

No. 17-1459

In The
Supreme Court of the United States

—◆—
WORLD PROGRAMMING LIMITED,

Petitioner,

v.

SAS INSTITUTE INC.,

Respondent.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

—◆—
BRIEF IN OPPOSITION
—◆—

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QUESTIONS PRESENTED

1. Whether the recognition of foreign judgments in diversity cases is governed by state law under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

2. Whether a court of appeals may vacate a grant of summary judgment because the court concluded the parties lacked a legally cognizable interest in the outcome of that review.

CORPORATE DISCLOSURE STATEMENT

SAS Institute Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

SAS Institute Inc. (“SAS”), a North Carolina software company that created one of the world’s most highly regarded statistical analysis software systems (the “SAS System”), brought this lawsuit against a U.K. software producer that engaged in a years-long deceptive scheme to produce a clone of the SAS System. As the district court found following a three-week jury trial, World Programming Limited (“WPL”) “misrepresented its intent” and “used underhanded and fraudulent methods to acquire” numerous copies of an educational software tool from SAS that WPL then used to produce its own copycat product – a product that, the district court found, could not have been created “but for” WPL’s fraud and breach of contract. *SAS Inst., Inc. v. World Programming Ltd.*, No. 5:10-cv-00025-FL, 2016 WL 3435196, at *3–4, *6 (E.D.N.C. June 17, 2016).

After WPL began licensing its software as a drop-in replacement for the SAS System, SAS brought parallel actions in the United Kingdom and at home in North Carolina. SAS sought damages for separate sales, based on separate copyrights, and raised separate causes of action (including, in North Carolina only, a claim for fraud under North Carolina law). The U.K. courts agreed that WPL had violated the license agreement, but they concluded that a European Union directive prevented its enforcement in the U.K., despite the parties’ explicit choice of North Carolina law.

In the U.S. action, WPL failed to raise properly a *res judicata* defense before the district court, which found the issue forfeited. That court then agreed that WPL had breached the license, and it declined to give extraterritorial effect to the E.U. Directive in a U.S. lawsuit involving U.S. sales where that Directive contradicted North Carolina law by ignoring the substance of the contract and the parties' choice of law. The Fourth Circuit affirmed, declining to afford the U.K. judgment claim-preclusive effect even if WPL had not forfeited the issue.

WPL now seeks to parlay its forfeiture into a grant of certiorari on an abstract question of law. It asks the Court to overturn the status quo rule that judgment recognition is controlled by state law, claiming a non-existent split with a decades-old D.C. Circuit opinion that did not purport to resolve the issue now raised by WPL. Even if such review were warranted, WPL's forfeiture means it could not benefit from any favorable decision on remand. Nor can it derive any benefit from its request that the Court edit the wording of the Fourth Circuit's disposition by relabeling a *vacatur* as an affirmation on alternative grounds, with no effect on the parties.

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STATEMENT

A. SAS and the SAS System

SAS is the world's largest privately held software company and the creator of an integrated suite of

proprietary business software products known as the “SAS System.” Pet. App. 3a. It allows users to perform data access, management, and analysis. Users operate the SAS System through instructions written in the SAS computer language known as “SAS Programs.” *Id.*

SAS also created a version of its software called the SAS Learning Edition, a lower-cost version of the SAS System explicitly marketed as an educational tool solely to help individuals learn how to use the SAS System. *Id.* The SAS Learning Edition contained a full version of the SAS System for use on a personal computer, but it worked only with small datasets. *Id.*

A license agreement protected SAS’s intellectual property rights in the Learning Edition. To install the Learning Edition on a personal computer, a user had to click “Yes” to agree to the terms of its license. *Id.* Those terms included a prohibition on “reverse engineering,” as well as a restriction requiring use only for “non-production purposes.” *Id.*

B. WPL Created Copycat Software by Reverse Engineering the SAS Learning Edition to Produce Its WPS Software.

Shortly after its formation, WPL, a U.K. company, hatched a plan to create a copycat version of the SAS System called the World Programming System (“WPS”). Pet. App. 40a. WPL initially (and deceptively) tried to obtain a license to the SAS System directly from SAS, but SAS denied WPL’s requests. *Id.* at 44a–45a. Soon after that, WPL, by fraudulent inducement, acquired

from a third party licenses to a dozen copies of the SAS Learning Edition: two copies in 2003, one in 2005, two in 2007, and seven in 2009. *Id.* at 4a.

WPL's continual use of the SAS Learning Edition – in violation of the license agreement's reverse engineering prohibition and its restriction to use for "non-production purposes" – was integral to WPL's production of WPS. WPL's developers ran SAS Programs through both the Learning Edition and WPS, and then they modified the WPS code to make the two products achieve identical outputs. *Id.* WPL used the SAS Learning Edition "to compare behaviour and output to that of WPS" in an iterative process, in which "[s]nippets of SAS Language code [we]re fed through SAS Learning Edition and WPS repeatedly until the results compare[d] adequately." *Id.* at 44a. As the district court found, "WPS was designed to emulate even the idiosyncrasies of the SAS System." *Id.*

A number of SAS customers in the U.S. began replacing their SAS System software with WPS. *Id.* at 4a. SAS's lost profits from the customers who defected before the trial below formed the basis for the damage award.

C. SAS Filed Parallel Actions Against WPL in the U.K. and the U.S.

In September 2009 and January 2010, respectively, SAS sued WPL in the U.K. and in the U.S. District Court for Eastern District of North Carolina. Pet. App. 4a. In the U.K. litigation, SAS asserted claims for

copyright infringement under U.K. law and for breach of the Learning Edition license agreement. *Id.* In the U.S., SAS brought claims for U.S. copyright infringement and breach of the license agreement, and it also asserted claims for tortious interference and violation of the North Carolina Unfair and Deceptive Trade Practices Act (UDTPA). *Id.* (SAS later added a fraudulent inducement claim. *Id.*)

The U.S. litigation was erroneously dismissed for *forum non conveniens*, but that dismissal was reversed by the Fourth Circuit in February 2012. *Id.*

1. The U.K. Proceedings

With the U.S. action stalled because of the erroneous *forum non conveniens* dismissal, the U.K. litigation proceeded “more expeditiously.” Pet. App. 34a. In July 2010, the U.K. High Court rendered an interim judgment on SAS’s claims but also concluded that the case turned on interpretation of several provisions of E.U. law (the “E.U. Software Directive”) relating to the legal protection of computer programs. *Id.* at 4a–5a. The U.K. court referred interpretive questions to the Court of Justice of the European Union (CJEU), which ruled that activities like WPL’s did not violate E.U. law and that contractual provisions to the contrary were unenforceable in the E.U. despite the parties’ choice of law. *Id.* at 5a.

