No. 19-1201

In The

Supreme Court of the United States

CLAY BRIGHT, COMMISSIONER OF TENNESSEE DEPARTMENT OF TRANSPORTATION,

Petitioner,

v.

WILLIAM HAROLD THOMAS, JR.,

Respondent.

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

RESPONDENT'S SUPPLEMENTAL BRIEF

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In simultaneously arguing that this case is not moot, and that the Sixth Circuit's decision should be vacated if it is, the State creates a conundrum. After all, it has unquestionably changed the provision challenged here, yet claims that there is a "possibility"—in its view, a strong enough possibility to avoid mootness—that its unconstitutional law will simply be resurrected if the Sixth Circuit's ruling is removed.

This assertion is insufficient for some purposes, but more than enough for others. In particular, the State's suggestion that it will reenact the law at issue here at some point in the future does nothing for its vehicle problems, and does not meet this Court's high standards for avoiding mootness.

At the same time, the State's implied threat is enough to tip the balance of equities in Mr. Thomas's favor regarding vacatur. There is nothing equitable about the State's attempt to invoke this Court's discretionary jurisdiction in order to avoid its loss in the court of appeals—precisely so that it can reoffend and begin the cycle of litigation anew.

A. Tennessee's Arguments against Mootness Confirm That This Case Is a Poor Vehicle for Certiorari

Tennessee House Bill 2255 was signed by the Governor on June 22, 2020.[1] This Court declares cases

[1] Available at https://legiscan.com/TN/bill/HB2255/2019.

moot when reform legislation goes into effect resolving the question before it. *See*, *e.g., N.Y. State Rifle & Pistol Ass'n v. City of N.Y.*, 140 S. Ct. 1525, 1526 (2020); *United States v. Microsoft Corp.*, 138 S. Ct. 1186, 1187-88 (2018); *Bowen v. Kizer*, 485 U.S. 386 (1988). With the new law in place, it is "impossible for" this Court "to grant any effectual relief" to the State. *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (internal quotation marks omitted); *cf. N.Y. State Rifle & Pistol Ass'n*, 140 S. Ct. at 1526 (holding moot because of new, ameliorative legislation). After all, this Court only "appl[ies] the law as it is now, not as it stood below." *Kremens v. Bartley*, 431 U.S. 119, 128-29 (1977). And the provision declared unconstitutional below, which the State wished to revive through certiorari, is precisely what has been changed. Tenn. Supp. Br. 1.

The State, however, argues that the case is not moot because there is "a possibility," Tenn. Supp. Br. 4, that the General Assembly will re-enact its current law in the event this Court allows it to do so. Supp Br. 2-5 (citing *Maher v. Roe*, 432 U.S. 464, 468 n.4 (1977); *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 288-89 (1982); and *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993)).

The State is wrong. In each of its cases, the government litigants were either certain to re-enact the old statute or had already enacted a new statute that did not fully address the judicial decision striking down the old law. *See*, *e.g.*, *City of Jacksonville*, 508 U.S. at 662 ("There is no mere risk that Jacksonville will

repeat its allegedly wrongful conduct; it has already done so."); *City of Mesquite*, 455 U.S. at 289 n.11 ("Indeed, the city has announced just such an intention.").

Those cases stand for the proposition that "'a defendant's *voluntary* cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *City of Jacksonville*, 508 U.S. at 662 (emphasis added) (quoting *City of Mesquite*, 455 U.S. at 289). But there was nothing "voluntary" about Tennessee's response to the opinion below, as even the State admits. Tenn. Supp. Br. 4 (noting that "the House sponsor acknowledged that legislators" were trying to "remedy[] the purported First Amendment violation found by the Sixth Circuit"). When even the State is unsure whether it will actually go back to the old law even if it were free to do so, that doctrine has no relevance here. *See also* Tenn. Supp Br. 4 ("suggest[ing] a possibility" of re-enactment). And the State's uncertainty underscores that this case remains a poor vehicle to address the State's concerns, and that there is no need to risk unsettling the opinion below, which vindicated First Amendment rights and brought the Sixth Circuit into accord with its sister circuits. Br. in Opp'n 15-23.

B. Vacatur Is Not Appropriate

Unlike mootness, vacatur is a purely discretionary doctrine, governed by the concerns of equity. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25

(1994); *cf. id*. at 24 (noting practice not uniform). Because vacatur is an "extraordinary remedy," *id*. at 26, "not every moot case will warrant vacatur," *Azar v. Garza*, 138 S. Ct. 1790, 1793 (2018). The State must show "equitable entitlement," *Bancorp*, 513 U.S. at 26, and it has not done so.

