No. 16-107

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

REPLY BRIEF FOR PETITIONER

MARIE R. YEATES
GREGORY F. MILLER
VINSON & ELKINS LLP
1001 Fannin Street, Suite 2500
Houston, TX 77002
(713) 758-2222

JOHN P. ELWOOD
Counsel of Record
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Other Authorities

REPLY BRIEF FOR PETITIONER

Respondents' strained efforts cannot conceal the deep division between circuits that "pa[y] particular attention in [their] 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" and circuits, like the Tenth, that "have not adopted such a particularized focus." Pet. App. 51a n.5. Respondents cannot deny that, in the D.C. and Ninth Circuits, parties that voluntarily sell assets involved in litigation will obtain vacatur if the sale was unrelated to the litigation, see *Am. Family Life Assurance Co. of Columbus* v. *FCC*, 129 F.3d 625, 631 (D.C. Cir. 1997) (appellant sold television stations involved in agency ruling, but "did not sell the stations in order to moot this case"); *Marshack* v. *Helvetica Capital Funding LLC,* 495 F. App'x 808, 810 (9th Cir. 2012) (appellant sold "property that ultimately mooted the appeal," but "not with the intention of mooting the case"), while indistinguishable sales in the Tenth Circuit warrant vacatur only if undertaken "for reasons that are commendable." Pet. App. 25a. Even respondents—*defending* the judgment below—concede that "no authority from this Court" supports the "unprecedented" "compelling equitable reason" test. Opp. 9.

Respondents cannot dispute that this case presents the very factors this Court held justified vacatur in *Alvarez* v. *Smith*, 558 U.S. 87, 95-97 (2009). In a wide-ranging opposition, respondents never deny that OXY's $1.4 billion sale of all its Hugoton Field assets *across four states* was "obviously not motivated by the pendency of" this declaratory judgment action involving around 300

Kansas leaseholders. Pet. App. 37a-38a (Hartz, J., concurring in part and dissenting in part). Nor do respondents deny that appellate courts "frequently encounter[]" the issue of vacatur resulting from mootness. 13C Charles A. Wright, et al., *Federal Practice and Procedure* § 3553.10, at 569 (3d ed. 2008). They hardly could: Most circuits have already weighed in, and just since the petition was filed, the Third Circuit issued *yet another* decision reaffirming the "general rule" that vacatur is warranted whenever there is "no evidence" that the mooting conduct "was part of any attempt to manipulate the judicial system." *Constand* v. *Cosby*, No. 15-2797, 2016 WL 4268941, at *6 (3d Cir. Aug. 15, 2016). Only this Court's review can resolve widespread uncertainty on this bedrock issue.

A. The Split Is Real

Disputing circuit conflict that both the panel below and the en banc Fifth Circuit have acknowledged, Pet. 13, respondents maintain that "all of the circuits" hold that *any* "voluntary case-mooting conduct" forecloses vacatur if "the appellant 'knew or should have known'" that conduct would moot the appeal "or made a 'conscious choice' * * * regarding the appeal." Opp. 13. But while vacatur analysis indeed involves an "equitable determination," *ibid.*, respondents' selective (mis)quotation cannot mask that *one factor* is determinative: nearly "every 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." *Staley* v. *Harris Cty.*, 485 F.3d 305, 316-317 (5th Cir. 2007) (en banc) (DeMoss and Smith, JJ., dissenting from denial of vacatur) (collecting authorities). Just three circuits refuse to give controlling weight to the fact that case-mooting conduct was unrelated to the appeal—apparently because of a mistakenly broad reading of "voluntar[y] forfeit[ure]" language in *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 25 (1994), that most courts have rejected. Pet. 17-18. Respondents concede that the Federal Circuit applies a categorical rule that looks *only* to whether mooting action was voluntary. Opp. 18. Respondents do not deny that the Fourth Circuit requires, *apart* from fault, a showing that vacatur "would serve the public interest," *United States* v. *Springer*, 715 F.3d 535, 542 (2013), and applies a presumption against vacatur.[1] Pet. 19. And respondents agree that the Tenth Circuit's requirement of "compelling equitable reason[s]" for vacatur is supported by "no authority from this Court." Opp. 9.