Based on the CJEU ruling, the U.K. High Court entered a final ruling in January 2013 for WPL on all U.K.-based claims, determining that, if WPS

reproduced the SAS System, it reproduced only aspects of the program not protected by U.K. copyright law. *Id.* at 5a, 36a. The U.K. court also ruled that, due to the mandatory nature of the E.U. Software Directive, SAS could not enforce any contractual provisions that prohibited WPL's conduct. *Id.* at 5a. Thus, the E.U. Software Directive trumped SAS's claims for breach of the license agreement. *Id.* This ruling became final in July 2014. *Id.* at 5a–6a.

2. The U.S. Proceedings

While the U.K. action was pending, the Fourth Circuit overturned the *forum non conveniens* dismissal. On remand, SAS moved successfully to amend its complaint to add a claim that WPL obtained the Learning Edition software by fraud. Pet. App. 34a. After fact discovery and before expert discovery, both parties moved for summary judgment. *Id.* at 6a. The district court granted summary judgment in favor of SAS on liability for breach of the Learning Edition license agreement. *Id.* It ruled for WPL on the copyright infringement claims (on the ground that what WPL copied from the SAS System was not copyrightable) and tortious interference. *Id.* The district court denied summary judgment to WPL on SAS's claims for breach of contract, fraud, and UDTPA violations. *Id.*

The district court found WPL liable for breach of contract based on two distinct violations of the license agreement: violations of (1) the term prohibiting “reverse engineering” and (2) the term restricting use to

“non-production purposes.” *Id.* at 12a–13a. For the fraud claim, the district court noted that WPL repeatedly misrepresented its intention to abide by the restrictions in the license agreement when, in fact, WPL intended at the time it licensed the software to misuse the Learning Edition in ways barred by the agreement. *Id.* at 76a.

In September 2015, the case went to trial on SAS’s fraudulent inducement and UDTPA claims, as well as to determine the damages from WPL’s breach of the Learning Edition license agreement. *Id.* at 6a–7a. The jury found WPL liable for fraud and a UDTPA violation. The jury also found that on each claim, including breach of contract, WPL’s misconduct caused SAS \$26,376,635 in damages, comprising lost profits from 27 customers who had converted to WPS before trial. *Id.* at 7a. Under the UDTPA, the compensatory damages award was trebled. *Id.*

After trial, the district court denied WPL’s motion for attorney’s fees under 17 U.S.C. § 505 on SAS’s copyright claim, *id.*, because, among other reasons, WPL “obtained the Learning Edition by making false, intentionally deceptive statements,” *SAS Inst., Inc. v. World Programming Ltd.*, No. 5:10-cv-00025-FL, 2016 WL 3920203, at *4 (E.D.N.C. July 15, 2016). The court also denied SAS’s request for a permanent injunction on sales of WPS in the U.S. Pet. App. 7a.

D. The Fourth Circuit’s Decision

Both parties appealed. Pet. App. 7a. In a unanimous opinion authored by Judge Wilkinson, the Fourth Circuit rejected WPL’s appeal in full. *Id.* As relevant here, the Fourth Circuit held that SAS’s claims were not precluded by the U.K. litigation as a matter of claim or issue preclusion. *Id.* at 7a–12a. The court also affirmed the district court’s holding that WPL violated the license agreement by breaching both (1) the reverse engineering prohibition and (2) the term restricting use to “non-production purposes” when it used the Learning Edition “specifically to produce a competing product.” *Id.* at 19a; *see also id.* at 12a–19a. The Fourth Circuit also rejected WPL’s challenge to evidentiary rulings underlying the fraud verdict. *Id.* at 19a–21a.

Regarding SAS’s appeal, the Fourth Circuit vacated as moot the district court’s ruling on the copyright claim, finding that resolving the merits of that claim would have no effect on the relief afforded the parties. *Id.* at 30a–31a. That finding was based on the Fourth Circuit’s rejection of SAS’s challenge to the denial of a permanent injunction as well as the Fourth Circuit’s understanding that SAS sought no damages on its copyright claim beyond the damages awarded on its other claims. *Id.* at 7a, 30a–31a.

WPL unsuccessfully petitioned for rehearing and rehearing en banc, with no judge requesting a poll on the petition for rehearing en banc. *Id.* at 103a.



ARGUMENT

I. The Fourth Circuit’s Factbound Application of Established Res Judicata Precedent Does Not Warrant Review.

Certiorari is not warranted on the first question presented for three reasons.¹ *First*, WPL argued on appeal that “both claim preclusion and issue preclusion” barred SAS’s claims. Pet. App. 12a. Yet its first question presented seeks this Court’s review of a distinct issue of international comity, which the Fourth Circuit discussed in a passage ultimately unnecessary to that court’s holding. The question therefore is neither squarely presented nor outcome determinative.

Second, the purported circuit split is manufactured. No circuit has enforced a foreign judgment by rejecting the time-tested consensus that after *Erie* state law governs recognition of a foreign judgment in a diversity case.

Third, this case presents a particularly poor vehicle for resolving this question given the district court’s

¹ WPL repeatedly criticizes the Fourth Circuit for affirming an evidentiary ruling of the district court preventing WPL from arguing to the jury that it purportedly had known before acquiring SAS’s software “that E.U. and U.K. law permitted use of [SAS] software” to create a competing product. Pet. 8; *see also id.* at 11–12. That issue is not germane to either question presented, as it addresses neither res judicata nor vacatur. *See id.* at *i*. In any case, WPL cites no record support for its purported pre-licensing belief because it failed ever to present any such evidence below; as the Fourth Circuit held, the matters “WPL sought to introduce occurred long after the relevant conduct, and thus did not address WPL’s state of mind at that time.” Pet. App. 20a.

finding that WPL forfeited any claim preclusion argument and given widespread agreement (even among some of WPL’s supporting Amici) that any effort to federalize this issue is best left to the political branches.

