No. 11-_____

In The
Supreme Court of the United States

MARINA POINT DEVELOPMENT CO., et al.,

Petitioners,

v.

CENTER FOR BIOLOGICAL DIVERSITY, et al.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the citizen suit provision of the Endangered Species Act, 16 U.S.C. § 1540(g)(2), federal courts may award attorney's fees and costs "whenever the court determines such award is appropriate." 16 U.S.C. § 1540(g)(4). Here, the Ninth Circuit upheld the district court's award of more than $1.1 million in attorney's fees and costs to plaintiffs under this provision in a lawsuit seeking to enjoin a development project purportedly to protect the bald eagle even though (a) the plaintiffs' claims became moot when the United States Fish and Wildlife Service removed the bald eagle from the list of protected species in accordance with its prior notice, (b) the Ninth Circuit expressly recognized that there was no evidence of impact to the bald eagle, and (c) the defendant ultimately prevailed on *every* substantive issue in the litigation. Against this background, the question presented is:

Can courts properly award attorney's fees and costs under fee shifting statutes that limit such awards to "appropriate" circumstances when, as here, the matter becomes moot on appeal, the judgment of this district court is vacated and undone, and the plaintiff ultimately accomplishes nothing?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Marina Point Development Associates, Okon Development Co., Oko Investments, Inc., Northshore Development Associates, L.P., Site Design Associates, Inc., VDLP Marina Point L.P., and Venwest Marina Point, Inc. represent that they have no parent company and no publicly traded company owns 10% or more of any of their stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Marina Point Development Associates, Okon Development Co., Oko Investments, Inc., Northshore Development Associates, L.P., Site Design Associates, Inc., VDLP Marina Point L.P., Venwest Marina Point, Inc., Ken Discenza, and Irving Okovita (collectively "Marina Point") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

This petition stems from two decisions of the United States District Court for the Central District of California and three decisions of the Ninth Circuit:

1. The district court's unpublished order awarding attorney's fees and costs totaling approximately $1.7 million, dated January 22, 2007, is reproduced at App. 68-88.

2. The Ninth Circuit's August 6, 2008 opinion reversing the district court's January 22, 2007 award of attorney's fees and costs is published at 535 F.3d 1026 and is reproduced at App. 44-67.

3. The Ninth Circuit's May 14, 2009 opinion amending its prior opinion and now *upholding* the district court's January 22, 2007 award of attorney's fees and costs (by a divided decision) is published at 566 F.3d 794 and is reproduced at App. 12-43.

4. The district court's unpublished order on remand awarding attorney's fees and costs totaling approximately $1.1 million, dated December 18, 2009, is reproduced at App. 8-11.

5. The Ninth Circuit's August 8, 2011 decision upholding the district court's December 18, 2009 award of attorney's fees and costs (again, by a divided decision) is available at 2011 U.S. App. LEXIS 16451 and is reproduced at App. 1-7.

JURISDICTION

The Ninth Circuit issued its final decision upholding the district court's revised fee award on August 8, 2011 and denied Marina Point's timely petition for panel rehearing or rehearing en banc on September 20, 2011. App. 89-90. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Section 11(g)(4) of the Endangered Species Act ("ESA") provides:

> The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever

the court determines such award is appropriate.

16 U.S.C. § 1540(g)(4).

STATEMENT OF THE CASE

In 1989, Marina Point purchased a 12.51-acre parcel of property on the north shore of Big Bear Lake in the San Bernardino Mountains. App. 14. The property, known as "Cluster Pines," had been operated as a tavern, recreational vehicle park, campground, and licensed marina since the 1950s. *Id*. Marina Point acquired the property to develop residential condominiums. *Id*.

In support of that development project, Marina Point secured a host of federal, state, and local permits, including a permit under the Clean Water Act ("CWA") from the Army Corps of Engineers authorizing it to strengthen the existing shoreline. *Id*. As part of that CWA permit, the Army Corps consulted with the United States Fish and Wildlife Service ("FWS") as required by the ESA. *Id*. The FWS concluded that the project would have no impact on bald eagles because the upland site was not suitable bald eagle habitat and because the activities authorized under the permit were limited to seasons when bald eagles were not present at Big Bear Lake. *Id*.

