No. 24-948

IN THE

Supreme Court of the United States

PATRICIA GUERRERO, CHIEF JUSTICE, SUPREME COURT OF CALIFORNIA, ET AL.,

Petitioners,

v.

STEPHEN MORELAND REDD,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

California guarantees indigent capital prisoners the right to the appointment of state-funded counsel for state habeas proceedings. Stephen Moreland Redd waited in vain for 26 years for the State to fulfill that promise. In a unanimous decision, the Ninth Circuit held that Mr. Redd pled a plausible claim that the quarter-century delay in fulfilling that state-law promise violated his due-process rights. But due to the State's delay, Mr. Redd would never receive habeas counsel. Two months after the Ninth Circuit's decision, Mr. Redd, by then 78 years old, died while still waiting for counsel to be appointed.

Petitioners—the California officials responsible for appointing habeas counsel—asked the Ninth Circuit to dismiss Mr. Redd's case as moot and vacate its decision. The Ninth Circuit dismissed the case but denied vacatur.

The question presented is:

Whether the Ninth Circuit abused its discretion in not vacating its opinion in the unique context presented by this case, where mootness was attributable to Petitioners' multi-decade delay and Petitioners face no legal consequences as a result of the decision.

PARTIES TO THE PROCEEDING

Petitioners Patricia Guerrero, Chief Justice of California and Kimberly Menninger, Judge of the Superior Court of California, were Defendants-Appellees below.

Respondent Stephen Moreland Redd was the Plaintiff-Appellant below. Respondent died on December 21, 2023 while Defendants-Appellees had a petition for rehearing en banc pending and the court below never substituted his estate. Counsel for Respondent filed an unopposed motion for substitution of his estate on March 13, 2025 with this Court.

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INTRODUCTION

Stephen Moreland Redd, a capital prisoner in California, had a right to appointed counsel under state law. But for 26 years he was denied that right. On appeal, the Ninth Circuit issued a limited, unanimous decision on his claims. The court held that Mr. Redd had adequately pled a due-process claim sufficient to survive a motion to dismiss based on Petitioners' failure to appoint him the habeas counsel to which he was entitled. The court made clear, however, that Petitioners could potentially successfully defend their delay and ultimately avoid liability on remand. Thereafter, Mr. Redd, then 78 years old, passed away.

With their petition for en banc review pending at the time of Mr. Redd's death, Petitioners sought dismissal of the case based on mootness and vacatur of the court's decision. The Ninth Circuit dismissed the case but held that Petitioners had not established entitlement to the equitable remedy of vacatur. A majority of the judges voted against taking the case en banc in order to vacate the decision.

Petitioners now seek this Court's intervention. They primarily argue that this Court's review is justified by attempting to manufacture a circuit split over the standard for vacatur when a case becomes moot due to happenstance unrelated to the parties' actions while an en banc petition is pending. As an initial matter, the mootness of this case due to Mr. Redd's death after a 26-year delay by Petitioners is not mere happenstance. But for their long delay, Mr. Redd's rights would have been fulfilled decades ago.

Moreover, the claimed split does not withstand scrutiny. Many cases that Petitioners cite do not even match their question presented, which is limited to appeals that "became moot by happenstance while a petition for rehearing was pending." Pet. i. In reality, there is no split. The circuits all apply an equitable, case-specific approach to determine whether vacatur is appropriate under particular circumstances. The circuits' unsurprising and uniform application of this Court's mootness precedents requires no further review or intervention by this Court.

Under this Court's well-established precedent, vacatur is a matter of equitable relief, with "the decision whether to vacate turn[ing] on 'the conditions and circumstances of the particular case.'" *Azar v. Garza*, 584 U.S. 726, 729 (2018). Notably, Petitioners have almost nothing to say about the equities of this case in seeking this Court's relief. And for good reason: In deciding not to vacate the panel's narrow, interlocutory opinion, the Ninth Circuit correctly weighed the equities consistent with this Court's precedents.

The petition should be denied.

STATEMENT OF THE CASE

California Law Entitles Indigent Capital Prisoners To State-Funded Habeas Counsel.

California Government Code section 68662 provides that the "superior court that imposed the sentence *shall* offer to appoint counsel to represent a

state prisoner subject to a capital sentence for purposes of state postconviction proceedings." § 68662(a) (emphasis added). The language of the statute is mandatory: The sentencing court "shall enter an order" appointing counsel "upon a finding that the person is indigent and has accepted the offer to appoint counsel or is unable to competently decide whether to accept or reject that offer." *Id.*; *see also* Cal. Penal Code § 1509(b) (similar).

Consistent with the statute's directive, the California Supreme Court's policies concerning capital cases provide that habeas counsel should be appointed either "simultaneously with the appointment of appellate counsel or at the earliest practicable time thereafter." Pet. App. 36a. And the California Supreme Court's caselaw directs "expeditious appointment" of habeas counsel in capital cases "to investigate potential claims for relief and to prepare a habeas corpus petition at roughly the same time that appellate counsel is preparing an opening brief on appeal." *In re Morgan*, 50 Cal. 4th 932, 937 (2010).

California law places responsibility on the state's judiciary as part of their administrative role to ensure this statutory guarantee is fulfilled. Superior court judges are responsible for "develop[ing] and implement[ing] a plan to identify and recruit qualified counsel who may apply to be appointed" to represent indigent capital prisoners. Cal. R. Ct. 4.562(f). And they have authority to appoint as habeas counsel both qualified private attorneys and attorneys from a range of public sources. Cal. Gov't Code § 68661(a); see also Cal. R. Ct. 4.561(e)(2).

