No.

In the Supreme Court of the United States

OXY USA INC., PETITIONER

v.

DAVID SCHELL, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has held that, when a civil case becomes moot on appeal due to the appellant's voluntary conduct in other cases, but the federal appeal "played no significant role" in the case-mooting conduct, the judgment below should be vacated. *Alvarez* v. *Smith*, 558 U.S. 87, 96-97 (2009).

The question presented is: Whether the fact that a pending appeal "played no significant role" in an appellant's voluntary conduct mooting a case is entitled to controlling weight in determining whether a lower court judgment should be vacated, as a majority of courts of appeals have held; or whether a party must make an *additional* showing of compelling circumstances warranting vacatur, as the Tenth Circuit held in this case.

RULE 29.6 STATEMENT

The parent companies of OXY USA Inc. are Occidental Oil and Gas Holding Corporation, Occidental Petroleum Investment Co., and Occidental Petroleum Corporation. Occidental Petroleum Corporation is traded on the New York Stock Exchange under the symbol OXY. No other publicly traded company owns 10% or more of OXY USA Inc.'s or Occidental Petroleum Corporation's stock.

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OPINIONS BELOW

The initial opinion of the court of appeals, App., *infra*, 39a-74a, is reported at 808 F.3d 443. The revised opinion of the court of appeals upon granting in part the petition for rehearing, App., *infra*, 1a-38a, is reported at 814 F.3d 1107. The opinion of the district court granting respondents' motion to certify the plaintiff class is unreported, but available at 2009 WL 2355792. The opinion of the district court granting partial summary judgment to respondents, App., *infra*, 75a-111a, is reported at 822 F. Supp. 2d 1125. The opinion of the district court reinstating that partial summary judgment, App., *infra*, 112a-114a, is unreported, but available at 2013 WL 1308385. The opinion of the district court denying respondents' motion for attorney's fees and expenses is unreported, but available at 2013 WL 5876593. The opinion of the district court denying petitioner's motion to decertify the plaintiff class is unreported, but available at 2013 WL 4857686.

JURISDICTION

The decision of the court of appeals was entered on December 14, 2015. A timely petition for rehearing was granted in part on February 9, 2016. The court denied a second timely petition for panel rehearing or rehearing en banc on March 21, 2016. On June 9, 2016, Justice Sotomayor extended the time for filing a petition for a writ of certiorari to July 20, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2106 of Title 28 of the United States Code provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

INTRODUCTION

A sharply divided panel of the Tenth Circuit has construed this Court's precedents to require that when an appellant's voluntary conduct causes a federal civil appeal to become moot, the fact that the conduct was "obviously not motivated by the pendency of this litigation" and the appellant "argued against mootness" (App., *infra*, 37a-38a) (Hartz, J., concurring in part and dissenting in part) is itself insufficient to warrant vacatur; instead, the appellant must satisfy a stringent test requiring a showing of "compelling equitable circumstances" beyond the fact that the appeal became moot for reasons unrelated to the litigation, including a demonstration that the appellant's actions were "commendable." *Id.* at 25a. The Tenth Circuit's decision deepens an acknowledged split about the weight to be accorded the fact that an appellant's voluntary conduct mooting an appeal is unrelated to the litigation, parting ways with a clear majority of federal courts that have addressed the question,

which have held that factor to be entitled to controlling weight in determining the propriety of vacatur and presumptively ordering vacatur upon such a showing. The Tenth Circuit's test is uniquely demanding even among the minority of jurisdictions that do not give controlling weight to the fact that mooting conduct was unrelated to the appeal. *Id.* at 25a. And the Tenth Circuit's approach conflicts with this Court's holding that voluntary case-mooting conduct by the party seeking review alone warrants vacatur so long as the case "played no significant role" in the conduct. See *Alvarez* v. *Smith*, 558 U.S. 87, 96-97 (2009).

For more than sixty-five years, "[t]he established practice * * * in the federal system" for dealing with a civil case that becomes moot on appeal "is to reverse or vacate the judgment below and remand with a direction to dismiss." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); accord *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 71 (1997). Section 2106 of Title 28 permits appellate courts to vacate judgments in cases that have become moot on appeal. *Alvarez*, 558 U.S. 94 (citing 28 U.S.C. § 2106). Vacatur is the "ordinary practice," *id.* at 97, because, absent countervailing concerns, the most equitable result is to "'clear[] the path for future relitigation of the issues between the parties,' preserving 'the rights of all parties,' while prejudicing none 'by a decision which . . . was only preliminary.'" *Id.* at 94 (quoting *Munsingwear*, 340 U.S. at 40). This Court recognized a limited exception to this "normal[]" practice, *ibid.*, in *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18 (1994), when it held that vacatur is inappropriate "[w]here

mootness results from settlement," reasoning that "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." *Id.* at 25. Several years ago, this Court clarified that "*Bancorp*'s 'settlement' exception" is narrow and does not apply where voluntary unilateral conduct by the party seeking review moots the appeal, but the record indicates that "th[e] federal case played no significant role" in causing the case-mooting conduct. *Alvarez*, 558 U.S. at 96. In such cases, mootness is effectively the result of "happenstance," and the appellate court "should follow [the] ordinary practice" of vacatur. *Id.* at 94, 97.

In the wake of *Bancorp* and *Alvarez*, the lower courts have diverged sharply in their treatment of cases mooted by the appellant's voluntary conduct. Six circuits have held, in direct conflict with the decision below, that vacatur is warranted if the court of appeals determines that the appellant's voluntary case-mooting conduct is unrelated to the federal lawsuit. In sharp contrast, three circuits have held that such a determination is itself an insufficient basis for vacatur. This state of confusion will continue absent this Court's intervention, affecting numerous cases every year. Further review is warranted.