During this same time period, the FWS initiated a process to remove the bald eagle from the list of species protected by the ESA. In 1999, the FWS announced that the bald eagle "has recovered" and no longer required the protections of the ESA. 64 Fed. Reg. 36,454 (July 6, 1999). Accordingly, the FWS proceeded with the public rulemaking process necessary to "delist" the bald eagle. That rulemaking process concluded on July 9, 2007, when the FWS formally removed the bald eagle from the list of species protected by the ESA. App. 28-29.

Notwithstanding the remoteness of any impact to the bald eagle and the fact that delisting of the bald eagle was imminent, Plaintiffs Center for Biological Diversity and Friends of Fawnskin (collectively "CBD") sued Marina Point in April of 2004 under the citizen suit provisions of the ESA and the CWA, seeking to enjoin Marina Point's project. *Id*. at 160. Following a five-day bench trial, District Court Judge Manuel Real issued a permanent injunction against the project, imposed $1.3 million in penalties, and awarded attorney's fees and costs totaling $1.7 million (plus post-judgment interest). *Id*. at 17.

Marina Point timely appealed both the district court's decision on the merits and its fee award. On appeal, the Ninth Circuit reversed or vacated the district court's rulings in a series of opinions. The first opinion was unanimous: the Ninth Circuit reversed the district court's rulings regarding CBD's CWA claim on jurisdictional grounds and vacated the district court's rulings based on CBD's ESA claim because

those claims became moot when FWS delisted the bald eagle. *Id*. at 49-63. The Ninth Circuit also explained that even if the ESA claim had not become moot there was no evidence that Marina Point's activities constituted a "take" within the meaning of the ESA. *Id.* at 64.

Having rejected *all* of CBD's claims, the Ninth Circuit turned to whether CBD could recover attorney's fees. Addressing that issue, the Ninth Circuit held as follows:

> The ESA provides for an award of attorney fees "whenever the court determines such award is appropriate." 16 U.S.C. § 1540(g)(4). While that is not the typical prevailing party language, it is apparent that it must be taken to mean and be limited to an award of fees to parties who prevail. *See Marbled Murrelet v. Babbitt*, 182 F.3d 1091, 1095 (9th Cir. 1999); *see also Ruckelshaus v. Sierra Club*, 463 U.S. 680, 693-94, 103 S.Ct. 3274, 3282, 77 L.Ed.2d 938 (1983) (in a Clean Air Act case, with the same language as that in the ESA, absent "some degree of success on the merits" an award of attorney fees is not "appropriate."). Thus, to be entitled to an award, the Center must be a prevailing party.
>
> The ESA claim became moot due to the delisting of the bald eagle. Still, it can be cogently argued that if the district court judgment were valid and enforceable as to that claim, the period between its issuance (April 21, 2006) and the date of delisting (July 9,

> 2007), gave relief and bald eagle protection, so some award may well be appropriate. *See Richard S. v. Dep't of Developmental Servs. of Cal.*, 317 F.3d 1080, 1088-89 (9th Cir. 2003) (holding that fact that case becomes moot does not eliminate right to fees); *Williams v. Alioto*, 625 F.2d 845, 847-48 (9th Cir. 1980) (per curiam) (same).
>
> However, we have carefully reviewed the record and we are satisfied that the evidence cannot support a determination that Marina Point caused, or would have caused, a take of a bald eagle.

App. 63-64 (footnote omitted). The Ninth Circuit therefore concluded that CBD could not properly recover attorney's fees. App. 65.

CBD thereafter requested rehearing and persuaded the Ninth Circuit to amend its decision regarding attorney's fees under the ESA. This time, the Ninth Circuit issued a divided opinion, with Judge Fernandez writing for the panel majority, Judge Rymer concurring, and Judge Kleinfeld dissenting. Judge Fernandez, writing for the panel majority, held that because CBD had prevailed on its ESA claims in the district court (before those claims became moot) it could properly recover attorney's fees under the ESA. *Id*. at 30-34. Judge Fernandez described this result as "somewhat disquieting," but saw "no principled

and persuasive reason to deviate from" Ninth Circuit authority. *Id.* at 33.