Respondents are demonstrably wrong that the majority-rule cases "all * * * predate *Alvarez*."[2] Opp.

---

[1] Respondents ignore *Valero Terrestrial Corp.* v. *Paige*, 211 F.3d 112, 118 (4th Cir. 2000) (cited at Pet. 20), which held lack of "fault" insufficient to warrant vacatur. Accord *Int'l Fed'n of Prof'l & Tech. Eng'rs* v. *Haas*, 599 F. App'x 477, 480 (4th Cir. 2014) (reaffirming test post-*Alvarez*). Far from being "*dicta*," Opp. 18 n.11, the *Springer* majority explicitly rejected "the dissent's recommended outcome—holding that the present case is moot *and* vacating the district court's judgment." 715 F.3d at 541.

[2] See, *e.g.*, *Constand*, 2016 WL 4268941, at *6; Pet. 16 n.4 (citing *Norsworthy* v. *Beard*, 802 F.3d 1090, 1092-1093 (9th Cir.

14. And respondents do not (and *could* not) contend that *Alvarez* undermines those decisions, because it *embraced* the majority rule. The rule respondents disparage as OXY's "subjective motivation analysis" (Opp. 13) is *this Court's own test*: "if the presence of this [litigation] played no role in causing the termination of those [other] cases, there is not present here the kind of 'voluntary forfeit[ure]' of a legal remedy that led th[is] Court in *Bancorp* to find that considerations of 'fairness' and 'equity' tilted against * * * our ordinary practice" of vacatur. *Alvarez*, 558 U.S. at 97.

Respondents are also wrong that the majority rule applies only when "governmental agencies" moot cases. Opp. 7 n.3. Courts *routinely* allow nongovernmental appellants vacatur when their voluntary actions unrelated to litigation moot appeals—including, specifically, *sales of property*. *E.g.*, *Marshack,* 495 F. App'x at 810;[3] *Am. Family Life*, 129 F.3d at 631. Respondents cannot identify a single passage in any majority-rule case—including *Alvarez* itself—suggesting that vacatur turned on an appellant's status as a governmental entity.

Respondents' case-specific efforts to distinguish majority-rule precedents likewise fail. While the First Circuit vacated an adverse judgment where the corporate appellant undertook the case-mooting con-

---

2015); *Marshack*, 495 F. App'x at 810; *Log Cabin Republicans* v. *United States*, 658 F.3d 1162, 1168 (9th Cir. 2011).

[3] See U.S. Trustee Program, *Chapter 7, 12 & 13 Private Trustee Locator*, https://goo.gl/vhqBRH (trustees "are private parties, *not* government employees").

duct "based on a perceived legal obligation," Opp. 14 (quoting *Kerkhof* v. *MCI WorldCom, Inc.*, 282 F.3d 44, 53-54 (1st Cir. 2002)); Pet. 15, the court did not limit its holding to legal obligations. Rather, it held, contrary to the decision below, that vacatur was warranted where the appellant took the actions in "good faith" and not to "deliberately moot[] the appeal." 282 F.3d at 53-54.