STATEMENT

1. This case arises from a dispute between Kansas landowners and the holder of oil and gas leases on their land regarding the meaning of contractual "free gas" clauses, which afford landowners the right to

obtain natural gas from wells for domestic, household purposes, such as stoves and heating. App., *infra*, 2a. The plaintiffs (respondents here) owned land in the Hugoton Field—a massive natural gas field stretching from southeastern Colorado, through southwestern Kansas, and into the Oklahoma and Texas panhandles. See Mot. to Dismiss, Attach. 2, C.A. Doc. 01019210975. The defendant, OXY USA, Inc. ("OXY"), petitioner here, owned or operated those leases. In the years before this lawsuit, OXY provided free gas to respondent landowners using taps connected directly to the wellhead lines on the landowner's property. At most, only 300 of the 2,200 Kansas landowners subject to such clauses—about 13%—actually used the free gas. App., *infra*, 76a.

As oil and gas wells near the end of their life cycle, they often experience a decline in gas pressure and increasing concentrations of the dangerous compound hydrogen sulfide. In August 2007, OXY sent letters to some of the free-gas users explaining that—because of either a decline in gas pressure or increasing hydrogen sulfide concentrations—it was no longer feasible to provide them with free gas. App., *infra*, 3a. In short, it was not technologically or economically feasible to install compressors to draw gas from low-pressure wells, and the risk to human health was too great for gas from wells with high hydrogen sulfide concentrations to be used domestically. *Id.* at 79a-82a.

2. a. In late August 2007, plaintiffs filed this class action lawsuit in the United States District Court for the District of Kansas. App., *infra*, 3a. Plaintiffs claimed that the free-gas clause in their leases imposed an unqualified obligation on OXY to provide

usable gas to the landowner even if, as a practical matter, it had to supply that gas from a source other than a well on the landowner's property. *Ibid.* Two years after the plaintiffs filed their suit, the district court certified a class comprised of "[a]ll surface owners of Kansas land burdened by oil and gas leases owned or operated by OXY USA, Inc. which contain a free gas clause." *Id.* at 3a-4a. After class certification, respondents amended their complaint to eliminate their claim for actual damages, leaving claims for a permanent injunction and a declaratory judgment. *Ibid.*

b. The district court granted respondents partial summary judgment in June 2013.[1] The court granted respondents declaratory judgment that "[t]he language of the free gas clause * * * requires defendant to provide plaintiffs with free, useable gas pursuant to the free gas clauses contained in the leases," App., *infra*, 100a, even if OXY had to provide it from a source other than the wells on their property. But the court denied respondents permanent injunctive relief, largely because OXY had consistently provided usable house gas to landowners who actually used it. *Id.* at 105a-110a. The court

[1] The district court initially granted respondents partial summary judgment in September 2011. App., *infra*, 75a, 110a. The district court later vacated its order based on OXY's argument that the leases were ambiguous and it was necessary to permit discovery of extrinsic evidence regarding the contracting parties' intentions. See *Schell* v. *OXY USA Inc.*, No. 07-1258-JTM, 2013 WL 1308385, at *1 (D. Kan. Mar. 26, 2013). But after the close of discovery, the court determined that the parties had not produced extrinsic evidence of intent, and therefore reinstated its order granting respondents partial summary judgment. *Ibid.*

later denied respondents' motion for attorney's fees, expenses, and incentive awards. *Id.* at 4a-5a.[2]

3. Both parties appealed. App., *infra*, 2a. OXY challenged the class certification and the award of declaratory judgment to respondents. *Ibid.* Respondents challenged the denial of their motion for fees, expenses, and awards. *Ibid.*

a. One week after OXY filed its opening brief, respondents filed a two-page motion to dismiss the appeal as moot, citing two news articles reporting that OXY was selling its interests in the Kansas leases as part of a $1.4 billion multi-state sale of all its assets in the Hugoton Field. Mot. to Dismiss, C.A. Doc. 01019210973. Both articles reported that OXY was selling the assets for business reasons as part of its strategic efforts to streamline and focus its efforts on other natural gas fields. *Id.*, Attachs. 1, 2, C.A. Docs. 01019210974, 01019210975. Neither article suggested that respondents' lawsuit played a role in OXY's decision to sell assets throughout the region, including in Colorado and Oklahoma, *ibid.*, where the bulk of OXY's Hugoton Field assets were located.

In its response, OXY argued, among other things, that the (as-yet-nonfinal) sale would not moot the appeal because OXY continued to have a cognizable interest in not being subject to the district court's declaratory judgment, and in not being subject to a potential damages action. OXY also argued that even if the appeal were moot, the court of appeals should follow the general rule that the judgment under

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[2] The district court separately denied OXY's motion to decertify the class, *Schell* v. *OXY USA Inc.*, No. 07-1258-JTM, 2013 WL 4857686, at *5 (D. Kan. Sept. 11, 2013).

review should be vacated when a case becomes moot on appeal. OXY noted that (1) it was respondents who had moved to dismiss the appeal as moot, and it was respondents who stood to gain from foreclosing appellate review of the district court's favorable ruling; and (2) all record evidence indicated that OXY's proposed $1.4 billion multi-state sale of assets was in no way motivated by its effort to avoid liability in this suit. The Tenth Circuit ordered that the motion to dismiss be carried with the case, and the parties fully briefed the merits of their claims. App., *infra*, 5a.

b. At oral argument, OXY maintained that the case was not moot, and urged vacatur of the district court's judgment only in the event that the court dismissed the appeal. Reh'g Pet. 5, C.A. Doc. 01019545036. Respondents asserted that the court should dismiss the appeal as moot but not vacate the judgment favoring the plaintiffs. *Ibid.* After the panel asked several questions about the details of the contract selling OXY's Hugoton Field assets, OXY's counsel offered to submit a copy of the sales contract—either to the court of appeals panel or to the district court on remand. *Id.* at 14 n.7 ("Your Honor, * * * we do have the contract and we can provide it to you or to the district court."). The panel did not instruct her to do so, even when counsel asked whether the panel had "[a]ny further questions" about the contract. *Ibid.* [3]