Although Judge Rymer joined Judge Fernandez's opinion, she expressly questioned "the wisdom of case law compelling us to uphold an award of attorney's fees" in a case where the plaintiff "ends the day with no benefit" because the "injunction was dissolved and 'otherwise undone' by our final decision in this case." *Id.* at 36-37. Judge Rymer added:

> Thirty years ago the Supreme Court left the question open. In *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 483, 110 S. Ct. 1249, 108 L. Ed. 2d 400 (1990), it asked whether the plaintiff there could be deemed a "prevailing party" in the district court even though its judgment was mooted after being rendered but before the losing party could challenge it on appeal – a question, the Court noted, "of some difficulty." It certainly is. Perhaps it is time, and this is the case, for the question to be answered afresh.

Id. at 37. Without this Court's guidance, Judge Rymer concluded that the panel was "hamstrung" by Ninth Circuit precedent, and she therefore concurred in Judge Fernandez's holding. *Id.* at 38.

Judge Kleinfeld dissented, explaining that it "makes no sense to award attorneys' fees based on a 'judgment' that no longer exists (because we are vacating it), and that entitles the party to no legally enforceable relief." *Id.* at 41. He concluded: "*A fortiori*,

the victory is too ephemeral here for prevailing party status and attorneys' fees, because [CBD] never won what it wanted under the Endangered Species Act." *Id.* at 42-43.

The matter was then remanded to the district court to award attorney's fees attributable to CBD's ESA claims and exclude those fees attributable to CBD's CWA claims. *Id.* at 34-35. Pursuant to that mandate, the district court awarded attorney's fees and costs totaling $1,117,368.56 plus post-judgment interest – almost two-thirds of the award that the panel vacated in the previous appeal. *Id*. at 11.

Marina Point again appealed, and the Ninth Circuit again affirmed in a divided opinion. Judges Fernandez and Rymer rejected Marina Point's arguments – challenging the "appropriateness" of awarding attorney's fees and the amount of such fees – and upheld the district court's award in its entirety. App. 2-3. Judge Kleinfeld, in turn, dissented "[f]or the reasons stated in [his] earlier dissent." *Id*. at 6. Marina Point timely petitioned for panel rehearing and rehearing en banc, which the Ninth Circuit denied on September 20, 2011, and now seeks this Court's review.

REASONS FOR GRANTING THE PETITION

I. THERE IS A DEEP AND RECOGNIZED CONFLICT AMONG THE CIRCUITS REGARDING WHETHER AN AWARD OF ATTORNEY'S FEES IS WARRANTED WHEN A CASE BECOMES MOOT ON APPEAL.

A. The Court Recognized In *Ruckelshaus* That Losing Parties Should Not Recover Attorney's fees, But Declined To Decide In *Lewis* How Mootness On Appeal Affects That Analysis.

The ESA's fee shifting provision is one of at least 16 federal statutes that authorize courts to award attorney's fees and costs whenever the court determines that such an award is "appropriate." *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 682 n.1 (1983). As to that standard, the Court in *Ruckelshaus* explained that Congress's use of the word "appropriate" rather than the typical "prevailing party" language used in many fee shifting statutes was intended to extend fee awards "to all parties who prevail in part as well as those who prevail in full." *Id*. at 689 (emphasis omitted). But while this standard allows partially prevailing parties to recover attorney's fees, the Court in *Ruckelshaus* also noted that Congress did not mean "to depart from the long-established rule that complete winners need not pay complete losers for suing them." *Id*. at 690.

As Judge Rymer noted in her concurring opinion below (App. 37), the Court's opinion in *Lewis* is also

relevant here. That case involved a bank's challenge to the constitutionality of a Florida statute. After the district court had entered judgment in favor of the bank, the Florida legislature amended the statute at issue. 494 U.S. at 475. The district court denied a subsequent motion for attorney's fees without giving any reason. The Eleventh Circuit affirmed on the merits and remanded the matter for an explanation as to why fees were denied. *Id.* at 477.

On review, this Court followed its "ordinary practice in disposing of a case that has become moot on appeal" by "vacat[ing] the judgment with directions to dismiss." *Id*. at 482. Turning to the issue of attorney's fees, the Court stated:

> Whether Continental can be deemed a "prevailing party" in the District Court, even though its judgment was mooted after being rendered but before the losing party could challenge its validity on appeal, is a question of some difficulty, *see, e.g., Palmer v. Chicago*, 806 F.2d 1316, 1321 (CA7 1986), that has been addressed by neither court below.

Id. at 483. Because the attorney's fees issue had not been addressed by the lower courts, the Court declined to address the issue. Thus, as Judge Rymer noted (App. 37), the issue remains unaddressed by the Court to this day.

