No. 23-_____

In The Supreme Court of the United States

WY PLAZA, LC,

Petitioner,

v.

SAFEWAY STORES 46 INC.,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

CLIFFORD S. DAVIDSON
Counsel of Record
SNELL & WILMER LLP
601 SW Second Ave., Ste. 2000
Portland, OR 97204
csdavidson@swlaw.com
Telephone: (503) 443-6099

CAMERON J. CUTLER
CARISSA L. PRYOR
SNELL & WILMER LLP
15 West South Temple, Ste. 1200
Salt Lake City, UT 84101-1547
ccutler@swlaw.com
cpryor@swlaw.com
Telephone: (801) 257-1828

KELLY H. DOVE
SNELL & WILMER LLP
3883 Howard Hughes Pkwy., Ste. 1100
Las Vegas, NV 89169
kdove@swlaw.com
Telephone: (702) 784-5286

Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether an appellee is obligated to raise all alternative bases for affirmance in its answer brief, or risk waiver of those alternative bases, in contravention of the widely accepted no-waiver-by-appellees rule.

PARTIES TO THE PROCEEDINGS

The caption of the case contains the names of all parties.

CORPORATE DISCLOSURE

WY Plaza, LC has no parent corporation or publicly held corporation that owns 10% or more of its stock.

RELATED CASES

Safeway Stores 46 Inc. v. WY Plaza, LC, No. 2:19-CV-00143-KHR, U.S. District Court for the District of Wyoming. Judgment entered October 20, 2020.

Safeway Stores 46 Inc. v. WY Plaza, LC, Nos. 20-8064 & 20-8066, U.S. Court of Appeals for the Tenth Circuit. Judgment entered April 7, 2023.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

PETITION FOR A WRIT OF CERTIORARI

Petitioner WY Plaza, LC respectfully submits this petition for a writ of certiorari to review the judgment of the Court of Appeals for the Tenth Circuit in this case.

OPINIONS AND ORDERS BELOW

The divided opinion of the United States Court of Appeals for the Tenth Circuit is published as *Safeway Stores 46 Inc. v. WY Plaza, LC*, 65 F.4th 474 (10th Cir. 2023) and is reproduced in the Appendix at 1–52. The decision of the United States District Court for the District of Wyoming is unreported and appears in the Appendix ("App.") at 53–98.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The United States Court of Appeals for the Tenth Circuit denied WY Plaza's timely petition for rehearing en banc on June 8, 2023. This petition is filed within 90 days of the Tenth Circuit's denial and is therefore timely under Rules 13.3 and 29.2 of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case does not involve constitutional or statutory provisions.

STATEMENT OF THE CASE

The factual background of this case that is pertinent to this Petition for Certiorari is largely undisputed. *See Safeway Stores 46 Inc.*, 65 F.4th at 479 ("The dispute largely involves legal implications from undisputed historical facts surrounding Safeway's delay in exercising contractual rights.").

The predecessor-in-interest of Plaintiff Safeway Stores 46, Inc. ("Safeway") leased a portion of a shopping center from the predecessor-in-interest of Defendant WY Plaza, LC ("WY Plaza") via a Shopping Center Lease entered in 1980 (the "Lease"). App. 54. The Lease provided that if the lessee opted to construct an addition, the lessor had the option to pay the costs of the addition. App. 55. If the lessor chose not to pay for the addition, the Lease provided that the lessee *may* deduct these costs from percentage rent that came due. App. 55. An addition was completed in 2001, but Safeway never deducted the costs of the addition from percentage rent, nor did it alert WY Plaza of its intent to do so until 2018, when Safeway allegedly "realized that it could have been deducting its construction costs" and demanded a refund from WY Plaza. App. 55, 58–59; *Safeway Stores 46 Inc.*, 65 F.4th at 480. WY Plaza

refused Safeway's demand in light of the length of time that had passed and based on other Lease provisions. *See* App. 59; *Safeway Stores 46 Inc.*, 65 F.4th at 480. Safeway continued to pay percentage rent under protest. App. 59–60.