[3] The Tenth Circuit does not produce official transcripts of oral arguments, nor does it make them generally available to the public on its website. *See* 10th Cir. R. 34.1(E). OXY filed a motion seeking an "mp3 recording" of the oral argument, which

c. Shortly after argument, the purchaser of OXY's Hugoton Field assets, Merit Energy Company ("Merit"), moved to intervene as an appellant challenging the district court's declaratory judgment construing the leases, which would be binding on Merit as the successor in interest. App., *infra*, 5a. The panel denied the motion as untimely in a one-sentence order. *Ibid.*

d. The court of appeals affirmed in part and dismissed as moot in part. App., *infra*, 39a-74a. The panel held that the appeal was moot because OXY "no longer has any purported obligation to provide free gas under the contracts." *Id.* at 46a. Although recognizing that "the ordinary course is to vacate the judgment below and remand with directions to dismiss" when "a case becomes moot on appeal," *id.* at 50a (internal quotation marks omitted), the panel held that the Tenth Circuit's "usual disposition is not to grant vacatur when the act mooting the appeal was caused by the non-prevailing party"; rather, the court will grant vacatur "when the act causing mootness was more attributable to some person or entity outside the litigation, or where other compelling equitable reasons demonstrate that vacatur is appropriate." *Id.* at 57a-58a. The fact that the sale of all of OXY's gas assets in a gas field encompassing several states was unrelated to this dispute involving certain Kansas landowners' entitlement to free gas was "only one factor" in the

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it received "via email" from the clerk of the court. *See id.* 34(E)(1); *see also* C.A. Dkt. 01019324824 (granting OXY's motion). The rules of this Court do not entitle a party to submit such materials, see S. Ct. R. 32, but OXY will provide a copy of that recording in any format the Court requests.

court's "holistic vacatur analysis"; the panel concluded, "[w]e cannot say that the fact that OXY may have undertaken a sale for other reasons" than the litigation "requires us to allow that party to eliminate its loss." *Id.* at 61a (internal quotation marks omitted). While acknowledging that OXY had argued against mootness, it characterized that action as "objectively consistent with an effort to secure an impermissible advisory opinion." *Id.* at 60a.

The panel noted that the Second Circuit's decision in *Russman* v. *Board of Education of Enlarged City School District of Watervliet*, 260 F.3d 114 (2d Cir. 2001), had "paid particular attention in its vacatur analysis to whether a party's voluntary act effecting mootness of the appeal took place as part of the litigation or was completely unrelated to the litigation." App., *infra*, 51a n.5. The panel noted that the Tenth Circuit "ha[d] not adopted" that position, citing a Fifth Circuit opinion it said suggested *Russman* was not "fully consistent with Supreme Court precedent." *Ibid.* (citing *Staley* v. *Harris Cty.*, 485 F.3d 305, 312 (5th Cir. 2007) (en banc)). The panel also affirmed the district court's denial of plaintiffs' request for fees, expenses, and awards. *Id.* at 74a.

e. OXY filed a timely petition for panel rehearing or rehearing en banc. It argued the panel's decision conflicted with *Alvarez*, which had ordered vacatur based solely on the conclusion that "the presence of th[e] federal case played no role in causing" case-mooting voluntary conduct by the party seeking review, 558 U.S. at 96-97, and conflicted with decisions of other courts of appeals, as "[t]he panel

decision acknowledged" in part in its discussion of *Russman*. Reh'g Pet. 12, C.A. Doc. 01019545036.

f. The panel granted the petition for panel rehearing in part and issued a revised opinion. App., *infra*, 117a-118a, 1a-37a. The panel again dismissed the appeal as moot and affirmed the district court's denial of fees, expenses, and awards. *Id.* at 36a-37a. A majority of the panel denied vacatur, holding that "even if we accept that mooting this appeal was not OXY's purpose for the sale, and also factor into the equitable calculus OYX's resistance to a mootness finding, it remains undeniable that OXY's voluntary action mooted this appeal." App., *infra*, 25a. The majority deleted the original opinion's acknowledgement that the Second Circuit had taken a different approach in *Russman*. See *id.* at 24a.

The majority acknowledged that OXY had argued that the appeal was not moot, App., *infra*, 24a, which this Court has said "suggests that a desire to avoid review * * * played no role at all" in mooting a case. *Alvarez*, 558 U.S. at 97. According to the majority, however, that factor, while "germane," App., *infra*, 24a, counseled *against* vacatur, because OXY's "apparent litigation strategy before our court * * * is objectively consistent with an effort to secure an impermissible advisory opinion," and, according to the majority, OXY failed to "take the fundamental steps necessary" to make the court's decision "binding on anyone." *Id.* at 23a. The majority also faulted OXY because, in its view, "[d]espite repeated questions at oral argument, OXY never voluntarily offered for inclusion in the record the sales contract," to show whether the panel's interpretation would be binding on Merit. *Ibid.* The majority did not address

the fact that, as noted in OXY's rehearing petition, its counsel had volunteered, "Your Honor, we can and we do have the contract and we can provide it to you or to the district court." Reh'g Pet. 14 n.7, C.A. Doc. 01019545036.

The majority concluded that "OXY has not presented a compelling equitable reason here for vacatur," App., *infra*, 25a, distinguishing *Alvarez* (which involved the return of seized property) and circuit precedent (involving reductions in prison overcrowding) on the grounds that there, a party "voluntarily caused the action to become moot, *but for reasons that are commendable*." *Ibid.* (emphasis added). The majority concluded (*id.* at 25a-26a):

> OXY's sale was certainly not anything to condemn, but we have no reason to necessarily commend it either; we are entirely phlegmatic regarding the sale. This case therefore does not present the kind of commendable action that the Supreme Court addressed in *Alvarez* * * *—the kind of action that would furnish compelling equitable reasons for vacatur.

Judge Hartz dissented from the denial of vacatur, reasoning that "two factors argue strongly in favor of vacating the district-court judgment." App., *infra*, 37a. First, "OXY's voluntary action that mooted the case was obviously not motivated by the pendency of this litigation, and OXY argued against mootness." *Id.* at 37a-38a. Second, because it was respondents "who raised the mootness issue," if they "wanted to preserve their legal victory * * *, they should have been the ones to seek to substitute OXY's successor (now the real party in interest) as the defendant." *Id.*

at 38a. He explained that, "[i]f there is any inequitable conduct here, it is the strategy of plaintiffs, who wished to prevent any appeal of the judgment in its favor by arguing mootness but opposing intervention." *Ibid.*

g. OXY filed a second timely petition for rehearing or rehearing en banc, which the Tenth Circuit denied. App., *infra*, 115a.