A. The Fourth Circuit Straightforwardly Applied the Law of Res Judicata.

The Fourth Circuit disposed of WPL’s preclusion arguments in a thorough and well-reasoned opinion that does not present the academic issue raised by WPL’s petition.

1. As noted, WPL’s preclusion argument on appeal was that “both claim preclusion and issue preclusion” barred SAS’s claims. Pet. App. 12a. In finding both doctrines “inapplicable in this case,” *id.*, the Fourth Circuit applied the law of res judicata (claim preclusion) and collateral estoppel (issue preclusion) in a straightforward manner. For res judicata, the court declined to reach WPL’s forfeiture, affirming on the alternative ground that WPL’s argument failed in any case. *Id.* at 8a. It reasoned that the doctrine’s applicability “turns, and ultimately falters, on the second element,” *id.* at 9a, required to establish res judicata: the “identity of the cause of action in both the earlier and the later suit,” *id.* at 8a.

The Fourth Circuit applied its own unremarkable precedent and held that “[t]he many legal and factual differences between the U.K. litigation and the present suit mean that applying res judicata would have the practical effect of preventing SAS from having its

claims heard in any adequate forum.” *Id.* at 9a. Although the “claims in both lawsuits revolve[d] around WPL’s acquisition of the Learning Edition, creation of a competitor product, and sales of that competing product,” at that point “the similarities between the actions end.” *Id.* at 10a.

Unlike the U.K. action – which concerned U.K. copyright law arising from licensing of WPL’s software in the U.K. – the “U.S. suit alleged violations of *U.S. copyright*, which WPL has not established could have been litigated in U.K. courts.” *Id.* (emphasis added). “Similarly,” the Fourth Circuit held, “the U.S. suit focused only on sales of WPS *within the United States*, and WPL has not established that SAS could have recovered for these sales in the U.K.” *Id.* (emphasis added). In the end, the claims, which “were based on the copyright laws of different countries and on different sets of sales transactions, were not barred by *res judicata*” because “WPL has not shown that SAS could have chosen to pursue the claims ultimately adjudicated in the U.S. in the U.K. instead.” *Id.*

As for SAS’s North Carolina breach of contract claims, the Fourth Circuit held that it was “clear that the U.K. was not, in fact, an adequate forum.” *Id.* The court recognized that although the “parties agreed to be governed by North Carolina law,” “the U.K. courts were bound to, and ultimately did, declare portions of the contract unenforceable based on E.U. law.” *Id.* Likewise, the court held that SAS’s fraud and UDTPA claims – which were brought only in the U.S. action –

“could not have been adequately addressed in the U.K. due to the same aspects of E.U. law.” *Id.*

WPL’s petition does not seek review of any of those rulings, all of which provide an independent basis for the Fourth Circuit’s rejection of claim preclusion.

2. After rejecting WPL’s *res judicata* challenge based on run-of-the-mill principles of claim preclusion, the Fourth Circuit discussed an alternative rationale – the discretionary nature of the application of international comity – that now underlies WPL’s petition.

The court recognized that, “[e]ven if these claims would present close *res judicata* questions had the first litigation been in another U.S. jurisdiction,” the “question is less close when the allegedly preclusive judgment is from a foreign jurisdiction.” *Id.* The court noted that – unlike a decision from “another U.S. jurisdiction,” *id.* – “courts may ‘refuse . . . to recognize a *foreign* judgment on the ground that it conflicts with the public policy of [the] state.’” *Id.* at 11a (alterations in original) (quoting *Jaffe v. Accredited Sur. & Cas. Co.*, 294 F.3d 584, 591 (4th Cir. 2002)). The Fourth Circuit’s determination that “North Carolina public policy and E.U. public policy are in clear conflict in this case” relied upon both North Carolina *and* U.S. law. *Id.*

After first noting that the “E.U. Directive that was dispositive of the contract claims in the U.K. litigation has no equivalent in North Carolina,” the Fourth Circuit went on to state that “the *United States* has taken an approach that is more protective of intellectual property.” *Id.* (emphasis added). North Carolina, for its

part, similarly takes “an approach that is more protective of the sanctity of contract, including broad deference to the parties to elect the governing law.” *Id.* To grant preclusive effect to the U.K. judgment, in the words of the Fourth Circuit, “would frustrate *these* policy goals” – *i.e.*, both federal and state goals. *Id.* It would “bar[] a North Carolina company from vindicating its rights under North Carolina law on the basis of the E.U.’s contrary policies.” *Id.* In sum, the Fourth Circuit held that “[n]o principle of international comity requires this outcome.” *Id.*

B. WPL’s Question Presented Regarding International Comity Is Not Squarely Presented in the Fourth Circuit’s Decision.

The first question that WPL raises – “[w]hether federal or state law governs the respect that must be accorded to the judgment of a foreign court in diversity,” *Pet. i* – is not squarely presented here.

As stated above, an independent and primary basis for the Fourth Circuit’s ruling was its application of standard principles of *res judicata* leading to its conclusion that WPL’s contentions “ultimately falter[ed]” based on WPL’s failure to establish the “identity” of the causes of action in the two cases. *Pet. App. 9a.* WPL, in other words, failed to make the showing required for *res judicata* that “SAS could have chosen to pursue the claims ultimately adjudicated in the U.S. in the U.K. instead.” *Id.* at 10a. That failure, moreover, necessarily

entailed a factbound inquiry into the “practical” considerations underlying the doctrine, *id.* at 8a, and the “many legal and factual differences between” the actions in the U.S. and the U.K., *id.* at 9a.

The foundation of the ruling below – that WPL could not show that claims based on North Carolina law for sales in the U.S. could have been brought in the U.K., *id.* at 10a – is not even challenged by WPL.

Instead, WPL seeks to refocus its contentions on an international comity issue dealt with only tangentially by the Fourth Circuit. *See* Part I.A, *supra*. Yet even there, WPL fails to show that the Fourth Circuit’s decision turned on actual differences between federal and state public policies. In fact, the Fourth Circuit’s discussion of comity relied on *both* federal public policy (“an approach that is more protective of intellectual property,” Pet. App. 11a) *and* North Carolina policies (“sanctity of contract, including broad deference to the parties to elect the governing law,” *id.*). WPL would have this Court review a question that, even if “intellectually interesting,” does not arise “beyond the academic or the episodic” since it would not change the outcome. *Rice v. Sioux City Mem’l Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955).²

² In addition, WPL points to no *differences* between federal and North Carolina law that would lead to a different outcome if federal law, rather than mirroring or simply complementing North Carolina law, were somehow made to prevail over North Carolina law.