The California Supreme Court is charged, along with the California Judicial Council, with adopting "binding and mandatory competency standards for the appointment of counsel." Cal. Gov't Code § 68665(a), (b). It is required to "reevaluate the standards as needed to ensure" competent counsel, including "to avoid unduly restricting the available pool of attorneys so as to provide timely appointment." *Id.* The Chief Justice of the California Supreme Court has the power to "allocate funding appropriated" for the Supreme Court's annual budget to the Habeas Corpus Resource Center, one source for appointed attorneys. Cal. R. Ct. 10.101(c)(2). And the California Supreme Court further has the authority to set policy for compensation and payment of litigation expenses for appointed habeas counsel. Cal. Gov't Code § 68666.

California's guarantee of habeas counsel is critical to ensuring that prisoners with the most severe sentences have an opportunity to raise some of their most consequential legal claims. California law requires "resort to habeas corpus," rather than direct appeal, anytime "reference to matters outside the record is necessary to establish that a defendant has been denied a fundamental constitutional right." *In re Bower*, 38 Cal. 3d 865, 872 (1985). Accordingly, state habeas review is the only means to raise challenges to criminal convictions such as ineffective assistance of counsel, newly discovered evidence, or the prosecution's reliance on false evidence. Pet. App. 49a. And assistance of an attorney is critical to fully presenting those claims for review. *See Martinez v. Ryan*, 566 U.S. 1, 12 (2012) ("To present a claim of ineffective assistance at trial in accordance with the

State's procedures, then, a prisoner … needs an effective attorney.").

Mr. Redd Sues As Part Of A Two-Decade Effort To Obtain His Guaranteed Counsel.

Mr. Redd was convicted and sentenced to death in California in 1997. Pet. App. 53a. The California Supreme Court found that he was indigent and therefore entitled under California law to habeas counsel. It appointed him counsel for his direct appeal; however, it did not appoint him habeas counsel. *Id.* Mr. Redd lost his direct appeal in 2010. *Id.* Still, more than a decade after he received his death sentence, no habeas counsel was appointed to him. *Id.* Without habeas counsel, he could not pursue any claims that depended on newly discovered or extra-record evidence concerning his culpability or the sufficiency of his representation.

Mr. Redd wrote multiple letters requesting appointment of habeas counsel. *Id.* He also attempted to file a pro se federal petition for a writ of habeas corpus. As Mr. Redd had not finished his state habeas proceedings, however, the district court dismissed the petition for failure to exhaust state-law remedies and the Ninth Circuit denied a certificate of appealability. Pet. App. 56a.

Mr. Redd then sought this Court's review, and the Court denied his petition. *Redd v. Chappell*, 574 U.S. 1041 (2014). In a statement respecting the denial of certiorari, however, Justice Sotomayor, joined by Justice Breyer, suggested that Mr. Redd "might seek to bring a 42 U.S.C. § 1983 suit contend-

ing … the State's failure to provide him with the counsel to which he is entitled violates the Due Process Clause." *Id.* (Sotomayor, J., respecting the denial of certiorari).

Mr. Redd subsequently filed suit under Section 1983. He styled the complaint as a putative class action on behalf of capital prisoners in California similarly awaiting appointment of habeas counsel. The operative complaint named as defendants the justices of the California Supreme Court and the judges of the California Superior Courts (Petitioners here), based on their duties as court administrators responsible for appointing habeas counsel. Mr. Redd sought only declaratory relief: a declaratory judgment that Petitioners' delays in appointing counsel violated the procedural due process rights of the class members. As to his specific claims, he alleged that during his decades-long wait for counsel, important witnesses for his habeas claims had either died or had memory loss, and that important documents and exculpatory evidence had been lost or destroyed. Pet. App. 54a-55a.

The district court dismissed Mr. Redd's complaint. As a threshold matter, the district court held that Mr. Redd had standing and that there were no grounds for abstention as Mr. Redd did not seek any "continued intervention by federal courts into state judicial affairs." Pet. App. 110a; *see* Pet. App. 107a-110a. It also rejected Petitioners' Eleventh Amendment immunity arguments. Pet. App. 110a-111a. But the court found that the complaint failed to state a claim for violation of procedural due process. Pet. App. 116a-117a.

With the complaint dismissed on the pleadings, the class of similarly situated capital prisoners that Mr. Redd had proposed was never certified.

The Ninth Circuit Issues A Limited Decision Permitting Mr. Redd's Claims To Proceed Past A Motion To Dismiss.

The unanimous Ninth Circuit reversed dismissal in a narrow interlocutory ruling holding that Mr. Redd had advanced a "legally plausible" claim sufficient to survive a motion to dismiss. Pet. App. 49a.

First, in agreement with the district court, the court of appeals rejected Petitioners' argument that Mr. Redd lacked standing. Pet. App. 59a. The court explained that there was no question that Petitioners had the authority to appoint the habeas counsel Mr. Redd requested, and that Mr. Redd alleged that Petitioners could have taken action to reduce the delay in appointments. Pet. App. 61a-63a. The court, however, emphasized that, if the case proceeded to summary judgment, Mr. Redd would bear the burden of "'offer[ing] evidence and specific facts demonstrating each element' of standing, including redressability." Pet. App. 63a.

The court next rejected Petitioners' abstention argument, again in agreement with the district court. Pet. App. 64a. Once again, the court noted that Petitioners would have another opportunity to raise their abstention argument if warranted. The court noted that "the district court may reassess whether abstention is appropriate should [Mr. Redd]

seek class certification" and specified that its opinion "d[id] not pass on that question." Pet. App. 75a.