REASONS FOR GRANTING THE PETITION

A. There Is An Acknowledged Split Among Federal Appellate Courts About Whether Vacatur Analysis Should Give Controlling Weight To The Fact That An Appellant's Case-Mooting Conduct Was Unrelated To The Litigation

In its initial opinion, the Tenth Circuit acknowledged a conflict among the circuits regarding whether a court should "pa[y] particular attention in its vacatur analysis to whether a party's voluntary act effecting mootness of the appeal took place as part of the litigation or was completely unrelated to the litigation," but rejected that "particularized focus" on whether the litigation was unrelated. App., *infra*, 51a n.5. The en banc Fifth Circuit has likewise noted the "different approach * * * to the remedy of vacatur" followed by many courts in giving controlling weight to the fact that voluntary conduct mooting the case "is entirely unrelated to the lawsuit." *Stanley* v. *Harris Cty.*, 485 F.3d 305, 312 (5th Cir. 2007) (en banc) (quoting *Russman* v. *Bd. of Educ.*, 260 F.3d 114, 122 (2d Cir. 2001), and citing *Khodara Envtl., Inc. ex rel. Eagle Envtl. L.P.* v. *Beckman*, 237 F.3d 186, 195 (3d Cir. 2001) and *Nat'l Black Police Ass'n* v.

D.C., 108 F.3d 346, 351-54 (D.C. Cir. 1997), as "appl[ying] the *Russman* approach"); see also *id.* at 316-317 (DeMoss, J., dissenting in part) ("every other circuit court to address the issue" of "whether vacatur is appropriate when voluntary action taken by an appellant moots a case, *but the action taken is completely unrelated to the litigation* * * * has determined that vacatur is appropriate under such circumstances"). This split is mature and entrenched, with six circuits holding that vacatur is warranted based solely on a determination that the case-mooting conduct is unrelated to the federal lawsuit, and three circuits holding that such a determination is alone an insufficient ground for vacatur.

1. Six Circuits Have Held That Vacatur Is Warranted Based On A Determination That The Appellant's Case-Mooting Conduct Was Unrelated To The Federal Lawsuit

In conflict with the decision below, six circuits have held that vacatur is warranted if the appellate court determines that the case-mooting conduct was unrelated to the federal lawsuit. The First, Second, Third, Seventh, Ninth, and D.C. Circuits have all held vacatur can be warranted based *solely* on such a determination. Each has given controlling weight to that determination, ordering vacatur where unrelatedness was essentially the only factor supporting such action. See, *e.g.*, *Lightner ex rel. NLRB* v. *1621 Route 22 W. Operating Co.*, 729 F.3d 235, 238 (3d Cir. 2013) (cross-appellant agency mooted its cross-appeal of temporary injunction by issuing a merits decision in a distinct administrative

proceeding; vacatur warranted because "there is no evidence of 'manipulation of the legal system, or an attempt to erase an unfavorable precedent'" (citation omitted)); *Kerkhof* v. *MCI WorldCom, Inc.*, 282 F.3d 44, 53-54 (1st Cir. 2002) (appellant employer mooted its own appeal "unilaterally by vesting [the plaintiff-employee's] shares * * * based on a perceived legal obligation"; vacatur warranted because "there is no reason to doubt [appellant]'s good faith" and no effort to manipulate litigation); *Russman* v. *Bd. of Educ.*, 260 F.3d 114, 123 (2d Cir. 2001) (appellant parents mooted their daughter's appeal by withdrawing her from school after she received her diploma; vacatur warranted where was no "suggest[ion] that [the child]'s withdrawal had anything to do with the litigation"); *Khodara Envtl., Inc. ex rel. Eagle Envtl. L.P.* v. *Beckman*, 237 F.3d 186, 194-95 (3d Cir. 2001) (Alito, J.) (appellant agency's appeal was mooted by amendment of the statute at issue; vacatur warranted because opponent "presented no evidence to indicate that the * * * [a]mendment represents manipulation of the legislative process" to moot appeal) (internal quotation marks omitted); *Am. Family Life Assurance Co.* v. *FCC*, 129 F.3d 625, 631 (D.C. Cir. 1997) (appellant broadcaster mooted its appeal by selling its interest in the television stations affected by the agency ruling; vacatur warranted because appellant "did not sell the stations in order to moot this case"); *Dilley* v. *Gunn*, 64 F.3d 1365, 1372 (9th Cir. 1995) (appellant prison officials mooted prisoner's appeal challenging restrictions on law-library access by transferring him; held that "automatic vacatur is appropriate" if transfer "was wholly unrelated to this lawsuit and would have

occurred in the absence of this litigation"); *Local Union No. 34* v. *Bazzano*, 43 F.3d 1474 (7th Cir. 1994) (unpublished table decision) (appellant union mooted appeal of decision applying traffic ordinance to picketers by settling labor dispute that gave rise to it; vacatur warranted because "[t]he subject of this litigation simply expired when the labor dispute was resolved" and there was no indication of manipulation of legal process).[4]

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[4] Accord, *e.g.*, *Norsworthy* v. *Beard*, 802 F.3d 1090, 1092, 1093 (9th Cir. 2015) (per curiam) (remanding so district court could determine whether appellant prison administrators released prisoner and thus mooted case because of "an independent parole suitability process" unrelated to litigation; dissenting judge argued order below should be vacated because "[t]here is no real doubt that the Parole Board" is "not subject to" appellant's authority); *Marshack* v. *Helvetica Cap. Funding LLC,* 495 F. App'x 808, 810 (9th Cir. 2012) ("the key question" in determining propriety of vacatur is "the live case was resolved by the strategic decision of the appealing party"; where appealing party "initiate[d] the sale of the Huntington Beach property that ultimately mooted the appeal," but "did so in the ordinary course of his duties as bankruptcy trustee, not with the intention of mooting the case, * * * and did not argue mootness" vacatur warranted); *Log Cabin Republicans* v. *United States*, 658 F.3d 1162, 1167-68 (9th Cir. 2011) (appellant United States mooted appeal by repealing statute district court enjoined as unconstitutional; vacatur warranted because United States had continuously "advance[d] all of its arguments against the district court's judgment and injunction"); *BankWest, Inc.* v. *Baker*, 446 F.3d 1358, 1362-68 (11th Cir. 2006) (appellant banks' appeal mooted by "[a]ppellant banks hav[ing] ceased making the type of payday loans at issue in this appeal and hav[ing] withdrawn from the servicing agreements or agency relationships * * * also at issue here" in light of new federal regulations; vacatur warranted to "clear[] the path for future relitigation" should appellant banks "eventually create new loan programs and enter into new servicing agreements"); *Nat'l*