C. There Is No Circuit Split.

WPL contends, Pet. 13–20, that certiorari is warranted to resolve a purported split between the majority of circuits and the “minority view,” Pet. 18, supposedly reflected in the D.C. Circuit’s decision in *Tahan v. Hodgson*, 662 F.2d 862 (D.C. Cir. 1981). According to WPL, *Tahan* applied “federal comity principles” in a diversity case, unlike other circuits that have applied state law. Pet. 18. But there is no circuit split. As explained below, *Tahan* did not decide or turn upon that question. Indeed, in the intervening 35 years since *Tahan*, the D.C. Circuit has embraced, rather than rejected, the well-established consensus of looking to the forum state’s law. WPL’s alleged circuit split is a fiction.

1. To begin, WPL does not dispute that it seeks to buck the widely settled view of the lower courts. As WPL concedes, following this Court’s decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), “many” courts “have ruled that forum-state law controls” both the preclusive effect and the enforcement of foreign judgments in diversity cases. Pet. 14–15 & n.4 (citing cases from the Second, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits). WPL’s supporting Amici describe this approach as the “status quo.” (Amicus Br. of Scholars and Practitioners (“Amicus Br.”) 4.) *Cf. Aetna Life Ins. Co. v. Tremblay*, 223 U.S. 185, 189–90 (1912) (holding, even before *Erie*, that a state court’s refusal to recognize a foreign judgment presented no federal question for subject-matter jurisdiction purposes).

While WPL cites the Wright & Miller treatise repeatedly in support of its argument that the settled “practice of relying on state law outside of federal-question cases deserves reconsideration,” Pet. 19 (quoting 18B Edward H. Cooper, *Federal Practice and Procedure* § 4473 (2d ed. 2018)), WPL omits the balance of the pertinent passage, in which that commentator advocates for that change through “federal legislation” or “international convention,”³ in part because the “habit of deference to state law” in federal diversity cases is “so well entrenched,” Cooper, *supra*, § 4473. That “consensus” position has long been reflected in the Restatement (Second) of Conflict of Laws § 98 cmt. c (1988) (“The consensus among the State courts and lower federal courts that have passed upon the question is that, apart from federal question cases, [recognition of foreign judgments] is governed by State law and that the federal courts will apply the law of the State in which they sit.”) and Restatement (Third) of Foreign Relations Law § 481 cmt. a (1987) (“Since [*Erie*], it has been accepted that . . . enforcement of foreign country judgments is a matter of State law. . . . Thus, State courts, and federal courts applying State law, recognize and enforce foreign country judgments without reference to federal rules.”).

2. In the face of this overwhelming precedent, WPL seizes on the D.C. Circuit’s decision in *Tahan* to

³ Statutes and international agreements precisely like those proposed continue to be considered and debated. *See infra* 25–26 & note 6.

fashion a circuit split for this Court’s review. WPL, however, misreads that case.

In *Tahan*, the D.C. Circuit upheld the enforcement in a diversity case of an Israeli default judgment. 662 F.2d at 863. The D.C. Circuit concluded that it did not need to decide whether federal or state law applied when analyzing whether to apply the reciprocity requirement set forth in *Hilton v. Guyot*, 159 U.S. 113 (1895). *Id.* at 868. In fact, contrary to the petition’s suggestion that *Tahan* applied *federal* comity principles, Pet. 18, the D.C. Circuit expressly recognized that federal courts may “be required by [*Erie*] to apply the rule of the state in which they sit as to the measure of respect that should be accorded the judgment of a foreign nation.” *Tahan*, 662 F.2d at 868 n.21. The *Tahan* court did not ultimately decide the issue, however, because it concluded that the outcome would be the same under federal or District of Columbia law. *See id.* at 867–68 (“It is unlikely that reciprocity is any longer a *federally* mandated requirement for enforcement of foreign judgments or that the District of Columbia itself has such a requirement that this court is obliged to follow” and “[e]ven assuming that reciprocity is required by *either the federal government or the District of Columbia*, we would still enforce the Israeli judgment.” (emphases added; footnote omitted)).

WPL relies repeatedly on one passing reference, in which the D.C. Circuit remarked in *dicta* that the “issue” of reciprocity – that is, “how best to respond to a foreign nation’s scrutinization of an American judgment” – “seems to be national rather than state,”

notwithstanding *Erie. Id.* at 868. *Tahan's* editorializing on how to treat judgments of countries that will not enforce U.S. judgments is not implicated here. Moreover, in the same passage, the D.C. Circuit also suggested that courts “should refrain from creating or resurrecting a reciprocity doctrine” at all, deferring instead to “action by the legislature” because the issue is “a political one.” *Id.*

Tahan fails to establish a circuit split warranting this Court’s review.

Not only is *Tahan* too thin a reed on which to hang a circuit split, but in the several intervening decades since *Tahan*, the D.C. Circuit has followed the other circuits in concluding that state law governs the effect given to foreign judgments. In *Matusevitch v. Telnikoff*, 877 F. Supp. 1 (D.D.C. 1995), *aff’d*, No. 97-7138, 1998 WL 388800 (D.C. Cir. May 5, 1998) (per curiam), the district court for the District of Columbia declined to recognize an English libel judgment because enforcement would be repugnant to Maryland and U.S. public policy (noting substantial differences in the law governing libel claims), *see id.* at 4.

On appeal, the D.C. Circuit did not begin with the federal law of international comity; instead, the court certified to the Maryland Court of Appeals the question whether enforcing the English judgment would be repugnant to the public policy of *Maryland*. *See Matusevitch*, 1998 WL 388800, at *1. The Maryland court then conducted a “comparison of English and

present Maryland defamation law” and answered the question in the affirmative. *Telnikoff v. Matusevitch*, 702 A.2d 230, 248 (Md. 1997). Relying on the Maryland court’s interpretation of Maryland law, the D.C. Circuit affirmed the district court’s refusal to recognize the English judgment. *Matusevitch*, 1998 WL 388800, at *1.