Respondents' claim that *Russman* v. *Board of Education*, 260 F.3d 114 (2d Cir. 2001), "actually confirms" the Tenth Circuit's approach (Opp. 8), would be news to the panel below, which *explicitly rejected Russman*'s "particularized focus" on whether case-mooting conduct was "unrelated to the litigation." Pet. App. 51a n.5. While *Russman* stated that the *Bancorp* exception applies if the appellant "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," the *very next paragraph* excludes from that standard "conduct that is voluntary * * *, but which is entirely unrelated to the lawsuit." 260 F.3d at 122. "Such conduct cannot be said to be a 'voluntary forfeiture' of the appellant's interest in vacatur * * *." *Ibid.*[4]

---

[4] Respondents are wrong that the Third Circuit applies a "conscious choice" standard foreclosing vacatur here. Opp. 9 (*mis*quoting *Lightner ex rel. NLRB* v. *1621 Route 22 W. Operating Co.*, 729 F.3d 235, 238 (3d Cir. 2013)). That phrase appears nowhere in *Lightner*—or *any other* Third Circuit vacatur opinion. That court has explained that when litigation "played no significant role" in conduct mooting an appeal, it reflects no "choice of [that] party to relinquish the appeal," so

Respondents' claim that *Dilley* v. *Gunn*, 64 F.3d 1365, 1372 (9th Cir. 1995), held that "the motivation behind the mooting conduct does not matter" (Opp. 16) is flatly contradicted by *Dilley* itself. It squarely held that "automatic vacatur is appropriate" if mooting conduct was "unrelated to this lawsuit and would have occurred in the absence of this litigation." 64 F.3d at 1372. So too for the Ninth Circuit's three post-*Alvarez* decisions, see n.2, *supra*, which respondents ignore.

Respondents *undermine* their position by arguing that *Local Union No. 34* v. *Bazzano*, 43 F.3d 1474, 1994 WL 709325 (7th Cir. 1994) (unpublished table decision), "interpreted *Bancorp* narrowly." Opp. 17. That is the point: The Seventh Circuit's narrow interpretation conflicts with the Tenth Circuit's "presumption * * * in favor of retaining the judgment" whenever mootness results from appellant's "voluntary action." See Pet. App. 14a-15a (first internal quotation marks omitted; then quoting *Bancorp*, 513 U.S. at 24).

Respondents' effort to distinguish *American Family Life* as being "concerned with the possible lingering precedential impact nationwide of a federal agency order" (Opp. 16-17) simply underscores the importance of the majority rule—and the unfairness of the Tenth Circuit's approach. That case involved an FCC order declaring unlawful a broadcast-station licensee's insistence that political candidates use its standard advertising contract. Even though the

---

vacatur is presumptively warranted. *Lightner*, 729 F.3d at 238. *Constand*, 2016 WL 4268941, at *6, reaffirmed that approach.

petitioner voluntarily "sold all of its interests," 129 F.3d at 626, the D.C. Circuit granted vacatur because "[i]t did not sell the stations in order to moot this case." *Id.* at 631. The court focused not on any "impact nationwide" of an order that *applied only to the petitioner*, Opp. 16-17, but on the "lingering though remote possibility of residual collateral harm to petitioner." 129 F.3d at 631.[5]

If that "remote possibility" justified invoking the "equitable tradition of vacatur" to put "to rest" arguably "speculative" harm for a company *no longer involved in broadcasting*, *ibid.*, OXY—which actively deals with oil and gas leases—has a compelling interest in vacating a decision construing a lease clause the panel termed "frequently used." Pet. App. 23a. Review is warranted so litigants are not subject to different vacatur rules based on the happenstance of where litigation is brought.

B. *Alvarez* Requires Reversal

Respondents do not dispute that the factors justifying vacatur in *Alvarez* are present here. See Pet. 22-26. Instead, they willfully misread *Alvarez,* focusing on irrelevant facts.

