

SCALIA, J., dissenting

SUPREME COURT OF THE UNITED STATES

PETER H. BEER ET AL. *v.* UNITED STATES

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

No. 09–1395. Decided June 28, 2011

The petition for writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Federal Circuit for consideration of the question of preclusion raised by the Acting Solicitor General in his brief for the United States filed July 26, 2010. The Court considers it important that there be a decision on the question, rather than that an answer be deemed unnecessary in light of prior precedent on the merits. Further proceedings after decision of the preclusion question are for the Court of Appeals to determine in the first instance. JUSTICE BREYER would grant the petition for writ of certiorari and set the case for argument.

JUSTICE SCALIA, dissenting.

It has been my consistent view, not always shared by the Court, that “we have no power to set aside the duly recorded judgments of lower courts unless we find them to be in error, or unless they are cast in doubt by a factor arising after they were rendered.” *Webster v. Cooper*, 558 U. S. ___, ___ (2009) (SCALIA, J., dissenting) (slip op., at 3). Today’s vacatur resembles that in *Youngblood v. West Virginia*, 547 U. S. 867 (2006) (*per curiam*), from which I dissented, *id.*, at 870. I would grant the petition and set the case for argument.