Ten years later, in *Society of Lloyd’s v. Siemon-Netto*, 457 F.3d 94 (D.C. Cir. 2006) (Garland, J.), the D.C. Circuit again applied *state* law in a case involving enforcement of a foreign judgment, *see id.* at 101. Without reference to federal law, the D.C. Circuit analyzed whether the judgment was repugnant to the public policy of the District of Columbia, in accordance with the District of Columbia’s Uniform Foreign-Country Money Judgments Recognition Act, and upheld enforcement of an English judgment. *See id.* at 99–102 (discussing *Matusevitch* and noting the D.C. Circuit’s certification to the Maryland Court of Appeals).

More recently, in *Commissions Import Export S.A., v. Republic of the Congo*, 757 F.3d 321 (D.C. Cir. 2014), the D.C. Circuit again made clear that the law in that circuit does not depart from the majority on this issue. The D.C. Circuit stated that “enforcement of foreign judgments was, and remains, presumptively and primarily under the control of the states.” *Id.* at 333 (citing Restatement (Third) of Foreign Relations § 481 cmt. a (1987) and *Aetna Life*, 223 U.S. at 190). The court’s ruling, moreover, explicitly recognized “the historical backdrop of state law on the enforcement of

foreign judgments” as a “field which the States have traditionally occupied.” *Id.* at 332–33.

3. The Third Circuit is not, as WPL contends, Pet. 19–20, internally divided. Once again, the long-settled rule in the Third Circuit, as in other circuits, is that state law governs the enforcement of a foreign judgment in diversity actions. *See Somportex Ltd. v. Phila. Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971) (“[B]ecause our jurisdiction is based solely on diversity, ‘the law to be applied . . . is the law of the state,’ in this case, Pennsylvania law.” (quoting *Erie*, 304 U.S. at 78)); accord *Choi v. Kim*, 50 F.3d 244, 248 (3d Cir. 1995) (applying New Jersey law).

The only case WPL cites in conflict with the general rule had exceptional facts and (a) cited *Somportex* as the law, (b) did not expressly decide whether federal or state law governed the comity inquiry, and (c) involved a form of abstention on comity grounds rather than recognition of a foreign judgment. *See Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 392–94 (3d Cir. 2006) (holding claimants had justiciable claim for interest payments allegedly owed by German corporations to a reparations fund and rejecting arguments for dismissal based on international comity).

The Third Circuit’s decision in *Paramount Aviation Corp. v. Agusta*, 178 F.3d 132 (3d Cir. 1999), is even further afield from the question presented, having to do only with the preclusive effect of prior *federal* court judgments, *see id.* at 144–45.

The Third Circuit thus is not internally split. And in any event, an internal split is not a sufficient ground for granting review. *See Joseph v. United States*, 135 S. Ct. 705, 707 (2014) (Kagan, J., joined by Justices Ginsburg and Breyer, respecting the denial of certiorari) (“[W]e usually allow the courts of appeals to clean up intra-circuit divisions on their own[.]”).

D. This Case Is an Exceptionally Poor Vehicle to Decide the Question.

1. The District Court Ruled that WPL Waived Any Argument that SAS Was Barred by Res Judicata from Bringing Its Claims in the U.S.

The only ruling below to address preservation of res judicata explicitly ruled that WPL had waived the issue. In its summary judgment decision, Pet. App. 32a–80a, the district court found that WPL “has only contended that the U.K. judgment should have *issue preclusive* effect, and has not raised the defense of *res judicata*,” *id.* at 51a n.9 (emphases added). While the court acknowledged that “[f]ederal courts have also held that recognized foreign judgments may have res judicata effect,” the court held that WPL had “not raised the defense of res judicata.” *Id.* Relying on this Court’s decision in *Arizona v. California*, 530 U.S. 392 (2000), the district court refused to consider any claim preclusion defense “[b]ecause ‘res judicata [is] an affirmative defense ordinarily lost if not timely raised,’ and [WPL] has had ample time to raise this defense.”

Pet. App. 51a n.9 (second alteration in original) (quoting *Arizona*, 530 U.S. at 410).

The Fourth Circuit ruled that it was “unnecessary for us to determine whether WPL sufficiently preserved this issue” because “res judicata did not bar this case in any event.” *Id.* at 8a; *see also id.* (declining to wrestle with the parties’ “competing characterizations of WPL’s arguments below related to claim preclusion and issue preclusion in the course of disputing whether the res judicata issue is properly before us”).

This Court is not an appropriate venue for WPL belatedly to bring forward an issue for which there is a district court finding of waiver below.

2. The Issue Is of Minimal Importance.

In an effort to show the putative importance of the issue, both WPL and the Amici try to paint an alarming picture of the potential for out-of-control interference with critical federal prerogatives in a manner “prone to create international tensions.” Pet. 14; *see also* Amicus Br. 4. Those claims are hyperbole.

WPL traces the long-established rule that state law controls back to the *Erie* doctrine established in 1938. Pet. 13–14. In the 80 years since *Erie*, no “international tensions” have manifested themselves – a fact highlighted by the paucity of allegedly conflicting authority cited by WPL. *See id.* at 14–20. As one of the Amici succinctly put it in a recent article, “it is probably too late in the day to try to argue that federal

common law can preempt either state common law or a state statute dealing with recognition and enforcement of foreign country judgments.” Linda J. Silberman, *The Need for a Federal Statutory Approach to the Recognition and Enforcement of Foreign Country Judgments*, in *Foreign Court Judgments and the U.S. Legal System* 112 (Paul B. Stephan ed., 2014).

3. If Reform Were Warranted, the Legislative and Executive Branches Should Act, Rather Than Have the Judiciary Create Standards as a Matter of Federal Common Law.

The authorities cited by both WPL and the Amici (which include writings of the Amici themselves) make clear that the policy choice to federalize foreign-judgment recognition is better left to Congress and the Executive than to the courts under the guise of federal common law. WPL, for example, cites John B. Bellinger, III and R. Reeves Anderson (both Amici), and their article *Tort Tourism: The Case for a Federal Law on Foreign Judgment Recognition*, 54 Va. J. Int’l L. 501 (2014). *See* Pet. 6. Those same authors, however, recognize that “[f]or decades, numerous legal scholars, joined by the respected American Law Institute (ALI), have called for a federal law to govern foreign judgment recognition.” Bellinger & Anderson, *supra*, at 503. They also acknowledge that “there was never a concerted legislative push to advance the ALI’s model statute at the national level, and Congress never acted on it.” *Id.* at 534. Hence their conclusion that “[a]fter nearly a

century of foreign judgment recognition governed by state laws, *Congress and the President* should work together to enact federal legislation to govern recognition and nonrecognition of foreign judgments.” *Id.* at 543–44 (emphasis added).