On July 10, 2019, Safeway sued WY Plaza for breach of contract, anticipatory breach, and other related common law contractual claims. App. 60. Following discovery, each party moved for summary judgment. App. 60–61. On October 20, 2020, the district court issued its Order Denying Plaintiff's Motion for Summary Judgment, Granting Defendant's Motion for Summary Judgment, ruling in WY Plaza's favor except as to WY Plaza's request for attorneys' fees. App. 79, 97. The district court held that: (1) the doctrine of laches barred Safeway's claims; (2) WY Plaza did not breach the parties' contract or the covenant of good faith and fair dealing; and (3) Safeway's equitable claims were not viable under Wyoming law because the parties had an enforceable contract.

Safeway appealed the district court's order to the Tenth Circuit, challenging the district court's grant of summary judgment in WY Plaza's favor and denial of summary judgment in its favor. WY Plaza cross-appealed only on the district court's denial of its request for attorneys' fees. A divided Tenth Circuit panel reversed, holding that the district court erred in awarding summary judgment to WY Plaza. *Safeway Stores 46 Inc.*, 65 F.4th at 498. The Tenth Circuit further held that the district court should have instead granted summary

judgment to Safeway on its claims for declaratory relief and restitution. *Id.*

Because the district court's order in its favor was premised on its laches defense, WY Plaza did not raise on appeal four other affirmative defenses it had raised in the district court. The majority chose not to address them, *see id.* at 483, 496, despite the district court acknowledging in its order that WY Plaza had briefed and argued the "affirmative defenses of estoppel, accord and satisfaction, waiver, laches, and mitigation of damages" before it with respect to the parties' cross motions for summary judgment. *See* App. 60–61. While the majority held that "WY Plaza didn't waive the other four defenses by failing to present them here [on appeal]," and acknowledged that "WY Plaza could have reasserted these defenses if the case had resumed in district court," the majority declined to remand for consideration of the four other affirmative defenses to the district court, holding that because "WY Plaza *could have* [1] raised these affirmative defenses as alternative grounds to affirm or [2] urged [it], in the alternative, to remand for the district court to consider these defenses in the first instance" but instead "chose to rely here solely on laches," the court "must decide Safeway's appeal based on the arguments presented to [it]." *See id.* at 496 (emphasis added). The dissent disagreed, reasoning that the majority erred "by refusing to remand for consideration of the other theories WY Plaza raised to combat Safeway's summary judgment motion at the district court" in light of longstanding federal appellate court precedent requiring the opposite

result. *See id.* at 498–500 (Carson, J., concurring in part and dissenting in part).

On June 8, 2023, the Tenth Circuit denied WY Plaza's petition for rehearing en banc. App. 99–100. This Petition for Certiorari followed.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT REVIEW BECAUSE THE TENTH CIRCUIT'S DECISION CONFLICTS WITH THOSE OF OTHER CIRCUIT COURTS OF APPEALS.

A. The General Rule that an Appellee Is Not Required to Raise Alternative Bases for Affirmance or Risk Waiver Enjoys Widespread Support Among the Other Circuit Courts of Appeals.

The United States Courts of Appeals broadly embrace the general rule that "the failure of an appellee to have raised all possible alternative grounds for affirming the district court's original decision, unlike an appellant's failure to raise all possible grounds for reversal, should not operate as a waiver." *Schering Corp. v. Illinois Antibiotics Co.*, 89 F.3d 357, 358 (7th Cir. 1996); *see also Ms. S. v. Reg'l Sch. Unit 72*, 916 F.3d 41, 48–49 (1st Cir. 2019) (same); *Eichorn v. AT&T Corp.*, 484 F.3d 644, 658 (3d Cir. 2007) (holding that appellees are "not required to raise all possible alternative grounds for affirmance to avoid waiving those grounds"); *Oldenkamp v. United Am. Ins. Co.*, 619 F.3d 1243, 1249

(10th Cir. 2010) (holding that cross-appellants are "not required to raise alternative arguments" for affirming the district court's ruling in their favor); *Indep. Park Apartments v. United States*, 449 F.3d 1235, 1240 (Fed. Cir.), *decision clarified on reh'g*, 465 F.3d 1308 (Fed. Cir. 2006) (holding that an appellee is "not required to raise all possible alternative grounds for affirmance in order to avoid waiving any of those grounds"); *Kessler v. Nat'l Enters., Inc.*, 203 F.3d 1058, 1059 (8th Cir. 2000) (same); *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 740 (D.C. Cir. 1995). This rule has been articulated with support by the First, Third, Seventh, Eighth, Tenth, D.C., and Federal Circuits, for good reason.