Turning to the merits, the court of appeals found that Mr. Redd had plausibly alleged a violation of his procedural due-process rights at this preliminary stage of the case. Pet. App. 75a. As the court was addressing a motion to dismiss, "the question … was 'not whether [Redd] will ultimately prevail' on his procedural due process claim … but whether his complaint was sufficient to cross the federal court's threshold." Pet. App. 76a.

The court first held that California's specific law "gives rise to a protected property interest in appointed counsel."[1] Pet. App. 79a. "The hallmark of property … is an individual entitlement grounded in state law." Pet. App. 78a (quoting *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982)). A state may establish a property interest in a wide range of entitlements, including in utility services, *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9, 11-12 (1978), driver's licenses, *Bell v. Burson*, 402 U.S. 535, 539 (1971), nursing care, *O'Bannon v. Town Ct. Nursing Ctr.*, 447 U.S. 773, 786 (1980), and even a cause of action, *Logan*, 455 U.S. at 429-30. The Ninth Circuit explained that California's statutory

[1] The court did not reach Mr. Redd's alternative argument that California's entitlement also created a protected liberty interest. Pet. App. 75a. As for Mr. Redd's separate claim that Petitioners' delay violated his non-statutory liberty interest inherent in habeas, the panel concluded that the complaint failed to state that claim. Pet. App. 92a-93a.

guarantee of counsel was such an entitlement: It had "mandatory language" that "lef[t] no discretion to deny habeas counsel to indigent capital prisoners who opt for appointed counsel." Pet. App. 78a.

Notably, Petitioners did not dispute below that the statutory entitlement created a property interest. Pet. App. 79a. Their sole argument was "that because California does not guarantee the appointment of counsel within a specific time frame, 'under California law, Redd has received everything to which he is entitled'" despite never having had counsel actually appointed. *Id.* The court of appeals rejected that argument. First, it held that Petitioners misrepresented state law: Myriad California code sections, as well as California Supreme Court cases and government guidance, require that counsel be appointed expeditiously. Pet. App. 79a-82a. Second, the court explained that Petitioners' argument "misunderstands the nature of due process protections." Pet. App. 83a. "State law creates the property interest, but it is federal constitutional law that determines the procedures required to protect that interest." *Id.* (citing *Logan*, 455 U.S. at 432). A State may not elect to create a property right and then deprive the beneficiary without due process. The court held that, at least at the motion-to-dismiss stage, it was "legally plausible that the state's procedures," which allegedly deprived Mr. Redd of counsel for 26 years, were "inadequate to protect that interest." Pet. App. 85a.

The court stressed that its ruling did not translate into certain victory for Mr. Redd on remand. Mr. Redd still would have to establish evidentiary support for his allegations that the delay in appoint-

ment of counsel had damaged his habeas case in a way that reduced the value of counsel for him. Pet. App. 87a. And, whatever Mr. Redd's harm, the Ninth Circuit recognized that "the state's challenge in providing capital habeas counsel…is great" and that Petitioners would have the opportunity "to put on evidence that requiring them to take any further action is unduly burdensome." *Id.* Even if Mr. Redd were to prevail in his case, that did not mean anything for a future case—relief ultimately might be limited to Mr. Redd's circumstances, with the courts "draw[ing] the line at the 26-plus year delay [Mr. Redd] has experienced." Pet. App. 74a.

Following Mr. Redd's Death, The Ninth Circuit Denies Petitioners' Motion To Vacate Its Decision.

The Ninth Circuit issued its decision in October 2023. Pet. App. 45a. Petitioners sought rehearing en banc shortly thereafter. Dkt. 53.[2] A month later, before he had the chance to respond to the petition for rehearing, Mr. Redd died in his prison cell at the age of 78. Pet. App. 4a. By then, he had been awaiting the appointment of habeas counsel for 26 years.

Petitioners informed the court of appeals of Mr. Redd's death and suggested that "Mr. Redd's death may render moot this appeal and this action and may further justify vacating the published panel opinion that is the subject of [the] pending petition

[2] All "Dkt." references refer to the underlying 9th Circuit case, *Redd v. Guerrero*, No. 21-55464.

for rehearing and rehearing en banc." Dkt. 61. Petitioners requested briefing to "address issues of mootness, dismissal, and vacatur of the opinion." *Id.* The Ninth Circuit took Petitioners up on their suggestion. It issued an order directing the parties to "address the issue of Redd's death, including procedural questions of mootness, dismissal, or vacatur as relevant" in their response and reply to the petition for rehearing. Dkt. 62.

As the "party seeking relief from the status quo of the appellate judgment," Petitioners bore the burden of establishing their "equitable entitlement" to vacatur of the panel's validly issued opinion. *U.S. Bancorp Mortg. Corp. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994). In their reply in support of rehearing, Petitioners claimed, however, that vacatur was automatically required whenever a party dies after a panel opinion is issued where there is a pending petition for en banc review. Dkt. 73 at 8.