B. In The Absence Of This Court's Guidance, The Lower Courts Have Reached Disparate And Conflicting Results Regarding Whether An Award Of Attorney's fees Is Warranted When A Case Becomes Moot On Appeal.

There is a deep and recognized split among the circuits regarding whether an award of attorney's fees is warranted when a case becomes moot on appeal, with nearly every circuit adopting *different* and *conflicting* legal standards. Starting with the First Circuit, that court recognizes that a party may be "prevailing" and therefore entitled to an award of attorney's fees in cases that become moot even if the plaintiff ultimately loses on all issues. In *Diffenderfer v. Gomez-Colon*, 587 F.3d 445 (1st Cir. 2009), the First Circuit vacated and dismissed the plaintiff's claims as moot but nevertheless awarded attorney's fees because the plaintiff "managed to obtain a favorable, material, alteration in the legal relationship between the parties prior to the intervening act of mootness." *Id.* at 453 (emphasis omitted).

The Second Circuit has adopted the First Circuit's "favorable, material, alteration in the legal relationship" test, but has added a second step to the analysis. *Kirk v. N.Y. State Dep't of Educ.*, 644 F.3d 134, 138-39 & n.4 (2d Cir. 2011). Specifically, if the plaintiff ultimately leaves "empty handed," then attorney's fees cannot properly be awarded. *Id*. at 138. In *Kirk*, the plaintiff did not leave "empty handed" because the Second Circuit's decision vacating the

district court's injunction did not deprive him of the license issued as a result of the injunction. *Id*. at 139. This alteration in the parties' relationship, the Second Circuit held, was sufficient to warrant an award of attorney's fees. *Id.* at 138-39.

The Third Circuit, on the other hand, has held that a plaintiff may recover attorney's fees even if the plaintiff accomplishes nothing. In *County of Morris v. Nationalist Movement*, 273 F.3d 527 (3d Cir. 2001), the Third Circuit reviewed a challenge to the constitutionality of regulations limiting protests on courthouse steps in anticipation of the Nationalist Movement's July 4, 2000 protest march. But the Nationalist Movement never held its protest on the courthouse steps, and the county subsequently revised its policy regarding such protests. The Third Circuit therefore vacated the district court's opinion as moot, leaving the Nationalist Movement "empty handed" in that it never secured the right to protest on the courthouse steps. The Third Circuit nevertheless allowed the Nationalist Movement to recover its attorney's fees. *Id.* at 536.

The Fourth Circuit has adopted the opposite rule. In *S-1 and S-2 v. State Bd. of Educ.*, 21 F.3d 49, 51 (4th Cir. 1994), the Fourth Circuit held that a party has not prevailed *at all* and therefore cannot recover attorney's fees if and when a case is dismissed as moot on appeal and the judgment below is vacated. The Fourth Circuit reached the same result when a preliminary injunction was mooted by entry of a settlement agreement. *Smyth v. Rivero*, 282 F.3d 268,

277 (4th Cir. 2002). Moreover, even where a party is successful to some extent, the Fourth Circuit has held that attorney's fees can properly be awarded only if the litigation "served the public interest." *Stoddard v. W. Carolina Reg'l Sewer Auth.*, 784 F.2d 1200, 1209 (4th Cir. 1986).

The Fifth Circuit has adopted both the "empty handed" test and the "public interest" test. In *Foreman v. Dallas County*, 193 F.3d 314, 321 (5th Cir. 1999), the Fifth Circuit concluded that when the actions of a third party (there the Texas legislature) "moot[ed] the litigation, the plaintiffs went home empty handed" and were therefore not entitled to recover attorney's fees. Like the Fourth Circuit, the Fifth Circuit also asks whether "a party has advanced the goals of the statute invoked in the litigation." *Chem. Mfrs. Ass'n v. U.S. Envtl. Prot. Agency*, 885 F.2d 1276, 1279 (5th Cir. 1989).

The Sixth Circuit, in contrast, has flatly rejected categorical rules, such as those adopted by the Third Circuit and Fourth Circuit, when a case becomes moot on appeal. In *McQueary v. Conway*, 614 F.3d 591, 604 (6th Cir. 2010), the district court granted the plaintiff's motion for a preliminary injunction enjoining enforcement of a Kentucky law that prohibited protests at military funerals. The case was subsequently dismissed as moot when the legislature repealed the law. *Id.* at 596. Eschewing any hard and fast rules, the Sixth Circuit remanded the matter for a "contextual and case-specific inquiry" to determine

if the plaintiff could properly recover attorney's fees. *Id.* at 604.

