NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 22-7168

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DISTRICT OF COLUMBIA, *et al.*,
APPELLANTS,

v.

THE KROGER CO., *et al.*,
APPELLEES.

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

APPELLANTS' REPLY IN SUPPORT OF VACATUR

Appellants respectfully ask that this Court do nothing more than follow its custom of vacating a district court decision now that the appeal from that decision has become moot through no fault of their own. *See, e.g.*, *United States v. Schaffer*, 240 F.3d 35, 38 (D.C. Cir. 2001) (en banc). While Kroger and Albertsons call this request "extraordinary," the very cases they cite disagree. According to those precedents, when appellants play no role in mooting their appeal, vacatur is the "established practice," *Azar v. Garza*, 138 S. Ct. 1790, 1793 (2018); the "normal principle," *Hall v. CIA*, 437 F.3d 94, 99 (D.C. Cir. 2006); and even a "duty of the appellate court," *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950)

(internal quotation marks omitted). This Court should accordingly grant appellants' request for vacatur and reject Kroger's and Albertsons's meritless objections.

First, Kroger misstates the test for vacatur in arguing that relief is unavailable if an appellee supposedly took "no action whatsoever to moot this appeal." Kroger 1, 3-4. In actuality, the "principal condition" for vacatur "is whether the party seeking relief from the judgment below caused the mootness by voluntary action." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24 (1994). If it did, vacatur may be unwarranted. *Id.* at 26-29. But "[i]f the party who lost below *did not* cause the case to become moot, that is, if happenstance *or* the actions of the prevailing party ended the controversy, vacatur remains the standard form of relief." *Humane Soc. of U.S. v. Kempthorne*, 527 F.3d 181, 187 (D.C. Cir. 2008) (internal quotation marks omitted) (emphases added); *see Akiachak Native Cmty. v. Dep't of Interior*, 827 F.3d 100, 115 (D.C. Cir. 2016) (ordering vacatur where Alaska's appeal was mooted "for reasons outside its control").

So, regardless of whether Kroger "paid anything to anyone" (at 2), vacatur is appropriate here because *appellants* undisputedly played no role in mooting this appeal. Indeed, payment of the $4 billion dividend mooted this appeal, whether that payment reflected Albertsons's unilateral conduct or whether (as appellants allege) it was part of an anticompetitive combination involving both Kroger and Albertsons. Either way, mootness resulted from "happenstance or the actions of the prevailing

party"—not "the party who lost below"—and thus either way, "vacatur remains the standard form of relief." *Kempthorne*, 527 F.3d at 187.

Second, Albertsons's concession (at 6) that the mootness of this appeal "was the product of Albertsons' payment of the Special Dividend" all but ends the vacatur inquiry. Yet Albertsons nevertheless opposes vacatur on the theory that, because it was "required to pay" the dividend under "Delaware law," that act "was neither unilateral nor voluntary." Albertsons 6-8. This argument lacks merit.

The conduct of prevailing parties is sufficiently unilateral and voluntary if it is *intentional* and *non-accidental*—it need not be free from legal obligation. *See* 13C Edward H. Cooper, Fed. Prac. & Proc. Juris. § 3533.10.1 (3d ed. Aug. 2022) ("Even involuntary action by the winner may justify vacation of the judgment that is no longer reviewable."). That is why vacatur is appropriate even when appellees cause mootness by paying funds pursuant to a statutory mandate, *W. Va. Ass'n of Comm. Health Ctrs., Inc. v. Heckler*, 734 F.2d 1570, 1572-73, 1577 (D.C. Cir. 1984); or by complying with their legal duty to release prisoners at the end of their sentence, *Maydak v. United States*, 630 F.3d 166, 169, 174, 177 (D.C. Cir. 2010); or by making a statutorily required finding, *Fund For Animals, Inc. v. Hogan*, 428 F.3d 1059, 1061, 1063-65 (D.C. Cir. 2005). That Albertsons characterizes its conduct as fulfilling a self-created legal duty is thus no reason to let the decision below stand.