1. There is no basis for respondents' claim that *Alvarez* turned on "whether the voluntary conduct was knowingly case-mooting," and whether "one hand of the government did not know what the other was doing." Opp. 7. *Alvarez* never mentions the

[5] *American Family Life*'s application of *Bancorp* was not "*dicta*." Opp. 6 n.2. The court's narrow reading was necessary to hold that the sale did not foreclose vacatur. See 129 F.3d at 630-631.

petitioner's "knowledge" of the mooting behavior, much less indicate it drove the outcome. Nor could it: "[T]he Cook County State's Attorney" was the defendant in the federal litigation *and* the party that "return[ed] all three cars and some of the cash," mooting the appeal. 558 U.S. at 90, 94. The State's Attorney certainly knew or should have known that returning property would moot challenges to its seizure, yet this Court vacated the opinion solely because it determined "the presence of this federal case played no significant role in the termination of the separate state-court proceedings." *Id.* at 96-97. *Alvarez* contains no language limiting its application to "governmental entities," Opp. 7, and respondents identify no decision adopting their idiosyncratic reading. Rather, courts read *Alvarez* to embody the majority rule. *E.g.*, *Lightner*, 729 F.3d at 238.

Respondents wrongly claim that OXY's standard—really, *Alvarez*—involves "subjective motivation analysis," Opp. 13, that will spawn "satellite litigation," *id.* at 19-21. As in *Alvarez*, the no-significant-role determination turns on whether an *objective examination of the record* "suggests that a desire to avoid review * * * played no role" in case-mooting conduct. 558 U.S. at 97; see Pet. 24-25. The courts applying the majority rule have consistently focused on objective record facts. See Pet. 14-18 & n.4. Tellingly, petitioners cite *no authority* suggesting that courts have struggled to apply the majority rule. See Opp. 19-21.

Indeed, the majority rule is more workable than the Tenth Circuit's test, which requires normative judgments about whether mooting conduct was

undertaken "for reasons that are commendable." Pet. App. 25a. It was the *Tenth Circuit's* test—not the majority rule—that caused that court to examine whether it could "reach a firm conclusion regarding OXY's *subjective* purpose." Pet. App. 24a (emphasis added). These practical considerations favor granting review to correct the Tenth Circuit's misguided approach.

2. Far from "hid[ing] the case-mooting conduct," Op. 10, OXY *publicly announced* the asset sale.[6] Respondents alerted the Tenth Circuit, and the parties fully briefed mootness. Pet. App. 5a, 23a n.5. As in *Alvarez* and most (if not all) majority-rule cases, the appellant (OXY) argued that the case was not moot.

Contrary to respondents' assertion, the Tenth Circuit neither suggested that OXY's conduct reflected any "lack of candor," Opp. 11, nor made findings about the company's subjective intent. Pet. App. 24a. But based on the fact that OXY argued against mootness, and *did not itself* move to substitute a new party (and thereby foreclose its *own* ability to pursue the appeal), the panel majority held that OXY's conduct was "objectively consistent with an effort to secure an impermissible advisory opinion." Pet. App. 23a. But this Court, and most appellate courts, consider the fact that an appellant argues against mootness as a factor *supporting* vacatur

---

[6] Press Release, Occidental Petroleum Corp., Occidental Petroleum Announces Sale of Hugoton Field Assets as Part of Company's Strategic Review (Feb. 13, 2014), http://goo.gl/iUTJch.

because it "suggests that a desire to avoid review * * * played no role" in mooting a case. *Alvarez*, 558 U.S. at 97. Neither the Tenth Circuit nor respondents have cited any decision, nor have we found any, suggesting a party's decision to resist mootness and argue it remains the proper appellant results in it forfeiting vacatur.[7] Respondents do not dispute that the Tenth Circuit's analysis is incompatible with *Bancorp*'s focus on the "nature and character" of the conduct that "caused the case to become moot." Pet. 27 (quoting *Bancorp*, 513 U.S. at 24).

C. No Vehicle Problem Would Prevent Resolution Of This Issue

Finally, respondents do not contest that, because the vacatur issue was thoroughly litigated below, it comes to this Court much more fully developed than mootness and vacatur issues usually do. See Pet. 29.

