suggested that the "established practice" of federal appellate courts was to vacate opinions of lower courts when cases became moot on appeal. 340 U.S. at 39. *Munsingwear* was "for many years the leading case on vacatur," but the 1994 decision *U.S. Bancorp* "has displaced *Munsingwear* as the Supreme Court's latest word on vacatur." *Mahoney*, 113 F.3d at 221.

Conspicuously, the Tribe never cites *U.S. Bancorp*.[1] Under *U.S. Bancorp*,

[1] The Tribe's reference to the "standard practice" of granting "automatic vacatur" comes from this Court's decision in *Clarke v. United States*, 915 F.2d 699, 706 (D.C. Cir. 1990) (en banc), which predates the Supreme Court's decision in *U.S. Bancorp*. In *Mahoney*, this Court recognized that at least "one aspect of *Clarke* may no longer be good law" after *U.S. Bancorp*: "While [in *Clarke*] we operated on the opposite belief … that the precedential effect of a decision was a reason supporting vacatur—the Supreme Court has since come down on the other side in *U.S. Bancorp*." 113 F.3d at 222.

when a case is mooted pending appellate review, it is the burden of "the party seeking relief from the status quo … to demonstrate not merely" that the parties share "equivalent responsibility for the mootness, but equitable entitlement to the extraordinary remedy of vacatur." 513 U.S. at 26. *U.S. Bancorp* instructs courts to consider the "conditions which have caused the case to become moot," as well as "the public interest" in permitting the decision to stand, when deciding whether the party seeking vacatur has met its burden. *Id.* at 24, 26 (internal quotation marks and citations omitted).

Applying the *U.S. Bancorp* framework here, the Tribe fails in multiple respects to show that vacatur is warranted.

First, this Court has already reviewed the decision below, removing it from the *U.S. Bancorp* framework entirely. Courts vacate decisions that are mooted pending appeal in order to avoid prejudice to parties who were "prevented through happenstance" from obtaining appellate review. *Munsingwear*, 340 U.S. at 108. That is not this case. When this Court rejected the Tribe's motion for an injunction pending appeal, it also provided the Tribe with full appellate review of the district court's decision denying the Tribe a preliminary injunction. The Tribe has not disputed that "[t]he standard the Tribe needed to satisfy in the district court is the same standard this Court has already held it fails to meet." Mot. 18. Because these standards are the same, the Tribe cannot complain that mootness prevented review of the decision

the Tribe now wants vacated. This Court reviewed—and by agreeing with it, effectively affirmed—the district court's decision when it determined that the Tribe "has not carried its burden" to show entitlement to injunctive relief. Add. 94.[2] Indeed, pending this Court's consideration of the Tribe's injunctive claims, the Tribe obtained interim relief from this Court—precluding construction within 20 miles on either side of Lake Oahe—that was dissolved only when this Court concluded, after review, that the Tribe had no right to injunction it sought.

Second, vacatur is inappropriate because, as the government's Response points out, even *Munsingwear*'s "established practice" of vacating the lower court's decision when an appeal becomes moot generally does not extend to mooted *interlocutory appeals*. "[I]f the case remains alive in the district court, it is sufficient to dismiss the appeal without directing that the injunction order be vacated." Wright & Miller, *supra*, § 3533.10.3. In addition to the authorities cited by the government, every other court that has directly confronted this question has concluded that, "[i]n the case of interlocutory appeals ... the usual practice is just to dismiss the appeal as

[2] In opposing summary affirmance in the alternative—a ground the Court need not reach now that the Tribe concedes mootness—the Tribe contends that its preliminary injunction motion presented issues of first impression. That is wrong. The lower court opinion plainly shows that issues of first impression did not come into play because (1) the Tribe repeatedly refused to engage in the consultation process that underlies its claims, Add. 35, and (2) the Tribe mischaracterized the legal issues that were in play, Add. 42–43, 46–49. Regardless, the issue here is whether the Tribe has a fair opportunity for appellate review of the lower court ruling. Plainly it did.