The Seventh Circuit has adopted an entirely different approach. The Seventh Circuit agrees, in part, with the First Circuit in holding that a plaintiff can recover attorney's fees even when the party's claims are dismissed as moot on appeal. *Kinney ex rel. NLRB v. Fed. Sec., Inc.*, 272 F.3d 924, 925 (7th Cir. 2001). But the Seventh Circuit adds a "second step" to the analysis, asking whether "the [d]efendant['s] litigation position was substantially justified and taken in good faith or whether [it was] out to harass [the plaintiff]." *Pakovich v. Verizon Ltd. Plan*, Nos. 10-1889, 10-3083, 2011 U.S. App. LEXIS 15014, at *15 (7th Cir. July 22, 2011) (internal quotation marks and citation omitted; brackets in original).

The Ninth Circuit, on the other hand, has adopted at least two distinctly different tests. In this case, the panel majority below held that CBD was a "prevailing party" because "until the date of delisting, the judgment of the district court had the effect of giving relief to [CBD] and protecting the bald eagle." App. 31. But as the unanimous panel below previously indicated, "there was no basis for a finding" of any harm to bald eagles. *Id.* at 64. As such, the only basis upon which to award attorney's fees (as the panel majority subsequently did) is by adopting the Third Circuit's approach and awarding attorney's fees even when the plaintiff ultimately accomplishes nothing.

In *Saint John's Organic Farm v. Gem County Mosquito Abatement District*, 574 F.3d 1054, 1062 (9th Cir. 2009), in contrast, the Ninth Circuit concluded that the word "appropriate" in fee shifting statutes requires courts to analyze whether "*special circumstances* would render such an award unjust." *Id*. (emphasis added; internal quotation marks and citation omitted). This, in turn, requires courts to consider "(1) [whether] allowing attorney's fees would further the purposes of [the underlying statute] and (2) whether the balance of equities favors or disfavors the denial of fees." *Mendez v. Cnty. of San Bernardino*, 540 F.3d 1109, 1126 (9th Cir. 2008) (internal quotation marks and citation omitted).

The Tenth Circuit, too, has its own standard. In *Powder River Basin Resource Council v. Babbitt*, 54 F.3d 1477, 1487 (10th Cir. 1995), the Tenth Circuit applied a "some measure of success" standard to deny an award of fees in a case that was dismissed as moot because the "plaintiff did not extract any of the requested relief." Absent such success, the Tenth Circuit held that an award of fees was not appropriate. *Id.*; *see also Ctr. for Biological Diversity v. Norton*, 262 F.3d 1077, 1080 (10th Cir. 2001) (denying fees under ESA in case that became moot in district court).

Finally, the Eleventh Circuit and the D.C. Circuit permit plaintiffs to recover attorney's fees in mooted cases under a "catalyst test" even if the case is dismissed as moot. In *Loggerhead Turtle v. County Council*, 307 F.3d 1318, 1321 (11th Cir. 2002), the Eleventh Circuit affirmed an award of fees when a

defendant mooted a case by changing its regulations, finding the lawsuit had "a positive catalytic effect" by inducing the regulatory change. *Id*. at 1326. Similarly, the D.C. Circuit awarded fees under a catalyst test in a moot case because the plaintiffs obtained "some of the benefit sought." *Sierra Club v. Envtl. Prot. Agency*, 322 F.3d 718, 727 (D.C. Cir. 2003).

As the above discussion demonstrates, the lower courts have adopted disparate and inconsistent standards for deciding whether to award attorney's fees in cases that become moot on appeal. These standards range from categorical denial to categorical grant to more nuanced "empty handed" or "catalyst" standards. In addition, some circuits limit their analysis to a single step, whereas other circuits apply a second step that also varies from circuit to circuit – ranging from consideration of the "public interest" to "special circumstances" to "good faith." The resulting conflict is both deep and irreconcilable.