Similarly, Amicus Ronald A. Brand, cited by WPL (at Pet. 19) for his *Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance*, 67 Notre Dame L. Rev. 253 (1991), conceded that congressional legislation was “the most direct path to true unification of United States law on the matter,” *id.* at 298.

Another of WPL’s cited authorities, Professor Goldsmith, acknowledged the problems with creating a federal common law of foreign relations. Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617 (1997). It “requires courts, in the absence of political branch guidance, to identify, weigh, and accommodate the foreign relations interests of the United States,” all without sufficient justification. *Id.* at 1641; *see also id.* at 1665 (“[T]he federal common law of foreign relations lacks justification.”). He summarized his view that this is a matter for the political branches, given

that the federal common law of foreign relations represents a sharp break with 175 years of historical practice, that the evils addressed by the doctrine are overstated, that the political branches have relatively little need for federal judicial assistance in protecting their foreign relations prerogatives, and that the

federal courts are not well-suited to provide such assistance in any event.

Id. at 1699 (footnotes omitted).⁴

In fact, Congress has intervened when it found intervention justified, namely in the 2010 SPEECH Act, 28 U.S.C. §§ 4101–05.⁵ And in that case, Congress *restricted* enforcement of foreign defamation judgments by state courts.

By contrast, Congress has not acted, as WPL and Amici suggest it should, to *expand* recognition of foreign judgments through federal law. The ALI published a model statute on judgment recognition more than a decade ago. *See* Am. Law Inst., *Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute* (2006). Congress has held hearings on the issue, in which some of the Amici testified. *See Recognition and Enforcement of Foreign Judgments: Hearing Before the Subcomm. on Courts,*

⁴ WPL cites Ruth Bader Ginsburg, *Recognition and Enforcement of Foreign Civil Judgments: A Summary View of the Situation in the United States*, 4 Int'l Law. 720 (1970), solely for the unremarkable proposition that recognition of foreign judgments is “susceptible [to] federalization because of its close association with foreign relations,” Pet. 19 (alteration in original) (quoting Ginsburg, *supra*, at 733). Nowhere does then-Professor Ginsburg suggest adopting a federal common law approach as WPL advocates here.

⁵ *See* Silberman, *supra*, at 101 n.2 (“In only one specific area has Congress entered the field. The SPEECH Act . . . limiting the recognition and enforcement of foreign defamation judgments, was enacted in 2010 to address the phenomenon of ‘libel tourism’ . . .”).

Commercial and Admin. Law of the H. Comm. on the Judiciary, 112th Cong. (2011). But after holding these hearings, Congress has not chosen to adopt any legislation. See S.I. Strong, *Recognition and Enforcement of Foreign Judgments in U.S. Courts: Problems and Possibilities*, 33 *Rev. Litig.* 45, 54 & n.26 (2014); see also Bellinger & Anderson, *supra*, at 527 (noting that Congress has not heeded continued calls to federalize foreign-judgment recognition). This Court should not preempt that choice.

Meanwhile, Congress rejected WPL's primary example of the federal common law approach. WPL cites *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), as an instance in which "conflict with foreign powers" called "for this Court's intervention." Pet. 21. This Court held in *Sabbatino* that federal common law governed application of the "act of state" doctrine. *Id.* at 22 (quoting *Sabbatino*, 376 U.S. at 421–25). Within months of that decision, Congress enacted the so-called Hickenlooper Amendment overruling the decision. See *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 174 (2d Cir. 1967).

More recently than the 50-year-old decision in *Sabbatino*, this Court has recognized "the runaway tendencies of 'federal common law' untethered to a genuinely identifiable (as opposed to judicially constructed) federal policy." *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 89 (1994). In light of the lack of discernible problems – let alone crises – associated with continuing application of the long-time precedent, the Court should heed its own cautionary admonition against

“the judicial ‘creation’ of a special federal rule of decision.” *Atherton v. FDIC*, 519 U.S. 213, 218 (1997).

In the words of one of the Amici, an appropriate standard “can only be accomplished with a federal statute; neither a common law approach nor promulgation of a Uniform Act can achieve that goal.” Silberman, *supra*, at 101. Simply put, “*federal common law* is not a practical option,” *id.* at 112, even if one favors reform.⁶

4. WPL Conflates International and Domestic Copyright Law with the Law on Contract, Fraud, and UDTPA Claims and Misstates Their Importance.

1. In contrast to WPL’s approach in the Fourth Circuit, WPL now makes the Berne Convention a centerpiece of its petition, *see* Pet. 2–3, 6–7, 20, 23–24, as if the Convention established some overarching principle of international law directly relevant to, or controlling on, the preclusion analysis. Yet the section of WPL’s opening Fourth Circuit brief on preclusion never even mentioned the Berne Convention, which is wholly inapplicable here.

⁶ An international treaty is another way to change recognition and enforcement of foreign judgments. The U.S. is currently in the process of negotiating such a treaty. *See* Hague Conference on Private Int’l Law, Special Comm’n on the Judgments Project (May 2018), <https://perma.cc/Q8LJ-UMXN>. WPL expresses no concern about this Court possibly wading into active treaty negotiations by adopting a federal standard by judicial decision.

First, the Berne Convention addresses *copyrights*, not the state-law claims on which SAS prevailed (breach of contract, fraud, and UDTPA). The jury found that SAS was a victim of WPL's fraud, and the fraud judgment survived appeal (as did the UDTPA and breach of contract judgments). Any importation of foreign law to excuse that fraudulent conduct is repugnant to U.S. law – federal or state – and is in no way implicated by the Berne Convention.

Second, even on the subject Berne addresses, the Convention cannot be used as WPL seeks to use it here. Although WPL repeatedly invokes Berne's "principles," the only provision in the Convention it cites is the "national treatment" provision under Article V. Pet. 23. But WPL has that requirement backwards.

