Nos. 19-1075 & 19-1292

IN THE

United States Court of Appeals for the Seventh Circuit

E.F. TRANSIT, INC.,
Plaintiff-Appellant,

v.

INDIANA ALCOHOL AND TOBACCO COMMISSION, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division,
No. 1:13-cv-1927-RLY-MJD,
The Honorable Richard L. Young, Judge.

APPELLEES' RESPONSE TO APPELLANT E.F. TRANSIT, INC.'S MOTION TO DISMISS ITS APPEAL

The appellees—the Indiana Alcohol and Tobacco Commission, David Cook, John Krauss, Marjorie Maginn, and Dale Grubb—by counsel, object to Monarch-EFT's motion to dismiss its appeal because the case is not moot. In no event, moreover, should this Court or the district court vacate the existing judgment on mootness grounds.

ARGUMENT

I. The Case Is Not Moot Because Monarch-EFT's Successor Retains an Interest in the Outcome of the Appeal

The appellees do not support Monarch-EFT's motion to dismiss the appeal because Monarch-EFT still has an interest in the resolution of the case. In addition,

this litigation has been pending for some time and is close to resolution. The Court should resolve the case on its merits.

A case is moot when there is no longer a live case or controversy "'or the parties lack a legally cognizable interest in the outcome.'" *Chafin v. Chafin*, 568 U.S. 165, 172 (2013); *see also Paramount Media, Inc. v. Village of Bellwood*, 929 F.3d 914, 919 (7th Cir. 2019); *Loertscher v. Anderson*, 893 F.3d 386, 392 (7th Cir. 2018). "Indeed, a case will become moot only if it is 'absolutely clear that the alleged wrongful behavior could not reasonably be expected to recur.'" *Speed First, Inc. v. Kileen*, 968 F.3d 628, 645 (7th Cir. 2020) (quoting *Friends of the Earth, Inc. v. Laidlaw Env. Sev. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). Even a small cognizable interest can save a case from mootness. *See Chafin*, 568 U.S. at 176.

This case is not moot because Reyes Holdings is essentially in the same position as Monarch-EFT—indeed it has purchased Monarch's beer distribution license—and Monarch-EFT has made no assertion about whether Reyes will seek to transport liquor in addition to beer. Indeed, the very fact that Reyes has purported to purchase all assets and liabilities from Monarch-EFT *except* this lawsuit is reason to question whether Reyes may be attempting to avert the consequences of a negative judgment here.

If this appeal were to be dismissed and Reyes were to initiate efforts to transport liquor in addition to beer via some transportation subsidiary, the Commission and Monarch-EFT would have to relitigate this case all over again. And this litigation has already involved two rounds of summary judgment briefing and two

appeals over the course of seven years. To be sure, the district court's judgment in this matter should bar Reyes Holdings from relitigating Monarch-EFT's preemption claim in a later suit. *See, e.g.*, *Tartt v. Northwestern Community Hosp.,* 453 F.3d 817, 822 (7th Cir. 2006) ("Res judicata bars subsequent suits against those who were not party to a prior suit if their interests are closely related to those who were." (citations omitted)). But that merely demonstrates that Monarch-EFT still retains an interest in this suit even though it is now owned by Reyes Holdings. The case is not moot.

II. Even if the Case is Moot, Vacatur of the District Court's Judgment Is Not Appropriate

At all events, even if the Court grants EFT's motion to dismiss its appeal, neither this Court nor the district court should vacate the district court's judgment on mootness grounds.

Vacatur is not appropriate when the party that lost in the district court takes action on appeal to moot the case. *See U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership*, 513 U.S. 18, 25–30 (1994); *Karcher v. May*, 484 U.S. 72, 81–83 (1987). Ordinarily, the "established practice" is for an appellate court "to reverse or vacate the judgment below and remand with a direction to dismiss" when a case becomes moot on appeal. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950) (footnote omitted). But while that default rule, which "is rooted in equity," *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (cleaned up), makes sense where mootness occurs by mere "happenstance," *see Munsingwear*, 340 U.S. at 40–41, or where the case is mooted by the unilateral acts of the party who *prevailed* below, *Azar*, 138 S. Ct. at 1792–93, it makes little sense when mootness arises because of the acts of the party that *lost* below.

When the party that lost in the district court withdraws its appeal or takes action to moot the case, the effect is no different than if appellate "jurisdiction were lacking because the losing party failed to appeal at all." *U.S. Bancorp*, 513 U.S. at 25. The Supreme Court in *Karcher* thus held that "the *Munsingwear* procedure [was] inapplicable" where the original defendants' successors in office withdrew the state legislature's appeal of a judgment declaring a state statute unconstitutional. 484 U.S. at 82–83. Similarly, the Court held in *U.S. Bancorp* "that mootness by reason of settlement does not justify vacatur of a judgment under review." 513 U.S. at 29.

Here, if the case is moot and the Court grants EFT's motion to dismiss its appeal, vacatur is not appropriate, for three reasons. First, EFT has not asked this Court for vacatur. *See Munsingwear*, 340 U.S. at 40–41 (holding that vacatur was not appropriate where "the United States made no motion to vacate the judgment" and "acquiesced in the dismissal"). Second, EFT lost in the district court but now requests that the Court dismiss its appeal, putting it in the same position as the state legislature in *Karcher* or a party who never appealed in the first place, rendering "the *Munsingwear* procedure . . . inapplicable." *Karcher*, 484 U.S. at 83. Third, and relatedly, if this case is now moot it is because of Monarch-EFT's act in selling its assets—save this lawsuit—to Reyes Holdings, conduct which is neither happenstance nor attributable to the Commission. *Cf. U.S. Bancorp*, 513 U.S. at 26 ("It is petitioner's burden, as the party seeking relief from the status quo of the appellate judgment, to demonstrate not merely equivalent responsibility for the mootness, but equitable entitle-

ment to the extraordinary remedy of vacatur. Petitioner's voluntary forfeiture of review constitutes a failure of equity that makes the burden decisive, whatever respondent's share in the mooting of the case [by agreeing to the settlement] might have been.").

The upshot is that even if Monarch-EFT's appeal is moot and the Court grants the motion to dismiss, the judgment below should not be vacated and should remain in force.

CONCLUSION

For the foregoing reasons, the appellees request that the Court deny Monarch-EFT's motion to dismiss its appeal or, alternatively, dismiss Monarch-EFT's appeal but *not* order vacatur of the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Aaron T. Craft
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