B. The No-Waiver-by-Appellees Rule Promotes Judicial Efficiency and Procedural Fairness to Appellees.

It is no doubt well-established that an appellee *may* raise alternative grounds for affirmance in its answer brief. *Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982) ("[A]n appellee may rely upon any matter appearing in the record in support of the judgment below."). It is similarly well-established that, for appellees, "[t]he urging of alternative grounds for affirmance is a privilege rather than a duty." *Schering*, 89 F.3d at 358. At its heart, the no-waiver-by-appellees rule is widely adopted and applied because it promotes judicial efficiency and ensures procedural fairness to appellees. *Ms. S.*, 916 F.3d at 49. The abrogation of that rule or the adoption of an opposite rule would mandate either (1) over-inclusive and unnecessarily complex answer

briefs that put appellees at an automatic procedural disadvantage or (2) cross appeals that are both unnecessary and generally disfavored by courts. In either case, the result is a larger than necessary appeal.

Courts recognize that to require an appellee to put forth every possible alternative ground for affirmance would "increase the complexity and scope of appeals more than it would streamline the progress of the litigation," *Crocker*, 49 F.3d at 740, because it would "fuel a multiplication of arguments by appellees, even if 'entirely redundant,'" *Ms. S.*, 916 F.3d at 49. Courts also recognize that appellees "may have tactical, strategic, or financial reasons to seek to preserve a victory on a narrow ground, without wanting to fight all possible theories." *Bradley v. Vill. of Univ. Park, Illinois*, 59 F.4th 887, 898 (7th Cir. 2023). Notwithstanding those reasons, without the no-waiver-by-appellees rule, an appellee is left with no choice but to include and defend any possible ground for affirmance in an appeal it did not initiate.

If an appellee's chosen vehicle is to include all alternative grounds for affirmance in its answer brief, automatic procedural disadvantages come with that choice. To begin with, it requires an appellee to have a wider focus on the quantity of arguments presented on appeal rather than quality of its defense of an already-endorsed analysis in its word-restricted answer brief. This quantity-over-quality disadvantage is made worse by the reality that appellees are always at a natural briefing disadvantage as appellants, having not prevailed at the district court, "define[] the

battleground" of an appeal in their opening briefs. *See Crocker*, 49 F.3d at 740; *see also Laitram Corp. v. NEC Corp.*, 115 F.3d 947, 954 (Fed. Cir. 1997) (noting that "[a]ppellees do not select the issues to be appealed"). In turn, in their answer briefs, appellees must both respond to the appellant's arguments and defend the ruling on which they prevailed. *Id.* If appellees were required to present all alternative grounds for affirmance, they would be required to not only fight on the appellant's defined battleground, but also to cover territory beyond the issues raised on appeal and dispositive in the underlying decision. In other words, in addition to responding to the appellant's chosen arguments, an appellee required to present all alternative grounds for affirmance would be forced to "both defend the district court's decision and . . . present, as the basis for an alternative ground, a reworking of the interpretative framework assumed by the district court." *Ms. S.*, 916 F.3d at 49.

Given the inherent procedural disadvantages of being an appellee rather than the appellant, the lack of a no-waiver-by-appellees rule also encourages unnecessary and burdensome cross-appeals. Appellees do not "enjoy[ ] the offsetting procedural benefit of filing both the opening and reply briefs." *Crocker*, 49 F.3d at 740–41. And courts recognize that "an appellee might respond to this procedural handicap by filing a cross-appeal," which "imposes significant burdens on the appellate court." *Id.* at 741; *see also Kessler, Inc.*, 203 F.3d at 1059 ("[A]ppellate courts should not enforce the [waiver] rule punitively against appellees, because

that would motivate appellees to raise every possible alternative ground and to file every conceivable protective cross-appeal, thereby needlessly increasing the scope and complexity of initial appeals.").

Cross-appeals are ordinarily necessary only to "enlarge the scope of [a prevailing party's] judgment; they are not necessary when the party simply presents alternative bases for affirmance." *Id.* Indeed, courts expressly disfavor the latter form of cross-appeal even if it is otherwise permissible:

> Cross-appeals for the sole purpose of making an argument in support of the judgment are worse than unnecessary. They disrupt the briefing schedule, increasing from three to four the number of briefs, and they make the case less readily understandable to the judges. The arguments will be distributed over more papers, which also tend to be longer. Unless a party requests the alteration of the judgment in its favor, it should not file a notice of appeal.