In decisions both before and after *Alvarez*, these courts have reasoned that absent "evidence of an illegitimate motive, * * * the general rule in favor of vacatur still applies." *Nat'l Black Police Ass'n*, 108 F.3d at 354. As the Second Circuit explained pre-*Alvarez*, for an appellant's case-mooting "conduct to constitute 'forfeiture' of the benefit of vacatur" under *Bancorp*, the party must have "intended that the appeal become moot, either in the sense that mootness was his purpose or that he knew or should have known that his conduct was substantially likely to moot the appeal." *Russman*, 260 F.3d at 122 (citing *Bancorp*, 513 U.S. at 25). But "conduct that is voluntary in the sense of being non-accidental, but which is entirely unrelated to the lawsuit" does not forfeit "the appellant's interest in vacatur." *Ibid.*

Even before *Alvarez*, courts on this side of the split "interpreted *Bancorp* narrowly" as a limited exception to the general rule favoring vacatur. See, *e.g.*, *Humane Society* v. *Kempthorne*, 527 F.3d 181, 185 (D.C. Cir. 2008); *Am. Family Life Assurance*, 129 F.3d at 630 ("The specific holding of *Bancorp*, concerning as it does settlements, has no application" to vacatur of judgments mooted by sale of assets). And as the Third Circuit explained, "[t]he Supreme Court recognized the limited nature of the exception created by *Bancorp* in *Alvarez*," *Lightner*, 729 F.3d at 238, which clarified that an appellant's voluntary conduct should still be considered "happenstance" for

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Black Police Ass'n v. *D.C.*, 108 F.3d 346, 351-353 (D.C. Cir. 1997) (appellant city mooted its appeal by amending legislation that the district court had found unconstitutional; vacatur warranted because "new legislation in this case was not motivated by the district court's decision below").

vacatur purposes if the conduct does not amount to a conscious "choice * * * to relinquish the appeal." *Ibid.* Thus, courts in the majority of jurisdictions to have addressed the issue have reasoned that vacatur is warranted where "the presence of [the] federal case played no significant role" in the case-mooting conduct. *Ibid.* (brackets in original; quoting *Alvarez*, 558 U.S. at 96-97); accord *Dilley*, 64 F.3d at 1372 (if prisoner's transfer that mooted appeal "was wholly unrelated to this lawsuit and would have occurred in the absence of this litigation" then "automatic vacatur is appropriate").

There is little question that this case would have been decided differently in jurisdictions on the majority side of the split. Indeed, both the D.C. Circuit and the Ninth Circuit specifically have ordered vacatur where, as here, a sale of assets mooted the appeal, and the *sole factor* those courts relied on in ordering relief was that the party challenging the decision "did not sell the [assets] in order to moot this case." *Am. Family Life Assurance*, 129 F.3d at 631; *Marshack*, 495 F. App'x at 810 (noting that party "initiate[d] the sale of the * * * property that ultimately mooted the appeal" but "did so in the ordinary course of his duties" and "not with the intention of mooting the case").

2. Three Circuits Have Refused To Give Controlling Weight To The Fact That An Appellant's Case-Mooting Conduct Was Unrelated To The Litigation

With its decision in this case, the Tenth Circuit joins the Fourth Circuit and the Federal Circuit in holding that the fact that voluntary case-mooting

conduct is unrelated to the federal lawsuit does not alone suffice to warrant vacatur. See *United States* v. *Springer*, 715 F.3d 535, 542 (4th Cir. 2013) (holding that, when the appellant's "voluntary action" moots the appeal, "vacatur is appropriate only when it would serve the public interest") (internal quotation marks omitted); *Norfolk S. Ry Co.* v. *City Of Alexandria*, 608 F.3d 150, 162 (4th Cir. 2010) (foreclosing vacatur where the case is mooted "through the voluntary action of the losing party"); *Tafas* v. *Kappos*, 586 F.3d 1369, 1371 (Fed. Cir. 2009) (en banc) (rejecting joint motion to vacate district court's judgment, holding that although Patent and Trademark Office "rescinded the rules that formed the basis of this litigation," mooting appeal, vacatur is appropriate "if the mootness arises from external causes over which the parties have no control, or from the unilateral act of the prevailing party, but not when the mootness is due to a voluntary act by the losing party"); accord *Tessera, Inc.* v. *Int'l Trade Comm'n*, 646 F.3d 1357, 1371 (Fed. Cir. 2011) (quoting *Tafas* for proposition that "[*v*]*acatur* . . . is appropriate if the mootness arises from external causes over which the parties have no control").

These circuits rely on a broad reading of *Bancorp*'s use of the phrase "voluntary action," 513 U.S. at 24. See, *e.g.*, App., *infra*, at 14a-15a (noting blanket "presumption . . . in favor of retaining the judgment" whenever mootness results from "voluntary action" by the appellant (quoting *Bancorp*, 513 U.S. at 24)); *Springer*, 715 F.3d at 542 (imposing presumption against vacatur "[w]hen the voluntary action of a losing party moots a case"); *Tafas*, 586 F.3d at 1371 (holding vacatur not appropriate "when the mootness

is due to a voluntary act by the losing party, such as a settlement," citing *Bancorp*). Neither the Fourth nor the Tenth Circuit perceives any inconsistency between *Alvarez* and a broad reading of *Bancorp* that forecloses vacatur absent proof of factors beyond the fact that voluntary conduct mooting the appeal was unrelated to the litigation. *E.g.*, App., *infra*, 19a-20a; see also *Norfolk S. Ry Co.*, 608 F.3d at 161-162 (after citing *Alvarez*, stating that vacatur is unavailable whenever mootness results from the "voluntary action of the losing party").