Third, Albertsons and Kroger insist that "the equities and public interest do not favor" vacatur here. Albertsons 4-5; *see* Kroger 3-6. Yet their own cases recognize that vacatur serves the public interest and equities when, as here, "*the party seeking appellate relief*" is not "attempting to manipulate the courts to obtain the relief it was not able to win in the judicial system." *Kempthorne*, 527 F.3d at 188 (internal quotation marks omitted) (emphasis added); *see Nat'l Black Police Ass'n v. District of Columbia* (*NBPA*), 108 F.3d 346, 352-54 (D.C. Cir. 1997) (holding that "the public interest" and "equity would best be served by granting vacatur" as appellant did not try "to erase an unfavorable decision from the books"). It is irrelevant, then, whether Albertsons tried to "thwart" review in mooting this appeal, or whether Albertsons and Kroger would like to make a "precedent" out of the district court's decision. *See* Albertsons 4; Kroger 6. Because appellants are not seeking to manipulate the judicial process, vacatur serves the public interest and equities. *See Kempthorne*, 527 F.3d at 188; *NBPA*, 108 F.3d at 352-54.

Nor do the "judicial resources" involved in this case change the analysis. *See* Albertsons 4-5. Appellants filed this suit in November 2022, and this appeal has been pending for roughly two months. While preserving judicial resources is undoubtedly important, this months-long litigation pales in comparison to other cases where vacatur was still "the equitable solution." *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 71-75 (1997) (issuing "a path-clearing vacatur decree" after

nearly a decade of litigation); *Maydak*, 630 F.3d at 168-77 (similar, more than a decade of litigation). The same relief is appropriate here.

Kroger and Albertsons offer no precedent supporting a different conclusion. Most of the cases they cite support appellants. *See, e.g.*, *Planned Parenthood of Wis., Inc. v. Azar*, 942 F.3d 512, 516-17 (D.C. Cir. 2019) (ordering vacatur where appellants "caused neither" event mooting their appeal); *Altamont Gas Transmission Co. v. FERC*, 92 F.3d 1239, 1242 n.* (D.C. Cir. 1996) (vacating one part of an order that the agency-respondent stopped enforcing). The rest are inapposite. One is a district court order. *Fund for Animals v. Mainella*, 335 F. Supp. 2d 19 (D.D.C. 2004). One did not even address the issue of vacatur. *NBC-USA Hous., Inc., Twenty-Six v. Donovan*, 674 F.3d 869 (D.C. Cir. 2012). And the remaining few involved situations where, unlike here, mootness was caused "by the deliberate action of the losing party." *Ctr. for Sci. in Pub. Int. v. Regan*, 727 F.2d 1161, 1162, 1165-66 (D.C. Cir. 1984) (agency mooted its own appeal through rulemaking).[1]

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[1] *See Bancorp*, 513 U.S. at 24-27 (creditor mooted appeal through settlement); *Mahoney v. Babbitt*, 113 F.3d 219, 221-22 (D.C. Cir. 1997) (officials mooted case by not seeking further review); *I.A. v. Garland*, No. 20-5271, 2022 WL 696459, at *1 (D.C. Cir. Feb. 24, 2022) (agency mooted appeal by issuing a superseding rule); *Chau v. Dep't of State*, No. 95-5205, 1995 WL 686332 (D.C. Cir. Oct. 19, 1995) (government mooted case by granting plaintiff's wife's visa application: "Vo Van Chau and Le Thi Thanh Xuan's claims were later rendered moot when the Department of State processed and granted Le's visa application on September 14, 1995." *Le v. U.S. Dep't of State*, 919 F. Supp. 27, 29 (D.D.C. 1996)).

Fourth, vacatur does not require certainty that the decision below *will* bar further litigation. *See* Kroger 6-7; Albertsons 5-6. After all, a key purpose of vacatur is to "eliminate[] that possibility altogether," even if "speculative" or "remote." *AFLAC v. FCC*, 129 F.3d 625, 631 (D.C. Cir. 1997); *see Loughlin v. United States*, 393 F.3d 155, 170-71 (D.C. Cir. 2004) (same). So, unless appellees moot an appeal by giving their adversaries the exact relief they requested, *see Chau*, 1995 WL 686332, at *1; *Le*, 919 F. Supp. at 29, interlocutory rulings should be vacated, since they too "may be given collateral estoppel effect in future litigation," *Gjertsen v. Bd. of Election Comm'rs*, 751 F.2d 199, 202 (7th Cir. 1984) (citing *CFTC v. Bd. of Trade*, 701 F.2d 653, 657 (7th Cir. 1983), which ordered vacatur on this basis). Kroger and Albertsons thus cannot preserve the unreviewable decision below on the flimsy assurance that it *may* not affect the proceedings on remand. Vacatur exists precisely to put such "speculation to rest." *AFLAC*, 129 F.3d at 631.