To the extent the Berne Convention establishes an international standard for copyright, that standard provides a *minimum* level of protection for U.S. copyright *holders* abroad (and to foreign copyright *holders* in the U.S.). It does not eliminate protections under U.S. law when a foreign *infringer* imports products into the United States – the target of SAS's copyright claim in this action. *See, e.g.*, Berne Convention for the Protection of Literary and Artistic Works art. 5, Sept. 9, 1886, 828 U.N.T.S. 221, 232–33 (“(1) *Authors* shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, *the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specifically granted by*

this Convention. . . . (3) Protection in the country of origin *is governed by domestic law.*” (emphases added)).

Contrary to WPL’s arguments here, Berne does not establish some higher order of international copyright law to which the U.S. has submitted its domestic copyright law, much less the law of contract or fraud. “[I]n no instance can a litigant directly invoke [the Berne Convention’s] provisions and attempt to assert rights under the [Convention]. The sole source of copyright law in the United States is domestic U.S. law, embodied in title 17 United States Code and court decisions under that title.” 7 William F. Patry, *Patry on Copyright* § 23:1.50 (2018); *see also* 17 U.S.C. § 104(c) (providing that any rights in a work “shall not be expanded or reduced by virtue of, or in reliance upon, the provisions of the Berne Convention”).

Nor can the Berne Convention export the public policies of U.K. law to the U.S. That “U.K. courts appl[ie]d U.K. law to U.K. conduct” in a suit involving U.K. sales, Pet. 23, does not mean the Berne Convention requires a U.S. court to apply U.K. law (here, the E.U. Software Directive) to excuse WPL’s sales activities in the U.S. As this Court recognized in *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519 (2013), the Copyright Act “does not instantly *protect* an American copyright holder from unauthorized piracy taking place abroad,” but neither does it “mean the Act is *inapplicable* to copies made abroad,” *id.* at 531. The U.S. Copyright Act is “*applicable* to *all* pirated copies, including

those printed overseas,” *id.* at 532, even if liability does not attach under U.S. law until those products are sold into the U.S.

2. Also misplaced is WPL’s new argument (not raised below) that the Copyright Act preempts a contract provision under North Carolina law that prohibits “reverse engineering.” Pet. 26–27. In stark contrast to the E.U. Software Directive, a long line of cases holds that the Copyright Act does not preempt contractual restraints on copyrighted articles. *See Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317, 1323–25 (Fed. Cir. 2003) (“Courts respect freedom of contract and do not lightly set aside freely-entered agreements.”) (citing cases from the Seventh, Sixth, Eighth, Fifth, and Fourth Circuits). WPL claims the circuits are divided on this issue, pointing to the Fifth Circuit’s decision in *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255 (5th Cir. 1988). *See* Pet. 17, 27. But *Vault* is not to the contrary.

In *Vault*, the Fifth Circuit held that the Copyright Act preempted certain provisions of the Louisiana Software License Enforcement Act that “touched upon the area” of federal copyright law and were in direct conflict with § 117 of the Copyright Act. 847 F.2d at 269–70. At the same time, the line of cases cited in *Bowers* upheld private contractual restrictions in which no state statute or common law right conflicted with federal copyright law. *See Bowers*, 320 F.3d at 1325 (concluding that preemption of state law in *Vault* does not extend to “private contractual agreements supported by mutual assent and consideration”); *see*

also Baystate Techs., Inc. v. Bowers, 539 U.S. 928 (2003) (denying certiorari).

In any event, WPL failed to preserve this argument. It did not even cite *Vault* below. Moreover, this petition (aimed at the finding that WPL breached the licensing agreement’s prohibition on “reverse engineering” to create a copycat product) presents a particularly poor vehicle for addressing that issue because the judgment below is independently grounded on WPL’s violation of a separate license term restricting use to “non-production purposes” and also on the jury’s verdict against WPL for fraud.

II. The Fourth Circuit’s Vacatur Ruling Does Not Merit Review.

As for the second question presented, which concerns SAS’s claim for copyright infringement, WPL petitions for certiorari in connection with a claim on which it avoided liability. SAS obtained no copyright-infringement relief against WPL. Nevertheless, WPL disagrees with the Fourth Circuit’s decision to vacate the district court’s early-stage determination (on summary judgment and before the parties conducted expert discovery) that portions of a massive software product with countless input and output formats created over the course of nearly 40 years are not copyrightable. WPL urges this Court to relabel that vacatur as an affirmance on an alternative ground, with no real effect on the parties (or on anyone else).

The Fourth Circuit was right to vacate the district court's copyright ruling. But even if it were wrong, this Court should deny review because that ruling (1) had no effect on the relief afforded to SAS and (2) would not bind the parties in future litigation even if it were, as WPL suggests, affirmed on the alternative ground that SAS could obtain no further relief on that claim. *See* Pet. 3, 13 (“*Rather than affirm on that alternative ground*, the Fourth Circuit vacated the district court's decision as ‘moot.’” (emphasis added)). In the absence of any counterclaim for declaratory judgment that portions of SAS's software are not copyrightable or that WPL's software is not infringing – which WPL failed to file below – review of the district court's copyright ruling at WPL's behest would have been merely advisory. The Court should deny WPL's petition for review of the second question presented.

A. This Case Is a Poor Vehicle to Address WPL's Vacatur Argument.

This Court should deny WPL's petition because no judgment was entered below against it on SAS's copyright-infringement claim. WPL seeks review from this Court because it is dissatisfied with the ground on which it avoided an adverse judgment. But WPL lacks standing to raise that dissatisfaction here because it failed to do what is commonly done by parties accused of infringement: file a counterclaim seeking a declaratory judgment that the plaintiff's intellectual property is not protected or that the defendant's product is not infringing.

This case is therefore unlike *Cardinal Chemical Co. v. Morton International, Inc.*, in which the petitioner “filed an answer denying infringement *and* a counterclaim for a declaratory judgment that the patents [at issue were] invalid.” 508 U.S. 83, 86 (1993) (emphasis added). There, the district court entered a separate judgment “declaring the patents invalid,” *id.* at 87, but the court of appeals then “vacated the judgment on the counterclaim as moot” after finding that the patents were not infringed, *id.* at 91. The petitioner sought review of that adverse judgment, and this Court reversed. The Court explained that the counterclaim was not moot because “[a]n unnecessary ruling on an affirmative defense is not the same as the necessary resolution of a counterclaim for a declaratory judgment.” *Id.* at 93–94.