Jordan v. Duff & Phelps, Inc., 815 F.2d 429, 439 (7th Cir. 1987); *see also Crocker*, 49 F.3d at 741 ("These unnecessary cross-appeals may alleviate the procedural asymmetry faced by the appellee, but they generate additional complexity."); *Ms. S.*, 916 F.3d at 49 (recognizing that the no-waiver-by-appellees rule avoids "incentiviz[ing] 'dubious cross-appeal[s]' by appellees to fully air their alternative grounds" (quoting *Field v. Mans*, 157 F.3d 35, 41–42 (1st Cir. 1998)).

Because courts recognize that "full application of the waiver rule to an appellee puts it in a dilemma between procedural disadvantage and improper use of the cross-appeal," they recognize that this "dilemma, together with the potential judicial diseconomies of forcing appellees to multiply the number of arguments presented, justifies a degree of leniency in applying the waiver rule." *Crocker*, 49 F.3d at 741. Stated another way, the no-waiver-by-appellees rule protects appellees against automatic procedural disadvantage and serves to avoid functionally increasing the scope of appeals, which would naturally result if all appellees were forced to protect themselves against these disadvantages in order to avoid waiver.

C. Inconsistency Among the Circuits Justifies Review.

Although the no-waiver-by-appellees rule is widely applied among the Circuit Courts of Appeals, in at least two circuits, appellees risk waiver if they do not raise alternative bases for affirmance in their answer briefs or via cross-appeal. For example, the Eleventh Circuit applies waiver on appeal equally to appellants and appellees. *See Hamilton v. Southland Christian School, Inc.*, 680 F.3d 1316, 1318–19 (11th Cir. 2012) (collecting cases). In *Hamilton*, the court addressed a scenario in which an appellee did not raise in its answer brief an affirmative defense that the district court rejected as an alternative basis for affirmance. *Id.* at 1318. Although the Eleventh Circuit Court of Appeals acknowledged that the defense was properly before the

district court, it held that the appellee had "abandoned the . . . defense by failing to list or otherwise state it as an issue on appeal." *See id.* at 1318–19.

Similarly, the Fourth Circuit recently acknowledged but did not adopt the no-waiver-by-appellees rule; instead holding that it would apply rules of waiver and forfeiture "on a consistent basis." *Stokes v. Stirling*, 64 F.4th 131, 138 (4th Cir. 2023). While the Court did not explicitly reject the rule, it held that an appellee's failure to raise a substantive legal argument in its brief "risks abandonment of the argument." *Stokes*, 64 F.4th at 137 (internal alteration omitted).

This conflicting authority justifies this Court's review because the circuits are split on what is undeniably an "important matter" that guides appellees and their counsel on the proper scope of an appeal and the bounds of waiver. *See* Supreme Court Rule 10(a).

II. THE COURT SHOULD GRANT REVIEW BECAUSE THE TENTH CIRCUIT'S DISCRETIONARY APPLICATION OF THE NO-WAIVER-BY-APPELLEES RULE IS UNTENABLE, ILL-DEFINED, AND WILL HAVE THE SAME EFFECT AS NO RULE AT ALL.

In articulating the no-waiver-by-appellees rule, some courts have noted that "[w]hether application of th[e] general rule is justified 'depends on the particular facts' of the case." *Ms. S.*, 916 F.3d at 49 (citing *Field*, 157 F.3d at 41); *see also Stokes*, 64 F.4th at 138–39 (to same effect). But neither the Tenth Circuit nor any

other Court endorsing discretion has clarified how such discretion should be applied. And undefined discretion on an issue as important as waiver has the functional effect of having no rule at all. The lack of direction surrounding this discretion can lead appellees into a trap where, as here, in reliance on the general rule, they respond to an appellant's opening brief and defend the district court order only to have unwittingly waived other potentially protective alternative grounds for affirmance.