The unanimous panel granted Petitioners' request to dismiss the appeal as moot. Pet. App. 3a. But the panel declined Petitioners' request to vacate its opinion. *Id.* Petitioners' petition for rehearing en banc failed to garner a majority of votes and was accordingly denied as well. Pet. App. 3a-4a.[3]

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[3] After Mr. Redd died, his counsel moved to substitute the representative of his estate, Melissa Powe, in the case pursuant to Federal Rule of Appellate Procedure 43(a)(1). The Ninth Circuit denied the substitution motion when it dismissed the appeal as moot, apparently viewing the substitution issue as moot. Pet. App. 3a. Counsel also moved in this Court to substi-

The Ninth Circuit's order itself did not provide reasons for the denial of vacatur. Judge Berzon, however, joined by five other judges, issued a statement "respecting the denial of rehearing en banc." Pet. App. 4a. The statement explained that, given the mootness of the case, "the only question an en banc court could decide is whether the *Redd* panel abused its discretion in declining to vacate its opinion." Pet. App. 6a. As to vacatur, the statement noted that a court weighs "equitable considerations when deciding whether vacatur is appropriate," including the opinion's value "to the legal community as a whole," any prejudice to the parties of letting the opinion stand, and whether the mootness arose due to voluntary conduct. Pet. App. 6a-7a.

Addressing the value to the legal community, the statement noted that the general rule is that precedent is legally valid and "should stand unless a court concludes that the public interest would be served by a vacatur." Pet. App. 7a (quoting *Bancorp*, 513 U.S. at 26). It emphasized that "[t]he *Redd* opinion focused on Redd's individual claims," and any claims by other capital prisoners "w[ould] have to be decided on the facts of their cases." *Id.* It found, however, that the *Redd* opinion had public value as "a decisional framework for district courts deciding these cases," at least "at the motion-to-dismiss stage." *Id.*

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tute Ms. Powe. The Court has not acted on the motion, but the Clerk's Office contacted counsel and indicated that the Court expected counsel to file the brief in opposition on Ms. Powe's behalf.

Given this interlocutory posture, the statement also noted that there was little prejudice to the Petitioners in denying vacatur. They were left with no judgment against them—only a determination that a now-moot case could have gone forward past the pleading stage. Any future plaintiff relying on *Redd* would "not be entitled to relief unless they show prejudice to their habeas prospects due to delay in the appointment of counsel." *Id.* And Petitioners would have recourse to seek further review, including en banc review and certiorari, should another claim in the future proceed to any judgment against them. *Id.* Although the statement concluded that the mootness here was "involuntary," it found that insufficient to require vacatur given the other equities at issue. Pet. App. 8a-9a.

Judge Bennett, joined by five other judges, dissented on the ground that the court should have taken the case en banc to vacate the panel opinion. Pet. App. 20a.

REASONS TO DENY CERTIORARI

I. The Claimed Split Does Not Warrant Certiorari.

The standard for vacatur is well-established. Once mootness arises, the party seeking vacatur bears the burden of demonstrating their "equitable entitlement to th[at] extraordinary remedy." *Bancorp,* 513 U.S. at 26. The party seeking vacatur must demonstrate that the "unique circumstances of th[e] case and the balance of equities weigh in favor of vacatur." *Azar*, 584 U.S. at 730. But Petitioners

argue that this Court's review is required to resolve a circuit split over whether to vacate a decision in the unusual event where an appeal becomes moot "by happenstance" after a court of appeals issues its opinion but before the mandate issues.

As an initial matter, while Mr. Redd's death itself was not a voluntary act by either party, there was nothing "happenstance" about it. Pet. 24. His death in prison after 26 years of repeated pleas for appointed counsel went unanswered is hardly unrelated to the substantive claims—claims that unconstitutional delays were rendering his protected rights a nullity. Mr. Redd repeatedly demanded that his right to counsel be fulfilled, fearing his claims of innocence would never be adjudicated during his lifetime. To treat this case as just another example of run-of-the-mill happenstance mootness gravely misrepresents the circumstances underlying the action.

But even if cases addressing true happenstance contexts could be treated as relevant here, the claimed circuit split cannot withstand scrutiny. These decisions simply reflect courts applying the settled equitable inquiry to different contexts and circumstances. Moreover, the situation of mootness arising after a court of appeals' decision has issued but before the mandate issues arises infrequently, making any claimed split of little consequence.

A. Petitioners contend that the Second, Third, Ninth, and Tenth Circuits "disfavor vacating their own opinions when a case later becomes moot while the appeal remains pending." Pet. 17. But like all

circuits, these courts apply an equitable standard to the particular facts of the cases. Sometimes that results in vacatur and sometimes not, depending on the circumstances of a particular case. Moreover, many of the cited cases do not address Petitioners' question presented at all.

Notably, most of the cases that Petitioners cite to illustrate the Ninth Circuit's supposed "repeated[] refus[al] to vacate its own decisions" do not fall within the narrow confines of Petitioners' own question presented, which involves only post-decision, pre-mandate mootness by happenstance. Pet. i; *cf.* Pet. 18-19. In *Armster v. U.S. District Court for the Central District of California*, for instance, although the government "incorrect[ly]" suggested that the case had become moot, it was simply "not moot." 806 F.2d 1347, 1361 (9th Cir. 1986). Likewise, in *Black Mesa Water Coalition v. Jewell*, the case became moot only *after* the mandate had already issued—because of a settlement, not happenstance—and neither party asked for vacatur. *See* 797 F.3d 1185 (9th Cir. 2015); Notice of Settlement, No. 12-16980 (9th Cir. June 25, 2015), Dkt. 44. Similarly, in *United States v. Perez-Garcia*, the litigation over certain conditions of pretrial release became moot not by happenstance, but rather because one appellant "absconded and had his bond revoked" and the other "was convicted and sentenced." 115 F.4th 1002, 1004 n.1 (9th Cir. 2024). Notably, this Court denied the petitioners' request for it to vacate the Ninth Circuit's opinion in *Perez-Garcia* under *Munsingwear*. *See Perez-Garcia v. United States*, No. 24-6203 (U.S. May 19, 2025). These cases thus have no bearing on the question that Petitioners presented.