Indeed, the Tenth Circuit has staked out one of the more restrictive positions even among the jurisdictions taking the minority position in the split. In the Fourth Circuit, a panel will vacate a decision under review after the appeal is mooted by "the voluntary action of a losing party," "only when it would serve the public interest." *Springer*, 715 F.3d at 542. This creates a presumption against vacatur because there is a "public interest in the judicial product itself," *i.e.*, in the district court's judgment. See *Valero Terrestrial Corp.* v. *Paige*, 211 F.3d 112, 119 (4th Cir. 2000); see also *Springer*, 715 F.3d at 542 (citing *Paige*). Parties requesting vacatur must make some showing to overcome that default interest. See *Paige*, 211 F.3d at 119.

But the Tenth Circuit imposes a significantly more stringent test, requiring the party seeking vacatur to establish "compelling equitable circumstances" supporting vacatur. App., *infra*, 19a. That novel burden—which invokes the demanding language of strict scrutiny—can be overcome only upon a more demanding showing. The only "compelling equitable reason" the Tenth Circuit has

identified that would satisfy this burden is case-mooting conduct undertaken "for reasons that are commendable," such as "responsible governmental conduct," *id.* at 25a. It was not enough that OXY's sale of its Hugoton Field assets was undertaken for legitimate business reasons "unrelated to mooting this appeal" (*id.* at 24a) or that the sale was "certainly not anything to condemn," *id.* at 25a. The Tenth Circuit panel denied vacatur because the court "ha[d] no reason to necessarily commend it either; we are entirely phlegmatic regarding the sale." *Ibid.* The Federal Circuit appears to prohibit vacatur *entirely* unless "mootness arises from external causes over which the parties have no control, or from the unilateral act of the prevailing party." *Tafas*, 586 F.3d at 1371; accord *Tessera*, 646 F.3d at 1371.

There is thus considerable confusion even among the minority of jurisdictions that consider conduct unrelated to the litigation to be an inadequate basis for vacatur. Because litigants are subject to wildly varying practices based on the happenstance of where an appeal is heard, this Court's review is warranted. Indeed, this Court concluded that a comparable degree of confusion in vacatur practices warranted certiorari prior to *Bancorp*. See Robert S. Lewis, U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership: *Settlement Conditioned on Vacatur?*, 47 Ala. L. Rev. 883, 891-94 & nn.65-92 (1996) (describing similar split pre-*Bancorp*); see *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 30, 34 (1993) (noting grant of certiorari on vacatur issue, but dismissing as improvidently granted); *Bancorp*, 513 U.S. at 20 (noting Court set same

"vacatur question for briefing and argument" after post-certiorari settlement).

B. The Tenth Circuit's Decision Is Wrong

The Tenth Circuit misapplied this Court's precedent by refusing to grant vacatur regardless of whether OXY's case-mooting conduct was unrelated to this federal lawsuit. The decision below did so in two ways. First, refusing to grant vacatur in this case contradicts the holding of *Alvarez*, which granted vacatur based solely on this Court's conclusion that "th[e] federal case played no significant role" in the voluntary case-mooting conduct. 558 U.S. at 96. Second, by creating an entirely novel equitable factor weighing against vacatur—whether the appellant's conduct on appeal "is objectively consistent with an effort to secure an impermissible advisory opinion," App., *infra*, 23a—the decision below contradicts key teachings of both *Alvarez* and *Bancorp*.

1. The Panel Decision Conflicts With *Alvarez*

In *Alvarez*, this Court explained that it "normally do[es] vacate the lower court judgment in a moot case because doing so 'clears the path for future relitigation of the issues between the parties,' preserving 'the rights of all parties,' while prejudicing none 'by a decision which . . . was only preliminary." 558 U.S. at 94 (quoting *Munsingwear*, 340 U.S. at 40). *Alvarez* recognized that in *Bancorp*, this Court identified a limited class of "circumstances where we would not" order vacatur, writing, "'[w]here mootness results from settlement' rather than 'happenstance,' the 'losing party has voluntarily forfeited his legal remedy . . . [and] thereby surrender[ed] his claim to

the equitable remedy of vacatur.'" *Ibid.* (quoting *Bancorp*, 513 U.S. at 25 (brackets in *Alvarez*)). This Court then explained the circumstances under which the voluntary actions of the party seeking review could properly be deemed to result from "happenstance," and when they would properly be held to forfeit a party's ability to seek vacatur.

Alvarez involved a federal lawsuit alleging that state authorities had violated property owners' rights by failing to provide a prompt hearing after property was seized. 558 U.S. at 90. After the district court dismissed the complaint and while the appeal was pending, the state resolved all six of the forfeiture proceedings involving the federal plaintiffs, doing so in four of the cases by agreeing to return the seized property. *Id.* at 92, 95. The plaintiffs then prevailed on appeal and the state sought review. This Court raised the question of whether the resolution of the plaintiffs' state forfeiture proceedings had mooted the appeal, and determined that it had. *Id.* at 91-94. This Court then held that, where "th[e] federal case played no significant role" in the voluntary conduct that mooted the appeal, 558 U.S. at 96, that conduct does not represent "the kind of 'voluntary forfeit[ure]' of a legal remedy that led the Court in *Bancorp* to find that considerations of 'fairness' and 'equity' tilted against vacatur." *Id.* at 97 (brackets in original). Thus, the conduct of the party seeking review—*though voluntary*—"f[e]ll on the 'happenstance' side of the line," *id.* at 95, such that "we should follow our ordinary practice" of vacatur, "thereby 'clear[ing] the path for future relitigation of the issues." *Id.* at 97 (brackets in original; quoting *Munsingwear*, 340 U.S. at 40). This Court noted that outcome was consistent

with *Munsingwear* itself, which "stat[ed] that a lower court judgment would have been vacated even though an action of the party seeking review had brought about the mootness *because* that action * * * was basically unrelated" to the litigation. *Id.* at 96 (citing *Munsingwear*, 340 U.S. at 39-40).