"The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002). Equity's scale falls in Mr. Thomas's favor in part because of the continuing, threatened chill to Mr. Thomas's rights. There is nothing in the record or the State's arguments to indicate that the Tennessee General Assembly realized independently of this litigation that the Billboard Act was in error and needed to be changed to protect parties like Mr. Thomas. It changed its law only because the decision below forced it to do so. *See* Tenn. Supp. Br. 3-4.[2] And, while couched in terms like "may" and "possibility," Tenn. Supp. Br. 1, 4, the State demonstrates a desire to reinstate its old law. The only thing preventing the General Assembly from doing so, and consequently the only thing protecting noncommercial speech in Tennessee, is the decision below. The State's threat is sufficient to chill speech, especially given the history of "selective and vindictive

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[2] *See also* March 11, 2020 Committee Meeting ("March 11 Session") at 1:17:10-1:18:31, 1:19:48-1:21:15, 1:38:30-1:39:20, Senate Transportation and Safety Committee, March 11, 2020, tnga.granicus.com/MediaPlayer.php?view_id=440&clip_id=22117 (discussing need to change law to comply with the decision below).

enforcement" against individuals like Mr. Thomas. App. 7a (internal quotation marks omitted).

Moreover, vacating the Sixth Circuit's opinion will impose concrete litigation harms on Mr. Thomas and others. Mr. Thomas, through administrative proceedings, trials, and appeals, has fought to get relief for almost 14 years. App. 7a, 85a-86a. Under the decision below, the State is enjoined from enforcing the Billboard Act against the Crossroads Ford sign, App. 63a-64a, because the Billboard Act was unconstitutional, App. 132a. Should this Court vacate the decision below, allowing the State to argue that the Billboard Act was constitutional and in effect up until House Bill 2255 was enacted into law, the State may very well decide that it may act against the Crossroads Ford sign. Indeed, pending state court proceedings would do just that. *See State ex rel. Dep't of Transp. v. Thomas*, No. W2018-01541-COA-R10-CV, 2019 Tenn. App. LEXIS 181, at *10 n.5 (Tenn. Ct. App. Apr. 15, 2019) (noting that the Tennessee Court of Appeals has ordered that the sign be removed).

Furthermore, there is a very real possibility, even though Mr. Thomas has obtained injunctive relief—a "judicially sanctioned change in the legal relationship of the parties," *CRST Van Expedited, Inc. v. Equal Emp't Opportunity Comm'n*, 136 S. Ct. 1642, 1646 (2016) (internal quotation marks omitted)—and even though the Tennessee General Assembly would not have changed its law but for Mr. Thomas's litigation, that the State will challenge whether he is the prevailing party and entitled to attorney's fees. *See also*

Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968) (noting fees for injunctive relief). Indeed, it has already done so. *See* Statement of Issues, *Thomas v. Bright*, No. 19-5276 (6th Cir. Mar. 25, 2019), ECF No. 4. Not only would that be a great loss to Mr. Thomas, but it would undermine Congress's purposes in passing 42 U.S.C. § 1988, to "ensure effective access to the judicial process for persons with civil rights grievances." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (internal quotation marks omitted).

On the other hand, the State has failed to demonstrate any equitable factors that tip in its favor. In particular, the State has no interest in enforcing an unconstitutional statute. *See*, *e.g.*, *United States v. U.S. Coin & Currency*, 401 U.S. 715, 728 (1971) (Brennan, J., concurring); *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) (noting that "enforcement of an unconstitutional law is always contrary to the public interest"); *Joelner v. Vill. of Wash. Park*, 378 F.3d 613, 620 (7th Cir. 2004) (noting that "it is always in the public interest to protect First Amendment liberties" (internal quotation marks omitted)).

Indeed, not only has the State failed to put any weight on the scale in its favor, it has piled bricks on the other side. If Mr. Thomas had mooted the case, that might have been enough to overcome the equities in Mr. Thomas's favor and the absence of any for the State. But the State is responsible for any mootness, and "[t]he principal condition to which" courts look in deciding vacatur is "whether the party seeking relief

from the judgment below caused the mootness by voluntary action." *Bancorp*, 513 U.S. at 24.