C. The Inter-Circuit Conflict At Issue Here Is Well Recognized By Both Jurists And Commentators.

At least two courts have expressly *recognized* the inter-circuit conflict at issue here, as has Justice Byron White. When the question presented arose in *Kay v. David Douglas School District*, 484 U.S. 1032 (1988), Justice White disagreed with the Court's decision to deny certiorari and – in doing so – specifically acknowledged the "conflict" among the circuits

on this important issue. *Id*. at 1034. Similarly, in *Saint John's Organic Farm*, the Ninth Circuit explained that "[o]ur sister circuits have not agreed on a uniform standard for a prevailing party under" the CWA. 574 F.3d at 1061. The Ninth Circuit detailed at least three different standards before deciding that "we do not adopt any of these standards, and instead hold that the 'special circumstances' standard . . . is the proper standard for determining whether an award of attorney's fees to a prevailing plaintiff is 'appropriate' under" the CWA. *Id.* at 1062. In *People Against Police Violence v. City of Pittsburgh*, 520 F.3d 226, 233 n.4 (3d Cir. 2008), the Third Circuit likewise recognized a split among the circuits and expressly *disagreed* with the Fourth Circuit's contrary holding in *Smyth* (one of the opinions that is discussed above).

Legal commentators have also acknowledged this split among the circuits. *See* Joshua E. Hollander, *Current Development 2009-2010: Fee Shifting Provisions in Environmental Statutes: What Are They, How Are They Interpreted, and Why They Matter*, 23 Geo. J. Legal Ethics 633, 639-40 (2010) (discussing split among circuits regarding interpretation of "appropriate" in fee shifting statutes); Michel Lee, *Attorneys' Fees in Environmental Citizen Suits and the Economically Benefited Plaintiff: When Are Attorneys' Fees and Costs Appropriate?*, 26 Pace Envtl. L. Rev. 495, 508-13 (2009) (same). As such, the inter-circuit conflict is not only deep and irreconcilable, but has also been acknowledged as such.

II. THIS MATTER RAISES A RECURRING ISSUE OF SUBSTANTIAL IMPORTANCE.

The question presented by this petition – whether courts can properly award attorney's fees and costs under fee shifting statutes that limit such awards to "appropriate" circumstances when, as here, the matter becomes moot on appeal – is undeniably important. There are at least 16 federal fee shifting statutes that authorize an award of fees when "appropriate." *Ruckelshaus*, 463 U.S. at 682 n.1. In addition, there are dozens more fee shifting statutes that authorize an award of fees to "prevailing parties." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602-03 (2001). And, in *Hardt v. Reliance Standard Life Insurance Co.*, 130 S. Ct. 2149, 2157-58 (2010), the Court extended the standard articulated in *Ruckelshaus* to at least some statutes that do not contain the "appropriate" language.

It is equally clear that cases can become moot on appeal for a variety of recurring reasons. Mootness commonly occurs when regulatory changes eliminate the basis for the lawsuit, as occurred here (App. 29 (mooted by delisting of bald eagle)), in *Loggerhead Turtle* (307 F.3d at 1321 (mooted by amendments to ordinance)), in *Foreman* (193 F.3d at 321 (mooted by action of Texas legislature)), in *Powder River Basin Resource Council* (54 F.3d at 1487 (mooted by Secretarial approval)), and in *Diffenderfer* (587 F.3d at 450 (mooted by action of Puerto Rico legislature)). Mootness can also occur as a result of settlement (*S-1*

& S-2, 21 F.3d at 51) or by voluntary action of the defendant (*Ctr. for Biological Diversity*, 262 F.3d at 1080). Thus, the question presented here is both significant and recurring.

Equally important, this case is an excellent vehicle through which to review the question presented because the decisional record is exceptionally well developed. Unlike many such cases that are dismissed on appeal as moot, the Ninth Circuit below squarely addressed the merits of CBD's ESA claim and concluded that there was no evidence that Marina Point's activities constituted a "take" within the meaning of the ESA. App. 64. In addition, because the matter was subsequently remanded to determine the amount of attorney's fees to be awarded, the Ninth Circuit below has addressed both entitlement to fees (in the first and second appeals) and the amount of those fees (in the second appeal). As such, *all* issues relating to attorney's fees have now been *fully* adjudicated.