The Tenth Circuit's decision here is illustrative. Before the underlying opinion issued, the Tenth Circuit accepted and applied the general rule. *See*, *e.g.*, *Oldenkamp*, 619 F.3d at 1249 ("Although [appellees] could have advanced [an] argument as an alternative ground for affirming the district court's ruling in their favor, [an appellee] is not required to raise alternative arguments."). But here, where WY Plaza did not raise on appeal four alternative affirmative defenses—that the district court never reached—the Tenth Circuit refused to remand the case to the district court to allow it to consider those defenses in the first instance and functionally held that WY Plaza had waived them. In holding that because "WY Plaza *could have* raised these affirmative defenses as alternative grounds to affirm" but did not, and did not explicitly request remand, the Tenth Circuit foreclosed WY Plaza's ability to pursue its alternative affirmative defenses.

While the Tenth Circuit declined to characterize this as a waiver, it can hardly be described otherwise. As Judge Carson noted in his dissent:

> By granting summary judgment to Safeway on its claim for declaratory relief because WY Plaza "should have presented whatever appellate arguments were needed to uphold the denial of Safeway's motion," [Majority Op. at 40] the majority suggests that, in our circuit, we will require appellees to raise all possible grounds for affirmance to avoid waiver. The majority states that "we have no issue involving waiver of an affirmative defense," which would be a correct observation but for the majority's implicit injection of waiver into this appeal.

Safeway Stores 46 Inc., 65 F.4th at 500 (Carson, J., concurring in part and dissenting in part). A careful reading of the majority opinion reveals that this conclusion is unavoidable: the majority held that WY Plaza waived its four other affirmative defenses by not presenting them in its answer brief.

The majority's attempt to distance itself from the label of "waiver" simply does not hold up. The majority purported to agree with the dissent that "WY Plaza didn't waive the other four defenses by failing to present them here," noting that "WY Plaza could have reasserted these defenses if the case had resumed in district court," but the majority in fact foreclosed that opportunity. *Id.* at 497 (majority opinion). The majority also went on to distinguish—without disapproving of—*Oldenkamp*, noting that because "the *Oldenkamp* plaintiffs hadn't appealed the denial of their own motion for summary judgment . . . the reversal of summary judgment for the defendant required a remand

for further consideration of the plaintiff's claims." *Id.* But were a remand simply procedurally "required" in that case, the *Oldenkamp* court would have had no occasion to address the rule that the plaintiffs, as *cross-appellees*, to cross-appellant's challenge to the partial grant of summary judgment in their favor, were not required to raise alternative grounds for affirmance on appeal. *See Oldenkamp*, 619 F.3d at 1248. Instead, the *Oldenkamp* court properly left the unraised "alternative ground for affirming the district court's ruling in their favor" for the district court to decide on remand. *Id.* at 1249.

And the procedural distinction the majority purports to identify is a distinction without a difference, especially because, unlike here, the *Oldenkamp* parties each cross-appealed on the merits. In both cases, the appellee defended the underlying ruling in their favor without presenting all possible alternative grounds for affirmance. In both cases, the Tenth Circuit reversed that favorable ruling. The only distinction is that in *Oldenkamp*, the court found that plaintiff-appellee did *not* waive alternative grounds for affirmance; here, the court found that defendant-appellee *did*.

The dissent aptly summarizes both what occurred in this case and the implications of that decision:

> The simple facts are: Safeway moved for summary judgment; WY Plaza responded, raising multiple defenses; the district court latched onto a single defense in denying Safeway's motion; Safeway appealed; WY Plaza responded, asking us to affirm the district

> court's rationale; the majority disagrees with the district court's rationale, yet instead of reversing and remanding for further consideration, it declares that WY Plaza waived all other defenses and renders judgment for Safeway. Because the majority's requirement that WY Plaza "present these four defenses or request a remand," [Majority Op. at 496,] contradicts our precedent and sound principles of judicial economy, I respectfully dissent. WY Plaza should not have summary judgment granted against it simply because the district court relied on only one theory in granting relief.

Safeway Stores 46 Inc., 65 F.4th at 500 (Carson, J., concurring in part and dissenting in part). The no-waiver-by-appellees rule applies to *appellees* and makes no distinction about the underlying posture; thus, the court should have remanded just as it did *Oldenkamp*. Instead, the majority granted summary judgment in favor of Safeway—notwithstanding the existence of four other affirmative defenses that it conceded are properly before the district court—because "WY Plaza should have presented whatever appellate arguments were needed to uphold the denial of Safeway's motion" or "asked [it] to remand." *Id.* at 496. The only logical interpretation of the majority opinion in this case is that the majority considered and applied the waiver doctrine punitively against appellee WY Plaza in direct contravention of the rule stated in *Oldenkamp*.