Even if the cases cited by the State were binding on this Court, and they are not, application of an executive/legislative distinction would not be equitable here. This is not a situation where a legislature acted apart from the executive and passed a law to repair what was, in its independent judgment, a bad law.[3] The executive has concurred in the changes and signed them into law. The changes in law here are not "happenstance" to the State, or a situation where TDOT will be "frustrated by the vagaries of circumstance," *Bancorp*, 513 U.S. at 25 (internal quotation marks omitted), but the result of its cooperation with the General Assembly.[4] Moreover, the State's brief makes clear that the decision below is the General Assembly's only reason for changing the law, and the

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[3] This is an especially curious concept as Mr. Thomas's suit challenged the *statute*, not an independent action or interpretation by TDOT or some other executive department of the Tennessee government.

[4] *See* March 11 Session at 1:16:50-1:55:00 (TDOT testimony before committee and deliberation on bill); January 29, 2020 Committee Meeting, Senate Transportation and Safety Committee, January 29, 2020, http://tnga.granicus.com/MediaPlayer.php?view_id=440&clip_id=21348 (TDOT and other testimony, deliberation about decision below); March 11 Session at 1:19:00-1:19:05, 1:22:46-1:22:47, 1:33:12-1:33:28, 1:34:00-1:34:20 (noting collaboration between TDOT and the General Assembly); *id*. at 1:38:30-1:39:20 (noting TDOT proposal).

State repeatedly threatens that the law may well be reinstated. *See* Tenn. Supp. Br. 3-4.[5]

More importantly, a doctrine like that advanced by the State, if adopted by this Court, would undermine litigation under 42 U.S.C. § 1983 altogether. While § 1983 is intended to remedy situations where state and local governments deprive citizens of their rights "under color of any statute," the doctrine advanced by the State would effectively reduce § 1983 to controlling only agency regulations and decisions. Any time a state was sued over its statutes—through a government official in her official capacity—and lost at trial and on appeal, the state could get not only a second bite at the apple, but its desired outcome, without any consideration of the merits whatsoever. It would only need to change its law while certiorari was pending. And then, once the decision below was vacated, the government could simply "reinstate" the infringing law, as the State repeatedly implies it will do. Tenn. Supp. Br. 1, 4. An equitable doctrine cannot countenance the possibility of such gamesmanship.

And the equitable unfairness resulting from potential gamesmanship is only amplified by the nature of this Court's docket. This Court grants certiorari in a proportionally small number of cases, and the number of cases where this Court grants certiorari and reverses the decision below after full briefing and

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[5] *See also* March 11 Session at 1:17:10-1:18:31, 1:19:48-1:21:15, 1:38:30-1:39:20 (discussing need to change law to comply with the decision below).

consideration is smaller still. Yet the State's proposed doctrine would allow the government to get a disagreeable decision vacated whenever it wanted to, simply by passing a law while certiorari was pending. Rather than countenancing such gamesmanship, and giving it this Court's approval, the better practice would be to grant vacatur only after an explicit decision by this Court that it would have granted certiorari but for a case's mootness. And under such a standard, for the reasons given in Mr. Thomas's Brief in Opposition, certiorari and vacatur should be denied here.

Finally, the development of law in this area counsels against vacatur. The court below "believed that it was deciding a live controversy," such that "its opinion was forged and tested in the same crucible as all opinions." *Mahoney v. Babbitt*, 113 F.3d 219, 222 (D.C. Cir. 1997) (internal quotation marks omitted). Moreover, "[j]udicial precedents are presumptively correct and" not just "the property of private litigants," but "valuable to the legal community as a whole." *Bancorp*, 513 U.S. at 26 (internal quotation marks omitted). Thus, they "should stand unless a court concludes that the public interest would be served by a vacatur." *Id*. (internal quotation marks omitted). And granting the State's request, after it chose to "step[] off the statutory path [for appeals] to employ the secondary remedy of vacatur" would be a "form of collateral attack" that "disturb[s] the orderly operation of the federal judicial system." *Id*. at 27. To the contrary, "the benefits that flow to litigants and the public from the resolution of legal questions" counsels against vacatur. *Id*. And,

should the circuit split asserted by the State ever develop, the reasoned decision below will contribute to the "debate among the courts of appeal [to] illuminate[] the question[]" for review. *Id*. (emphasis removed).

CONCLUSION

For the reasons discussed in Mr. Thomas's Brief in Opposition, and because the case is moot, the petition for a writ of certiorari should be denied. Furthermore, because considerations of equity fall in Mr. Thomas's favor, the State's request for vacatur should also be denied.

Respectfully submitted,

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