moot and not vacate the order appealed from." *Fleming v. Gutierrez*, 785 F.3d 442, 449 (10th Cir. 2015) (internal quotation marks and citations omitted); *see also Serv. Emps. Int'l Union Local 1 v. Husted*, 531 F. App'x 755, 755–56 (6th Cir. 2013); *Brooks v. Ga. State Bd. of Elections*, 59 F.3d 1114, 1122 (11th Cir. 1995); *McLane v. Mercedes-Benz of N. Am., Inc.*, 3 F.3d 522, 523 n.6 (1st Cir. 1993); *In re Tax Refund Litig.*, 915 F.2d 58, 59 (2d Cir. 1990); *Marilyn T., Inc. v. Evans*, 803 F.2d 1383, 1385 (5th Cir. 1986); *Gjertsen v. Bd. of Election Comm'rs of City of Chi.*, 751 F.2d 199, 202 (7th Cir. 1984).

Third, vacatur is inappropriate because the Tribe "voluntar[ily] forfeit[ed]" its opportunity to pursue further appellate review before the case was mooted. *U.S. Bancorp*, 513 U.S. at 26. The Tribe points to cases where parties settled, but the voluntary forfeiture rule also applies where the appellant failed to pursue available avenues of review when it knew that mootness was imminent. Because the Tribe did not seek a stay in the Supreme Court, the rule applies squarely here.

In *Mahoney*, would-be protesters were threatened with arrest if they displayed certain signs at President Clinton's inaugural parade. 113 F.3d at 220. The day before the parade, this Court granted an emergency motion filed by the protestors seeking an injunction preventing the government from arresting them pending appeal of a district-court order denying the protestors' motion for a preliminary injunc-

tion. After the protesters demonstrated at the parade, the government, citing *Munsingwear*, petitioned this Court to rehear the emergency motion, and simultaneously sought vacatur of the order granting the motion. *Id.*

This Court declined to vacate its decision on rehearing, reasoning that because the government "elected not to seek further relief upon the entry of our order" it placed itself "squarely within the reasoning of *U.S. Bancorp* governing forfeiture of the right to vacatur." *Mahoney*, 113 F.3d at 221. The government "accepted the effects of [this Court's] emergency order" by failing to "appl[y] to the Supreme Court for a stay of our emergency order," even though the time for doing so was short. *Id.* at 221–22. Because the government "could have addressed the Circuit Justice for such a stay" and chose not to do so, "'the *Munsingwear* procedure [was] inapplicable.'" *Id.* at 222 (quoting *Karcher v. May*, 484 U.S. 72, 83 (1987)).

Like the government in *Mahoney*, the Tribe lost a motion for an emergency injunction in this Court. *See* Add. 94. The Tribe knew that "[w]ithout an injunction pending appeal, construction could render moot any relief that this Court could grant." Tribe Mot. 2. But the Tribe took no steps to obtain such an injunction after this Court denied its motion; it did not, for example, seek relief from the Chief Justice. Like the government in *Mahoney*, the Tribe "accepted the effects of [this Court's] emergency order," *Mahoney*, 113 F.3d at 221, and therefore "the principles of *Munsingwear* and *U.S. Bancorp* compel denial of the motion to vacate," *id.*

at 224.

* * *

"Because vacatur is equitable in nature, [courts] look to notions of fairness when deciding whether to use the remedy." *Sands v. NLRB*, 825 F.3d 778, 785 (D.C. Cir. 2016). And because "[j]udicial precedents are presumptively correct and valuable to the legal community as a whole," decisions "should stand unless a court concludes that the public interest would be served by a vacatur." *U.S. Bancorp*, 513 U.S. at 26–27 (internal quotation marks and citation omitted). For the reasons explained above, the Tribe has not come close to making that showing.

CONCLUSION

The Court should dismiss the appeal as moot without vacating the district court's decision.

Dated: December 12, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 27(d)(2)(C) and 32(g)(1), I certify that this reply complies with the applicable type-volume limitations. This reply was prepared using a proportionally spaced type (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1), this reply contains 1476 words. This certificate was prepared in reliance on the word-count function of the word-processing system used to prepare this reply.

Dated: December 12, 2016

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