Accordingly, the majority opinion functions as a clear warning to appellees that they must now both

(1) raise all possible alternative grounds for affirmance, and (2) explicitly request a remand on remaining issues or risk waiver. By doing so, the majority has eschewed the general no-waiver-by-appellees rule or at least left unsettled the question of when and how it will be applied in the Tenth Circuit. As such, appellees and their counsel are left without direction and forced to raise all affirmative bases for affirmance or risk waiver.

III. THIS CASE PRESENTS AN IDEAL OPPORTUNITY TO CLARIFY WHETHER APPELLEES ARE REQUIRED TO ARGUE ALL ALTERNATIVE BASES FOR AFFIRMANCE ON APPEAL OR RISK WAIVING THEM.

The Tenth Circuit here declined to remand WY Plaza's alternative affirmative defenses to the district court for further consideration. *See Safeway Stores 46 Inc.*, 65 F.4th at 496. As described *supra*, this implicates the applicability and scope of the no-waiver-by-appellees rule and makes this case an ideal vehicle for providing guidance on that rule.

First, as this Court recognized in granting certiorari in *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 92 (2014), review is appropriate where an issue is less likely to arise again because, on a going-forward basis, any diligent attorney will submit to the new burden rather than risk waiver. And, where attorneys will be likely to comply with, rather

than test this rule, the new rule will be "frozen in place" within the Tenth Circuit. *See id.*

Second, this case presents an important opportunity for the Court to clarify whether an appellee is obligated on appeal to raise all alternative bases for affirmance or explicitly request remand, or otherwise risk waiver. The majority opinion here held that because "WY Plaza could have asked [it] to remand to the district court to consider the defenses of estoppel, accord and satisfaction, waiver, and failure to mitigate damages. . . . But WY Plaza didn't do that," the case would not be remanded. *See Safeway Stores 46 Inc.*, 65 F.4th at 496. To be sure, "[a]s a matter of appellate advocacy, it would ordinarily be prudent for an appellee who deliberately chooses not to argue alternative grounds for affirmance to alert the appellate court to the existence of those alternative grounds." *Grede v. FCStone, LLC*, 867 F.3d 767, 776 (7th Cir. 2017). But this is not an established burden on appellees in circuits that apply the no-waiver-by-appellees rule, nor is using magic words to request remand.

Indeed, WY Plaza's answer brief in this case illustrates why an appellee may not request a remand for consideration of alternative grounds for affirmance operating under the belief that they will not be waived. In its answer brief, WY Plaza noted that issues not addressed by the district court were not properly before the court of appeals because the appeal concerned the district court's order. *See* App. 137–38. Accordingly, WY Plaza in fact asked the Tenth Circuit to affirm the district court's order denying summary judgment for

Safeway and granting summary judgment in its favor based solely on the district court's findings and related reasoning. *See* App. 140. As such, while it did not explicitly request a remand using magic words, its answer brief did alert the Tenth Circuit that the scope of the issues advanced by Safeway exceeded the district court's decision and appellate briefing.

Moreover, it is of course the case that WY Plaza, or any non-prevailing appellee, upon complete reversal of the district court order granting summary judgment in its favor, would want the case to be remanded for further consideration of other affirmative defenses it argued before the district court. Here, the majority opinion implies that appellees must anticipate an adverse outcome and say magic words along the lines of: "In the alternative, I request a remand." This not only conflicts with the no-waiver-by-appellees rule, it creates a new affirmative burden on appellees that serves more form than function. To the extent there is such a requirement, it is novel.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CLIFFORD S. DAVIDSON
Counsel of Record
SNELL & WILMER LLP
601 SW Second Ave.,
Ste. 2000
Portland, OR 97204
csdavidson@swlaw.com
Phone: (503) 443-6099

CAMERON J. CUTLER
CARISSA L. PRYOR
SNELL & WILMER LLP
15 West South Temple,
Ste. 1200
Salt Lake City, UT 84101-1547
ccutler@swlaw.com
cpryor@swlaw.com
Phone: (801) 257-1828

KELLY H. DOVE
SNELL & WILMER LLP
3883 Howard Hughes Pkwy.,
Ste. 1100
Las Vegas, NV 89169
kdove@swlaw.com
Phone: (702) 784-5286