Petitioners also point to *Crespin v. Ryan*, 51 F.4th 819 (9th Cir. 2022), and *Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014) (en banc), but those cases do not support the claimed split. Pet. 18-19. In *Dickens*, both sides' claims "ha[d] been subjected to en banc review" before the case became moot. *Dickens v. Ryan*, 744 F.3d 1147, 1148 (9th Cir. 2014). That meant, as Petitioners conceded below, that "equity did not weigh in favor of vacatur." Dkt. 73 at 11. And in *Crespin*, no party had requested vacatur prior to the court's consideration of it. 51 F.4th at 820. Thus, the case sheds little light on Petitioners' question presented, as that issue received no adversarial testing there.

What's more, the Ninth Circuit has regularly vacated its own opinions where the equities favor doing so for cases involving mootness by happenstance that arises before the mandate issues. *See Farmer v. McDaniel*, 692 F.3d 1052 (9th Cir. 2012); *Griffey v. Lindsey*, 349 F.3d 1157 (9th Cir. 2003); *Bumpus v. Clark*, 702 F.2d 826 (9th Cir. 1983). And the Ninth Circuit has vacated its own opinions for mootness arising outside of that hyper-narrow circumstance too, such as when the parties reach a settlement or one party's unilateral action moots the case before the mandate issues. *See Animal Legal Def. Fund v. Veneman*, 490 F.3d 725, 726 (9th Cir. 2007); *Ind. Union of Flight Attendants v. Pan Am. World Airways, Inc.*, 966 F.2d 457, 459-60 (9th Cir. 1992). That is a far cry from the "slant against vacating its own decisions" that Petitioners accuse the Ninth Circuit of exhibiting. Pet. 19. These cases prove that the Ninth Circuit does not "systematically shield[]" its decisions by refusing to vacate under *Munsingwear*; it

sometimes vacates and sometimes does not, depending on the equities. *Contra* Pet. 21.

Like the Ninth Circuit, the Third Circuit recognizes that some cases will warrant vacatur and others will not, depending on the equities of the particular cases. *Contra* Pet. 17. For example, in *Humphreys v. DEA*, the Third Circuit denied vacatur where the plaintiff died after the panel's decision issued but before the mandate issued, because a "balancing" of the equities favored keeping the panel's decision on the books. 105 F.3d 112, 116 (3d Cir. 1996). At the same time, however, *Humphreys* made clear that the "discretionary power" to determine "whether or not to vacate a previously issued decision" can be "exercised in either direction" depending on the facts. *Id.* at 114, 117.

As for the Second and Tenth Circuits, they have merely held that they have "discretion" to deny vacatur "where the circumstances leading to mootness occur after we file our decision but before the mandate has issued." *Bastien v. Off. of Senator Ben Nighthorse Campbell*, 409 F.3d 1234, 1236 (10th Cir. 2005) (quoting *In re Grand Jury Investigation*, 399 F.3d 527, 528 n.1 (2d Cir. 2005)). Denying vacatur in a single case based on the unique equities of that case hardly demonstrates a penchant for "disfavor[ing] vacating their own opinions" in either circuit. *Cf.* Pet. 17.

B. Petitioners put the D.C., Fourth, Eighth, and Eleventh Circuits on the other side of their ledger and insist that "the panel opinion would already have been vacated" in those courts. Pet. 20. But as

with the circuits just discussed, these courts likewise apply an equitable, case-specific approach to determine whether vacatur is appropriate.

Vacatur for post-decision, pre-mandate mootness is not a hard-and-fast rule in the D.C. Circuit. While *United States v. Schaffer* observed that the D.C. Circuit "generally … vacates any outstanding panel decisions" in that situation, 240 F.3d 35, 38 (D.C. Cir. 2001),[4] the court has also recognized that the ultimate equitable test remans case-specific and discretionary, *see In re United States*, 927 F.2d 626, 627 (D.C. Cir. 1991) ("the court of appeals *may* vacate its panel decision when a case becomes moot pending disposition of a petition for rehearing and suggestion for rehearing en banc and before issuance of the mandate" (emphasis added)).

The same holds true in the Fourth Circuit. Although vacating the panel's opinion is the court's "customary practice" when a case becomes moot before the mandate issues, "it is not, as once commonly thought, mandatory." *Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives*, 14 F.4th 322, 327 (4th Cir. 2021); *see also Clipper v. Takoma Park*, 898 F.2d 18, 19 (4th Cir. 1989) (refusing to vacate

[4] Petitioners also cite *Clarke v. United States*, 915 F.2d 699, 706 (D.C. Cir. 1990) (en banc), for the proposition that vacating the panel's decision is "standard practice" where a case becomes moot before the mandate issues. Pet. 15-16. But *Clarke* involved mootness by way of the losing party's unilateral action, not mootness by happenstance. 915 F.2d at 706-07.

the panel's opinion where the case became moot while a petition for rehearing en banc was pending).

The Eighth Circuit similarly recognizes that "vacatur is an equitable remedy, not an automatic right." *United States v. Flute*, 951 F.3d 908, 909 (8th Cir. 2020) (citation omitted). In *Flute*, the Eighth Circuit declined to vacate the panel's opinion not just because the mootness there arose from a plea bargain instead of happenstance, but also because the court found persuasive the Second and Tenth Circuits' explanations that appellate courts have discretion to leave panel opinions "intact" when a case becomes moot after the decision issues but before the mandate does. *Id.* at 909-10 (quoting *In re Grand Jury*, 399 F.3d at 529 n.1, and *Bastien*, 409 F.3d at 1235).