Besides, Kroger's and Albertsons's claim that vacatur is "unnecessary" rings hollow. Were that true, they would not be demanding the "certainty and repose" of "the district court's decision." Kroger 9; *see* Albertsons 5. They would not be trying to preserve "the scoreboard" in this litigation. Kroger 5; *see* Albertsons 4-5. They would not be portraying the decision below as "the District Court's assessment and rejection of" appellants' "claims on a robust factual record," as if the court had already ruled that they "did not violate state or federal antitrust law." Albertsons 4,

7; *see* Kroger 3-6. And Kroger at least would not be intimating that it will "confront" appellants with related "adverse rulings" on remand. Kroger 5 n.1.

Fifth, contrary to Kroger's assertions (at 8-9), vacatur is warranted regardless of whether appellants are "the government." Kroger's own cases confirm as much. *See NBPA*, 108 F.3d at 351-54 (vacating decision in favor of private parties when new legislation mooted the District of Columbia's appeal). In *United States v. Hamburg-Amerikanische*, 239 U.S. 466, (1916), for example, the government's appeal in an antitrust suit was mooted when World War I ended the defendants' international shipping cartel. *Id.* at 468-77. But rather than declare "vacatur improper" simply because the appellant was "a powerful government litigant," *see* Kroger 3, 8-9, the Supreme Court held that "the judgment below should not be permitted to stand when, without any fault of the government, there is no power to review it upon the merits," *Hamburg-Amerikanische*, 239 U.S. at 477-78. So too here. Kroger's unsound theory cannot be reconciled with the very decisions it relies on, much less any others, *see FTC v. Owens-Illinois, Inc.*, 850 F.2d 694, 694 (D.C. Cir. 1988) (vacating order "denying [FTC's] motion for a preliminary injunction").

Sixth, to the extent any "confusion" would result from vacating only the preliminary injunction ruling, *see* Kroger 5 n.1, the Court should order "vacatur down the line," *Arizonans*, 520 U.S. at 75. This Court has the "authority both to vacate the district court's order and to 'remand the cause and direct the entry of such

appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.'" *Columbian Rope Co. v. West*, 142 F.3d 1313, 1318 n.5 (D.C. Cir. 1998) (quoting 28 U.S.C. § 2106). Here, because the district court's preliminary injunction ruling incorporated its decision on the temporary restraining order, *see* Kroger 4, vacating both rulings is appropriate, along with instructions for the district court to vacate its post-appeal order as well.

Finally, Kroger and Albertsons are wrong to imply that this entire case may be moot. Kroger 5-7 & n.2; *see* Albertsons 2-3 & n.1. Appellants have requested all "such other relief as the Court determines to be just and proper," Compl. at 26 ¶c, and thus the district court on remand can grant a variety of remedies, including enjoining the merger agreement's credit-and-debt restrictions and ordering disgorgement, *see Randall v. Meese*, 854 F.2d 472, 482 (D.C. Cir. 1988). In any event, the vitality of appellants' suit is not currently before this Court; the only matter on appeal was appellants' challenge to the denial of preliminary relief, which all parties agree is moot through no fault of appellants, *see* Albertsons 6; Kroger 3-4. Vacatur is the established practice in such cases, and it should be ordered here.

CONCLUSION

The Court should vacate the decision below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this reply complies with the type-volume limitation in Federal Rule of Appellate Procedure 27(d)(2)(C), because it contains 1909 words, excluding exempted parts. This reply complies with the typeface and type style requirements of Federal Rules of Appellate Procedure 27(d)(1), 32(a)(5), and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Times New Roman 14-point font.

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