In reaching its conclusion, this Court did not treat the no-significant-role finding as "only one factor" to be considered, compare App., *infra*, at 24a, or suggest that the party seeking review must make an additional "compelling equitable circumstances to militate strongly in favor of vacatur," compare *id.* at 19a. And it *certainly* did not inquire into whether the county's conduct was "commendable," or simply "not anything to condemn." Compare *id.* at 25a. Instead, the no-significant-role finding definitively resolved the issue. As this Court explained: *"[I]f the presence of this federal case played no role in causing the termination of those state cases*, there is not present here the kind of 'voluntary forfeit[ure]' of a legal remedy that led the Court in *Bancorp* to find that considerations of 'fairness' and 'equity' tilted against vacatur." *Alvarez*, 558 U.S. at 97 (emphasis added; brackets in original). Thus, the "ordinary practice" of vacatur was warranted. *Ibid.*

Alvarez requires vacatur of the district court's judgment in this case. *All* of the evidence before the panel—evidence presented *by respondents, not* OXY—indicated that OXY sold its natural gas assets throughout the Hugoton Field for legitimate business reasons *completely unrelated* to this lawsuit involving

Kansas landowners.[5] Like the docket sheets in *Alvarez* indicating that the state-court proceedings involved substantive state law issues unrelated to the federal lawsuit, the evidence here showed that OXY's $1.4 billion sale was made for business reasons unrelated to the plaintiffs' lawsuit. The declaratory judgment affected only a few hundred Kansas landowners using free gas in their homes. App., *infra*, 76a. If OXY were simply attempting to moot the case, there would have been no need for it to sell natural gas assets in Colorado and Oklahoma (which comprised the bulk of its assets in the region) in addition to those in Kansas. See Mot. to Dismiss, Attach. 2, C.A. Doc. 01019210975. Finally, OXY "argued against mootness," which "suggests that a desire to avoid review in this case played no role" in the sale of its Hugoton Field assets.[6] See *Alvarez*, 558 U.S. at 97. Thus, as Judge Hartz explained, OXY's region-wide asset sale "was obviously not motivated by the pendency of this litigation." App.,

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[5] The Tenth Circuit plainly credited that evidence because it was the *only* proof the plaintiffs offered in support of their motion to dismiss the appeal as moot. See p. 7, *supra*. Otherwise, there would have been no proof with which respondents could carry their "heavy" burden of "demonstrating mootness." See *Los Angeles Cty.* v. *Davis*, 440 U.S. 625, 631 (1979).

[6] Concluding that this factor counts against vacatur here because respondents argued *for* mootness (in contrast with *Alvarez*, where both parties argued *against* mootness) would violate the principle that "maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye." *Knox* v. *Serv. Emps. Int'l. Union, Local 1000*, 567 U.S. ___, 132 S. Ct. 2277, 2287 (2012).

infra, 38a (Hartz, J., concurring in part and dissenting in part).

Every one of the factors that supported vacatur in *Alvarez* is also present here. It is thus no surprise that in most jurisdictions that have addressed the issue, the sale of property unrelated to litigation that results in mootness is, standing alone, sufficient basis to support vacatur. See *Marshack*, 495 F. App'x at 810; *Am. Family Life Assurance*, 129 F.3d at 631.

2. The Decision Creates A Novel Equitable Factor That Contradicts Key Teachings From *Alvarez* And *Bancorp*

The Tenth Circuit asserted that its refusal to grant vacatur was bolstered by its determination that OXY's conduct on appeal was "objectively consistent with an effort to secure an impermissible advisory opinion." App., *infra*, 23a. The conduct in question was that OXY *contested respondents' claims of mootness*. The panel majority cited no authority supporting its consideration of that factor, and OXY is not aware of any such authority. Quite the opposite: This novel factor conflicts with key teachings from *Alvarez* and *Bancorp*.

Alvarez explicitly held that one of the factors "reinforc[ing]" its decision to grant vacatur was that the "parties argued against mootness at oral argument," which, this Court explained, indicated "that a desire to avoid review in this case played no role at all in producing" the case-mooting conduct. 558 U.S. at 97. The panel majority, however, turned this Court's reasoning on its head, holding that the fact that OXY did precisely what the parties in *Alvarez* did was "*objectively consistent with* an effort

to secure an impermissible advisory opinion." App., *infra*, 23a (emphasis added). Significantly, the majority did not attempt to discern "OXY's subjective purpose," *id.* at 24a, drawing its inference (as this Court did in *Alvarez*), exclusively from the "objective" circumstances of the actions of the party before it. But according to the majority, the very conduct that was "objectively" a basis for *granting* vacatur in *Alvarez* is—in the Tenth Circuit, at least—now a basis for *denying* vacatur.

The majority's reasoning also conflicts with *Bancorp*. There, the Court observed that the decision whether to grant vacatur turned on "the nature and character *of the conditions which have caused the case to become moot*." 513 U.S. at 24 (emphasis added; internal quotation marks omitted). Hence, the Court's rule that "mootness by happenstance provides sufficient reason to vacate." *Id.* at 25 n.3; *Munsingwear*, 340 U.S. at 40. If the *case-mooting conduct* does not "forfeit" the right to vacatur, the inquiry is at its end and vacatur is warranted. That explains why, in *Alvarez*, this Court considered the party's conduct on appeal only in determining whether "a desire to avoid review in this case played no role at all in producing" *the case-mooting conduct*. 558 U.S. at 97. The panel majority's newly minted consideration undermines *Bancorp*'s focus on the "nature and character" of the conduct that "caused the case to become moot," 513 U.S. at 24, which is narrowly focused on whether that conduct giving rise

to mootness "forfeited * * * his claim to the equitable remedy of vacatur," *id*. at 25.[7]

3. The panel majority's novel equitable factor is systematically unfair to appellants. The factor effectively forces appellants to choose, when faced with a motion to dismiss their appeal, between either: (1) advancing a good-faith argument that the appeal is not moot, or (2) seeking to substitute another party into the appeal and effectively abandoning the case. Under the majority's rule, litigants would have to make that momentous decision before knowing whether the court will conclude the appeal is moot. Litigants who choose the first option risk the fate OXY suffered: Having the court disagree with their argument and then refuse to vacate the judgment because the litigant did not move to substitute another party. And litigants who choose the second option risk a different but equally undesirable fate: substituting a new party, even though the court may yet be persuaded by the litigant's arguments against mootness, and thus needlessly surrendering control over an appeal *which is not actually moot*, essentially ousting the party from its own appeal.