That leaves the Eleventh Circuit. Petitioners cite two cases—one 42 years old and the other 32 years old—to suggest that vacatur is mandatory for post-decision, pre-mandate mootness. Pet. 16-17 (citing *In re Ghandtchi*, 705 F.2d 1315, 1316 (11th Cir. 1983), and *Key Enters. of Del., Inc. v. Venice Hosp.*, 9 F.3d 893, 899-900 (11th Cir. 1993) (en banc)). The age of those cases matters because they predate *Bancorp*, as does another Eighth Circuit case that Petitioners cite. *See* Pet. 16. As the Fourth Circuit explained, "[b]efore *Bancorp*, some believed dictum in *Munsingwear* required vacating opinions after the case became moot. *See, e.g., In re Ghandtchi*, 705 F.2d [at 1316]." *Hirschfeld*, 14 F.4th at 327 n.5. But *Bancorp*—decided in 1994—made clear "that the *Munsingwear* 'mandate' was dicta and that equitable principles govern the practice." *Hirschfeld*, 14 F.4th

at 327 n.5. Thus, to the extent *Ghandtchi* and *Key Enterprises* describe vacatur as mandatory, they are not applying this Court's current established standard.

Moreover, that Petitioners had to delve back roughly 25-40 years to find cases to support their position illustrates how rarely the question presented, addressing the small window between when a panel issues its opinion and when the mandate issues, arises. *Contra* Pet. 23-24. Petitioners' question presented simply does not require this Court's attention, both because it is rare and because the circuits agree that they have discretion to determine whether to vacate in light of the equities of a given case. In the Federal Circuit's words, "the great weight of authority, through holdings or analysis, supports … treating the question of what a court should do when mootness arises after decision as subject to equitable and pragmatic considerations." *Microsoft Corp. v. ITC*, No. 12-1445, 2014 WL 10209132, at *3 (Fed. Cir. Jan. 3, 2014). That equitable, case-specific approach *is* "the ordinary application of *Munsingwear*," contrary to Petitioners' view that vacatur should occur automatically whenever the losing party had a rehearing petition pending when the case became moot. Pet. 20.

II. The Ninth Circuit Did Not Abuse Its Discretion In Declining Vacatur Here Based On The Equities Presented.

Under this Court's precedents and in every circuit, vacatur is an equitable determination, not an automatic right. Yet Petitioners seek to use the

Munsingwear doctrine to create an automatic right to vacatur when a case becomes moot by happenstance while a petition for rehearing remains pending. As discussed above, this is not a happenstance case. But even beyond that threshold flaw, Petitioners are simply wrong. *Munsingwear* establishes no such right. Rather, as Petitioners acknowledge, the equitable doctrine requires courts "to craft relief that is 'most consonant to justice.'" Pet. 24 (citation omitted). That is just what the court of appeals did here in concluding that the equities tilt sharply against vacatur under the specific circumstances of this case.

A. Vacatur is a form of "equitable relief." *Bancorp*, 513 U.S. at 26. Petitioners, however, largely abandon any effort to establish their equitable entitlement to vacatur. Instead, their primary contention is that they are entitled to vacatur as a matter of right merely because mootness occurred. *See* Pet. 24-27.

This Court's precedent forecloses that argument. This Court has specifically rejected the claim that "every moot case will warrant vacatur." *Azar*, 584 U.S. at 729; *see Bancorp*, 513 U.S. at 27 (vacatur never required on "systemic grounds"). Instead, "[b]ecause th[e] practice is rooted in equity, the decision whether to vacate turns on 'the conditions and circumstances of the particular case.'" *Azar*, 584 U.S. at 729.

Once mootness is established, the party seeking vacatur therefore bears the burden of demonstrating their "equitable entitlement to the extraordinary remedy of vacatur." *Bancorp,* 513 U.S. at 26. As

discussed above, this means showing that the "unique circumstances of th[e] case and the balance of equities weigh in favor of vacatur." *Azar*, 584 U.S. at 730. Petitioners thus cannot establish their entitlement to vacatur merely on the grounds of mootness absent an inquiry into the specific equities presented, with the party seeking vacatur carrying the burden.

B. The court of appeals did not abuse its discretion in finding that the equities and circumstances of this case weigh against vacatur.

The circumstances of this case could not be further removed from the prototype of what this Court has recognized as the classic case for vacatur: where a plaintiff "obtain[s] a favorable judgment, take[s] voluntary action that moots the dispute, and then retain[s] the benefit of the judgment." *Azar*, 584 U.S. at 729.

Mr. Redd did not take voluntary action to moot the case. He died from natural causes related to his advanced age, coupled with living in the harsh conditions of a prison. He died still waiting, after 26 years, for appointment of the state-promised counsel to represent him in a habeas proceeding seeking to vindicate his innocence. There is no retained or unfair benefit to Mr. Redd here—only tragic loss and unfulfilled promises from the State. Mr. Redd's death proved true his claim in this case that habeas counsel decades-delayed is effectively habeas counsel denied.

This is not a case of mere happenstance, wholly unrelated to the underlying claims. It would be uniquely inequitable to permit Petitioners, having deprived Mr. Redd of counsel until his eventual death, to now benefit from that death by securing vacatur of the court of appeals' decision.