In addition, the record shows very clearly that the result here is manifestly unfair. As this Court has explained, "generations of American judges, lawyers, and legislatures . . . would regard it as quite 'inappropriate' to award the 'loser' an attorney's fee from the 'prevailing litigant.'" *Ruckelshaus*, 463 U.S. at 684. Yet that is precisely what the Ninth Circuit did here: it upheld the district court's crippling award of attorney's fees (approximately $1.4 million with interest to date) even though CBD "ends the day with

no benefit" and "never won what it wanted under the Endangered Species Act." App. 36, 42-43. Marina Point ultimately prevailed on *every* substantive issue, yet under the Ninth Circuit's analysis it must pay the losing plaintiff over $1.1 million in attorney's fees and costs plus post-judgment interest on those amounts in addition to its own attorney's fees. The manifest unfairness of such a result is another compelling reason to grant this petition.

The result here is all the more unfair given that CBD *knew* when it filed its lawsuit against Marina Point that its ESA claim would soon be moot. The FWS announced that the bald eagle "has recovered" and no longer required the protections of the ESA *in 1999*, approximately *five years before* CBD filed its ESA claim against Marina Point. 64 Fed. Reg. 36,454. CBD nevertheless filed its lawsuit against Marina Point and thereby assumed the risk that it would be required to pay its own attorney's fees. Marina Point, in contrast, had no control over CBD's litigation strategy and no control over the events that mooted CBD's claims. Instead, it had only one viable option: to defend against CBD's meritless claim under the ESA and incur substantial attorney's fees in doing so. Under these circumstances, which are typical of cases that become moot on appeal, an award of attorney's fees in favor of an unsuccessful plaintiff cannot possibly be "appropriate." But absent this Court's review, lower courts will continue to sanction substantial fee awards in precisely such circumstances.

Moreover, because the record is fully developed, the Court's resolution of the question presented will likely be outcome determinative. If the Court, for example, were to adopt the Fourth Circuit's rule that mootness "prevents the plaintiffs from being found prevailing parties" (*S-1 & S-2*, 21 F.3d at 51), it would necessarily vacate the district court's fee award. The same would be true if the Court were to agree with the Tenth Circuit that a plaintiff cannot recover attorney's fees if the "plaintiff did not extract any of the requested relief" (*Powder River Basin Resources Council,* 54 F.3d at 1487) or if it were to agree with the Second Circuit and the Fifth Circuit that an award of attorney's fees is not appropriate if the plaintiff leaves the courthouse "empty handed." *Kirk*, 644 F.3d at 138-39 & n.4; *Foreman*, 193 F.3d at 321. Indeed, Marina Point can properly avoid liability for CBD's attorney's fees if this Court were to agree with the legal standard adopted by almost *any* circuit other than the Ninth Circuit.

Against this background, it is no surprise that prominent jurists and litigants alike have recognized the need for this Court's guidance. Thirty years ago, Justices William Rehnquist and Byron White dissented from the denial of certiorari in another Ninth Circuit case (much like this one) where attorney's fees were awarded to parties who secured an injunction in the district court and the injunction was subsequently vacated as moot. *Alioto v. Williams*, 450 U.S. 1012 (1981). Critical here, these Justices disagreed with the Ninth Circuit's ruling that a plaintiff could

properly recover attorney's fees where "the propriety of the injunction was being challenged on appeal at the time the case became moot and the appeal dismissed." *Id*. at 1013. When the issue arose again in *Kay*, Justice White once again disagreed with the Court's decision to deny certiorari given the "conflict" among the circuits (as noted above) and the "substantial" nature of the question presented. 484 U.S. at 1034.

More recently, the United States Solicitor General asked the Court to grant certiorari to address the question presented in *Sierra Club*, 322 F.3d 718. In that case, the D.C. Circuit held that an award of fees was "appropriate" even though the plaintiffs were not successful on *any* issue in the case. As the Solicitor General's petition for certiorari explained, there "is a compelling need" for the Court to provide guidance on the question presented because, among other things, the issue affects "fee awards under more than a dozen federal statutes." *EPA v. Sierra Club*, No. 03-509, Petition for Writ of Certiorari at 20 (May 10, 2002).

Finally, Judge Rymer likewise emphasized the need for this Court's review in her concurring opinion below. As noted previously, Judge Rymer specifically recognized that the question presented here is one "of some difficulty." App. 37 (internal quotation marks and citation omitted). She then added: "Perhaps it is time, and this is the case, for the question to be answered afresh." *Id*. Marina Point could not agree more.

CONCLUSION

For the above reasons, the Court should grant a writ of certiorari to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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