Here, by contrast, WPL filed no declaratory judgment action and the Fourth Circuit concluded that review of the district court’s copyright holding was unnecessary. That conclusion – which WPL does not seek to challenge in its petition by asking only for an affirmance on alternative grounds – made it appropriate for the Fourth Circuit to vacate the district court’s copyright ruling.

B. The Fourth Circuit Was Right to Vacate the District Court’s Copyright Ruling After Deciding Not to Address the Merits of SAS’s Copyright Claim.

There was no error in the Fourth Circuit’s decision to vacate the district court’s copyright ruling. As the Fourth Circuit explained, the “legal resolution of the copyright question” would have “no effect on the relief afforded the parties” because “SAS would not receive the injunction it seeks even were it to prevail on its copyright claim.” Pet. App. 30a–31a.⁷ As a result, review of the district court’s copyright ruling “would be effectively advisory.” *Id.* at 30a.

That review would have been advisory because (1) the Fourth Circuit concluded that SAS had already obtained the money damages it demanded through its state-law claims for customers lost before trial; and (2) the district court had already weighed the equities of an injunction as part of its analysis of those state-law claims, and the Fourth Circuit found no abuse of discretion in that analysis. *Id.* at 23a–30a. The Fourth Circuit concluded that SAS “would not receive the injunction it seeks even were it to prevail on its copyright claim” because “‘familiar principles’ of equity ‘apply with equal force to disputes arising’ from intellectual property violations.” Pet. App. 29a–30a (quoting *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391–92 (2006)). As a result, the copyright claim would not

⁷ WPL has not asked this Court to review the determination that SAS could obtain no further relief on its copyright claim in this case.

affect the judgment and the parties lacked any “concrete interest” in resolving it. *Chafin v. Chafin*, 568 U.S. 165, 172 (2013).⁸

While WPL may have preferred a ruling from the Fourth Circuit on the merits, in the absence of a counterclaim for declaratory judgment, it would have been inappropriate for the Fourth Circuit to issue an advisory opinion on copyright.

At its core, the question presented in WPL’s petition is whether a court of appeals may vacate a district court’s ruling on a “difficult question of law in a rapidly evolving context” when review of that ruling was frustrated by the vagaries of circumstance. Pet. App. 30a. The Fourth Circuit concluded under those facts that it was appropriate to vacate the district court’s ruling here. That procedure provides clarity to litigants, other courts, and observers about the precedential value of the district court’s summary judgment ruling – which SAS challenged on appeal but the Fourth Circuit declined to review. At the very least, the Fourth Circuit’s decision to vacate an unnecessary ruling on what it considered to be a close, difficult question about software copyrightability is an appropriate exercise of its supervisory authority. *Cf. Cardinal Chem.*, 508 U.S. at

⁸ WPL tries to create a circuit split by claiming that the opinion below conflicts with circuit decisions applying *Chafin*. See Pet. 31–32. But that argument conflates this case with one in which the parties retained a concrete interest in resolving a disputed issue. The decision below is consistent with *Chafin* and the opinions WPL cites.

99 (“The Courts of Appeals have significant authority to fashion rules to govern their own procedures.”).

C. The Issue Presented Is Unimportant.

While WPL disagrees with the vacatur reasoning below, that reasoning had no effect on the relief afforded the parties. Nor would that reasoning affect the claims, arguments, or relief available to the parties in future litigation.

WPL claims that the Fourth Circuit’s reasoning “depriv[es] litigants and the public of hard-earned rulings that would otherwise finally settle legal disputes,” but that claim is not accurate. Pet. 32. There is no meaningful difference to the parties between (1) vacating the district court’s no-copyrightability summary judgment ruling as moot, as the Fourth Circuit did here; and (2) affirming the judgment on the alternative ground that SAS is entitled to no additional relief on this claim against WPL in this action (*i.e.*, in addition to the damages that SAS has already obtained on its other claims), as WPL urges.

In either case, the district court’s infringement ruling would not affect the judgment here or have future issue-preclusive effect.⁹ “It is a well-established

⁹ As a matter of claim preclusion, the judgment here will not prevent WPL from filing a declaratory judgment action seeking a declaration of non-infringement or SAS from instituting a lawsuit against WPL for infringement arising from post-trial sales of infringing software. *Cf. Bouchat v. Baltimore Ravens Ltd. P’ship*, 619 F.3d 301, 316 (4th Cir. 2010) (“Each act of infringement is a

principle of federal law that if an appellate court considers only one of a lower court’s alternative bases for its holding, affirming the judgment without reaching the alternative bases, only the basis that is actually considered can have any preclusive effect in subsequent litigation.” *Niagara Mohawk Power Corp. v. Tonawanda Band of Seneca Indians*, 94 F.3d 747, 754 (2d Cir. 1996); accord 18A Edward H. Cooper, *Federal Practice and Procedure* § 4432 (2d ed. 2018); Restatement (Second) of Judgments § 27 cmt. o (1982).

At bottom, WPL’s second question presented is a stalking horse for its real claim: that the Fourth Circuit should have affirmed the district court’s copyrightability ruling on the merits. Only that outcome would “finally settle” the copyright dispute in WPL’s favor. Pet. 32. Yet no resolution of WPL’s vacatur arguments could lead to that result. At most, this case would be remanded to the Fourth Circuit with instructions to affirm the district court’s dismissal of the copyright claim on an alternative ground (without reaching the district court’s copyrightability determination on the merits). In no event would WPL be entitled to a copyright judgment in its favor that would have issue-preclusive effect in future litigation.

* * *

WPL “seek[s] review of uncongenial findings not essential to the judgment and not binding upon [it] in

distinct harm giving rise to an independent claim for relief.” (quoting *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 204 (4th Cir. 1997)).

future litigation.” *Mathias v. WorldCom Techs., Inc.*, 535 U.S. 682, 684 (2002) (per curiam). As this Court explained when dismissing a writ as improvidently granted, “a party may not appeal from a favorable judgment simply to obtain review of findings it deems erroneous.” *Id.* This Court should deny the petition.

◆

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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