Even in pure mootness-by-happenstance cases, this Court has never adopted either a rule or practice of vacating circuit decisions when a party dies while a petition for certiorari is pending. *See, e.g., Ryan v. Nash*, 559 U.S. 999 (2010) (Mem.) (not granting vacatur where death occurred while petition pending). Indeed, this Court historically "does not vacate a circuit court decision where a party dies after a petition for certiorari has been granted but before the Supreme Court has decided the merits"—a situation where, unlike here, the underlying case is indisputably worthy of certiorari. *Humphreys*, 105 F.3d at 114; *see, e.g.*, *United States v. Green*, 507 U.S. 545 (1993) (Mem.) (vacating order granting writ of certiorari but not underlying decision); *Mintzes v. Buchanon*, 471 U.S. 154 (1985) (Mem.) (same).

And, the court of appeals did not abuse its discretion in assessing that the equities here disfavor vacatur:

1. Petitioners failed to show any meaningful prejudice supporting vacatur. The opinion at issue did not result in any judgment against Petitioners. Nor did it resolve the question whether Petitioners could be held liable under the theory Mr. Redd advanced as a general matter. It merely allowed Mr. Redd's claims to proceed past the pleading stage. In

doing so, it made clear the high hurdles that Mr. Redd would have to clear to obtain even the limited declaratory relief he sought. Thus, there is no final adverse ruling, and the opinion here provides no definite entitlement for future claimants.

Petitioners contend that the prejudice they face is "plain" because, absent vacatur, other capital prisoners who have been deprived of habeas counsel under California law could sue them under the same theory that Mr. Redd advanced. Pet. 28. But that is true regardless of whether this Court vacates the decision below. Vacatur would not grant Petitioners immunity from future suits from other capital defendants who have been deprived of their right to habeas counsel for years.

And if such claims are brought, Petitioners would have every opportunity to defend themselves. There is nothing "unreviewab[ly] … binding" about the decision below on Mr. Redd's claims. Pet. 28. As the court of appeals itself stated again and again in the opinion, it was a narrow and interlocutory ruling, limited to the motion-to-dismiss stage and to the specific allegations pled in Mr. Redd's complaint concerning Mr. Redd's specific situation. Should another capital defendant sue, they would have to state a claim based on the exact delay in their appointment of counsel and their specific prejudice from the delay. And should they be able to do so and the claim proceed to judgment against Petitioners—something the Ninth Circuit emphasized was far from guaranteed even in Mr. Redd's case—Petitioners would have a full opportunity to challenge every aspect of the

holding in that live case, including, if necessary, by again seeking en banc review and certiorari.

2. The public interest also weighs against vacatur. "Judicial precedents are presumptively correct and valuable to the legal community as a whole." *Bancorp*, 513 U.S. at 26 (citation omitted). This Court has specifically held that "[j]udicial precedents…should stand *unless* a court concludes that the public interest would be served by a vacatur." *Id.* (emphasis added) (citation omitted). And, contrary to Petitioners' suggestion, that public interest is not just in "orderly procedure" but also in the "[j]udicial precedents" themselves as "presumptively correct and valuable." *Id.* at 26-27.

Petitioners contend that acknowledging precedent as valuable in and of itself means "deny[ing] vacatur in precisely those cases that would have received serious consideration for certiorari." Pet. 23. But this is a deeply wrongheaded conception of value. District and circuit judges around the country would likely be surprised to hear that the vast majority of their work has no value because it does not address issues that meet the specific and unique criteria for certiorari. So would litigants and the general public who rely on those decisions in making significant legal claims and understanding their legal relationships and obligations to one another. The criteria for certiorari are oriented to the specific work of this Court; the value of judicial precedent for the public is much broader.

Petitioners insist that a court cannot be trusted to evaluate the appropriateness of vacating its own

opinion due to mootness. Pet. 23. Our system of justice, however, rests on the presumption that judges can handle their cases impartially. Indeed, it is difficult to imagine how the court system would function if judges were presumed biased in a case based merely on the fact of their assignment to it. In this Court and every federal appellate court, for instance, the judges and justices who rendered a decision evaluate whether to grant any petition for rehearing of that decision. Similarly, district courts must decide whether to issue certificates of appealability of their own decisions.

III. Petitioners' Attack On The Merits Of The Ninth Circuit's Panel Opinion Does Not Justify This Court's Intervention.

Despite the fact that their petition asks only for this Court to review the standard the courts of appeals should apply in determining whether to vacate a decision under certain procedural circumstances, Petitioners also attack the Ninth Circuit's underlying opinion on the merits. As this Court's precedent establishes, however, it is "inappropriate ... to vacate mooted cases, in which we have no constitutional power to decide the merits, on the basis of assumptions about the merits." *Bancorp*, 513 U.S. at 27.

While simultaneously claiming that a case need not be worthy of this Court's review under the traditional certiorari standards to merit vacatur, Petitioners argue that "this case in any event would have been a prime candidate for further review, had respondent's death not mooted the appeal." Pet. 29. The cert-worthiness of the issues decided in the un-

derlying panel opinion is an entirely separate issue from the vacatur-related question that Petitioners have presented here. Nonetheless, even were this discussion relevant to the question presented, Petitioners' arguments about the importance of the underlying opinion are vastly overstated.