There is no previous decision of this Court—or any other federal court—that suggests courts should put appellants to such a harsh choice. To the contrary, as Judge Hartz explained, the more equitable rule

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[7] The majority cited no authority for its suggestion that intervention by Merit was an inadequate mechanism to ensure a party was entitled to move for vacatur. It is also squarely contrary to circuit precedent. See, *e.g.*, *Humane Society*, 527 F.3d at 187-188 ("any doubt about the federal appellants' entitlement to vacatur is removed by intervenor Safari Club's entitlement thereto").

would be to require that the prevailing party seeking dismissal of the appeal (here, respondents) file a motion to substitute the successor in interest. See App., *infra*, 38a (citing Fed. R. App. P. 43(a)(1), (b)).

C. This Case Is An Ideal Vehicle For Resolving A Recurring Federal Question Of Substantial Importance

This case represents an excellent vehicle for resolving the lower courts' confusion about how to apply vacatur analysis in cases where the appellant's voluntary but unrelated conduct has mooted the federal appeal. To begin with, petitioner's entitlement to vacatur was explicitly raised below, fully briefed and argued, extensively analyzed, and squarely decided by the court of appeals. Thus, the issues come to this Court much more fully developed than for most cases addressing the propriety of vacatur, where issues of mootness and appropriate relief are typically last-minute additions to unrelated merits issues that originally animated the grant of certiorari. See, *e.g.*, Docket, *Alvarez* v. *Smith*, 08-351 (in case granted to address adequacy of post-deprivation procedures under Due Process Clause, Court instructed counsel twelve days before argument to "be prepared to discuss at oral argument whether respondents have had forfeiture hearings or have otherwise had their property returned, and, if they have, the potential significance of those facts with respect to questions of mootness"); *Bancorp*, 513 U.S. at 20 (noting vacatur issue first arose before this Court after granting to review unrelated issues).[8]

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[8] The panel majority's statement faulting OXY for "never voluntarily offer[ing] for inclusion in the record the sales

There can be no real question that the issue is an important one. The issue implicates bedrock fairness concerns of everyday appellate procedure; *Munsingwear* vacatur "maintain[s] fairness between litigants who have been denied what would otherwise be an opportunity to challenge a prior adverse decision." *Blair* v. *Shanahan*, 38 F.3d 1514, 1520 (9th Cir. 1994) (internal quotation marks omitted); accord *Northshore Dev., Inc.* v. *Lee*, 835 F.2d 580, 583 (5th Cir. 1988) (vacatur analysis is "concerned primarily with fairness"). Vacatur is this Court's "ordinary practice" when a case is mooted on appeal because, absent strong countervailing considerations, vacating the judgment below is the most equitable course of action. *Alvarez*, 558 U.S. at 97. Doing so "prevent[s] an unreviewable decision 'from spawning any legal consequences,' so that no party is harmed by what [this Court] ha[s] called a 'preliminary' adjudication." *Camreta* v. *Greene*, 563 U.S. 692, 713 (2011) (quoting *Munsingwear*, 340 U.S., at 40-41); accord *Boston Firefighters Union Local 718* v. *Boston Chapter NAACP, Inc.*, 468 U.S. 1206, 1209 (1984) (vacatur "serves the purpose of preserving the rights of all parties to the controversy in any future litigation that might arise presenting similar issues").

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contract," App., *infra*, 23a, is impossible to square with counsel for OXY's explicit statement during argument that "Your Honor, we can and we do have the contract and we can provide it to you or to the district court," Reh'g Pet. 14 n.7, C.A. Doc. 01019545036. But the question presented in no way turns on resolution of that question. This Court's adoption of the majority rule would afford OXY complete relief. *E.g., Am. Family Life Assurance*, 129 F.3d at 630-631 (ordering vacatur in case where sale of property by party seeking review mooted case); *Marshack*, 495 F. App'x 808 (same).

So powerful are these general equitable considerations that this Court has repeatedly declared "it is the *duty* of the appellate court to set aside the decree below" under normal circumstances. *U.S. Dep't of Treasury, Bureau of Alcohol, Tobacco & Firearms* v. *Galioto*, 477 U.S. 556, 560 (1986) (emphasis added; quoting *Duke Power Co.* v. *Greenwood Cty.*, 299 U.S. 259, 267 (1936) (per curiam)); *Boston Firefighters Union*, 468 U.S. at 1209 (same); *Great W. Sugar Co.* v. *Nelson*, 442 U.S. 92, 93 (1979) (same). In light of the fundamental purposes that vacatur serves, this Court should not allow the current inconsistency among the courts of appeals to persist. This state of uncertainty frustrates the ability of individuals and businesses to plan, unavoidably chilling beneficial transactions—such as the sorts of asset sales that businesses undertake every day—because of questions over potential implications for litigation.

Finally, there can be no question that the issue is a recurring one. As the numerous circuit decisions discussed above amply illustrate, see pp. 13-22 & n.3, *supra*, courts frequently apply *Munsingwear* to circumstances indistinguishable from those present here.[9] And because vacatur is often handled through

[9] In addition to the courts of appeals, *Munsingwear* vacatur is an essential aspect of this Court's procedures, as evidenced by the fact that this Court has itself applied the doctrine repeatedly in recent terms. *E.g.*, *Camreta*, 563 U.S. at 713-714; *LG Elects., Inc.* v. *InterDigital Commc'ns, LLC*, 134 S. Ct. 1876 (2014); *United States* v. *Samish Indian Nation*, 133 S. Ct. 423 (2012); *Selig* v. *Pediatric Specialty Care, Inc.*, 551 U.S. 1142 (2007).

unpublished orders,[10] the issue occurs far more frequently than available decisions indicate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[10] *Cf. Matter of Mem'l Hosp. of Iowa Cty., Inc.*, 862 F.2d 1299, 1300 (7th Cir. 1988) (explaining that the Seventh Circuit uses unpublished orders to deny requests for vacatur).