---

[7] Respondent's passing assertion that OXY "hid" the sales contract (Opp. 10-11) is not serious. Twice below, OXY quoted counsel's never-accepted offer to provide the contract to the panel: "we do have the contract and we can provide it to you or to the district court." Reh'g Pet. 2, 5, 14 & n.7, C.A. Doc. 01019545036 (quoting recording); Second Reh'g Pet. 4, 6, 14 n.4, C.A. Doc. 01019575523 (same). And twice below, respondents failed to dispute that account. Answer to Reh'g Pet. 1-10, C.A. Doc. 01019552401 (not contesting); Answer to Second Reh'g Pet. 1-9, C.A. Doc. 01019583440 (same); see also Pet. 29-30 n.8. Even if respondents had preserved a factual objection, the sale contract is fundamentally irrelevant to the *Alvarez* inquiry. As the panel itself acknowledged, the contract could only clarify "whether [the] interpretation of the free gas clauses would be binding on" the asset buyer. Pet. App. 23a. Whether the decision would bind the buyer has nothing to do with *Alvarez*'s key question: *what motivated* OXY's asset sale.

Respondents identify no disputed issue—factual or jurisdictional—that would prevent the Court from resolving this important and recurring issue. The sole "vehicle problem" respondents assert is that the Tenth Circuit did not "reach a firm conclusion regarding OXY's subjective purpose." Opp. 21. But subjective motivation has no bearing on the *Alvarez* inquiry, which is based on objective circumstances. Furthermore, that would not keep the Court from resolving the issue; at most it would deny OXY relief *if* the rule adopted required proof of subjective purpose. Thus, no vehicle problems would prevent resolution of this issue. See R. 15.2 (nonjurisdictional objections not raised in opposition brief deemed waived).[8]

In *Ivy* v. *Morath*, a case now set for argument involving a Texas agency's obligation to provide driver education to persons with disabilities, the petitioners have acknowledged that their voluntary actions have raised mootness questions; they argue that if the case is moot, vacatur of the decision below would be appropriate. See Pet. Br. 22-24, *Ivy* v. *Morath*, 136 S. Ct. 2545 (No. 15-486). The possibility

---

[8] Tellingly, respondents do *not* suggest that OXY's purported inequitable conduct, Opp. 10-12, would prevent review of the question presented. At *most*, respondents might argue on remand that it furnishes an alternative basis for affirmance. But as the Solicitor General has often noted, potential alternative bases for affirmance "would not prevent the Court from addressing the questions presented by the petition." Cert. Reply Br. 10, *Match-E-Be-Nash-She-Wish Band* v. *Patchak*, 132 S. Ct. 2199 (2012) (Nos. 11-246, 11-247); accord Cert. Reply Br. 10-11, *Astrue* v. *Caputo*, 132 S. Ct. 2021 (2012) (No. 11-159).

this Court will address mootness and vacatur in *Ivy* does not diminish the need for review in this case. First, the mooting conduct here—the sale of assets involved in litigation—is a frequently recurring situation that is itself the subject of a circuit split. See p.1, *supra*. This issue is sufficiently important to warrant review lest any court conclude the mooting actions in *Ivy*—individuals obtaining drivers' licenses or leaving Texas—too dissimilar to furnish guidance, just as the Tenth Circuit failed to follow *Alvarez*. Second, review here is necessary to address the Tenth Circuit's misguided rule, which requires proof voluntary mooting conduct was undertaken "for reasons that are commendable," Pet. App. 25a, and to review its unprecedented holding that a party may forfeit its ability to obtain vacatur by arguing against mootness and maintaining it remains a proper party to the appeal, *id.* at 23a. *Ivy* thus provides no reason for this Court to forego reviewing this exceptionally significant case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

MARIE R. YEATES
GREGORY F. MILLER
VINSON & ELKINS LLP
1001 Fannin Street, Suite 2500
Houston, TX 77002
(713) 758-2222

JOHN P. ELWOOD
Counsel of Record
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

SEPTEMBER 2016