A. As discussed above, the underlying opinion is a limited decision in an interlocutory posture that neither resulted in any judgment against Petitioners nor resolved whether they could ever be held liable under the theory at issue. *Cf. Harrel v. Raoul*, 144 S. Ct. 2491, 2492 (2024) (Thomas, J., respecting the denial of certiorari) ("This Court is rightly wary of taking cases in an interlocutory posture."). Petitioners' primary argument that this case is nonetheless worthy of further review based on the merits of the underlying opinion (as opposed to the question presented in their petition for certiorari) is that the Court previously granted certiorari in what the petition calls a "mirror-image decision on Article III standing in *Gutierrez v. Saenz*, No. 23-7809 (Oct. 4, 2024)." Pet. 29. Petitioners' "mirror" is distorted.

Gutierrez concerns whether redressability can be established if state officials have independent state-law grounds as a basis for denying relief addressed in a federal declaratory judgment. In the decision under review, the Fifth Circuit held that a defendant failed to establish redressability where the state court "ha[d] already found that [the defendant] would have no right to DNA testing"—what the defendant allegedly had been wrongfully deprived of—"even if the statutory bar to testing for evidence about sentencing were held to be unconstitutional."

Gutierrez v. Saenz, 93 F.4th 267, 275 (5th Cir. 2024). Here, there is *no dispute* that Mr. Redd had a right to state-appointed counsel as a matter of state law. And Petitioners have never claimed that they have any independent state-law grounds for denying that counsel to him. *Gutierrez* therefore is irrelevant to this case.

B. Petitioners also argue that certiorari on the merits would have been likely, but for mootness, by claiming that the merits ruling here was contrary to this Court's precedent and splits with one Sixth Circuit decision. As discussed above, this is not a proper basis for deciding vacatur, but even if it were, the claimed merits conflicts are illusory.

Petitioners argue that the Ninth Circuit's recognition of a California-created property interest failed to follow *Castle Rock v. Gonzales,* 545 U.S. 748 (2005). Pet. 30. In actuality, the decision cited *Castle Rock*, *see* Pet. App. 79a, and fully complied with *Castle Rock*'s direction to consider an "'ascertainable monetary value'" as a hallmark of a property interest, 545 U.S. at 766.

Petitioners further contend that the Ninth Circuit erred in addressing Mr. Redd's due-process claim under *Mathews v. Eldridge*, 424 U.S. 319 (1976), and not *Medina v. California*, 505 U.S. 437 (1992). Pet. 30-31. But *Medina* had no application in this context. It applies in "assessing the validity of state procedural rules," *Medina*, 505 U.S. at 443, none of which are at issue here And, notably, *Mathews* requires full consideration of the exact "Government[] interest" Petitioners claim: "the fiscal

and administrative burdens" of requiring different action. 424 U.S. at 335.

Finally, the claimed conflict (Pet. 30) with the Sixth Circuit's decision in *Experimental Holdings, Inc. v. Farris*, 503 F.3d 514 (6th Cir. 2007), is equally flawed. The question at issue in *Experimental Holdings* was whether the plaintiff could claim "a property interest in getting the state to lease [its] real property." 503 F.3d at 516. That is wholly irrelevant to the merits of the due-process claim here, which was based on a state right to counsel.

C. Petitioners and their amici claim that the Ninth Circuit's decision poses unusual federalism concerns. Pet. 31. These arguments rest on an extreme misreading of the limited decision below. *See* Pet. App. 10a-19a.[5] Petitioners put forth the radical suggestion that federal law cannot set any limits on state procedures when they infringe on protected rights. But, as this Court has long held, the Fourteenth Amendment's guarantee of due process would be meaningless if "minimum procedural requirements" for protected interests were not "analyzed in constitutional terms" regardless of whether "the State may have specified its own procedures that it may deem adequate." *Logan*, 455 U.S. at 432 (internal quotation marks and brackets omitted). Petitioners' objection is to a basic tenet of our constitutional structure that cannot be addressed by vacatur here.

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[5] Notably absent from Petitioners' list of amici is the State of California itself.

Petitioners cite the *O'Shea* abstention doctrine as relevant given their status as judicial officers. Pet. 31. But, notably, Petitioners themselves did not challenge the rejection of their *O'Shea* abstention claim (by both the Ninth Circuit and the district court that otherwise ruled in their favor) in seeking rehearing below. Dkt. 53. For good reason. As the Ninth Circuit explained, *O'Shea* abstention is an "exceedingly rare" doctrine applicable in limited circumstances where the relief sought involves ongoing federal monitoring of state-court operations. Pet. App. 65a-66a (citing *O'Shea v. Littleton*, 414 U.S. 488 (1974)). It is wholly inapplicable, where, as here, a claim seeks only a declaration and no involvement whatsoever of federal courts in state-court proceedings. *Id.* And Petitioners' claim of inappropriate federal intrusion rings particularly hollow where the decision at issue did not hold that Petitioners violated *any* federal constitutional rights or require that Petitioners take *any* action whatsoever. The decision explicitly anticipated that Petitioners could reassert an abstention argument and demonstrate that requiring them to take any action would be overly burdensome. Pet. App. 87a.

Finally, Petitioners' amici provide a false flag in arguing that the merits decision here will trigger suits by prisoners across the country. Analyzing whether a state has created a property interest requires a state-specific investigation of the specific entitlement in question. *See Castle Rock*, 545 U.S. at 766. The Ninth Circuit's decision is limited in its reasoning and scope to specific aspects of California law. It is unlikely to have a significant impact outside of that State. And of course, this Court can re-

view any extension of the ruling of the court of appeals here to the extent it ever happens. There is no need to grant review of the court of appeals' sound application of vacatur principles here based on these speculative concerns.

CONCLUSION

The petition for a writ of certiorari should be denied.

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