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THIS IS UNPRECEDENTED: EXAMINING THE IMPACT OF VACATED STATE APPELLATE COURT OPINIONS

Michael D. Moberly*

*If the Court considers the language or legal analysis . . . in [a] vacated . . . opinion, regardless of how well reasoned that decision or language may be, any decision rendered is subject to challenge or criticism on the grounds that it was based in part on language, reasoning or analysis from an opinion that had been vacated.*¹

I. INTRODUCTION

Like their counterparts in Georgia,² Idaho,³ Illinois,⁴ Indiana,⁵ Louisiana,⁶ Michigan,⁷ Nebraska,⁸ Ohio,⁹ Oregon,¹⁰

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1. *Nez Perce Tribe v. Idaho Power Co.*, 847 F. Supp. 791, 808 (D. Idaho 1994).

2. *See Cash in Advance of Fla., Inc. v. Jolley*, 612 S.E.2d 101, 102 (Ga. App. 2005) (“[T]he vacated opinion . . . has no precedential value.”).

3. *See e.g. Idaho v. Barclay*, 232 P.3d 327, 330 (Idaho 2010) (“[T]he opinion of the Court of Appeals is vacated. Because the opinion is vacated, it lacks precedential value.”); *see also Nez Perce Tribe*, 847 F. Supp. at 808 (noting that “a vacated decision is not binding precedent”).

4. *See Mohanty v. St. John's Heart Clinic*, 866 N.E.2d 85, 93 (Ill. 2006) (“The appellate decision . . . was vacated by this court . . . and, as such, carries no precedential weight.”); *Quigg v. Walgreen Co.*, 905 N.E.2d 293, 297 (Ill. App. 2d Dist. 2009) (“An appellate court opinion vacated by our supreme court carries no precedential weight.”).

5. *See Est. of Helms v. Helms-Hawkins*, 804 N.E.2d 1260, 1268 n. 4 (Ind. App. 1st Dist. 2004) (noting that a vacated opinion “is held for naught and has no precedential value.”); *Burns v. Hatchett*, 786 N.E.2d 1178, 1182 (Ind. App. 5th Dist. 2003) (“[I]t is well settled that vacated opinions have no effect as legal precedent.”); *see also U.S. v. Norris*, 56 F. Supp. 2d 1043, 1044 (N.D. Ind. 1998) (characterizing a vacated case as being “of no value as precedent”).

6. *See Doerr v. Mobil Oil Corp.*, 774 So. 2d 119, 130 n. 11 (La. 2000) (“We recognize that vacated opinions are not binding precedent”); *Tippett v. Padre Ref. Co.*, 771 So. 2d 300, 304 (La. App. 2d Cir. 2000) (“[T]he Supreme Court subsequently vacated *Ka-Jon*, so it has no precedential value.”); *see also In re Conoco EDC Litig.*, 123 F. Supp. 2d 340,

and Wisconsin,¹¹ the Arizona state courts hold that vacated judicial opinions have no precedential value.¹² Although this characterization seems overly broad,¹³ and is arguably even somewhat misleading,¹⁴ the same view has been expressed by a number of federal appellate courts.¹⁵

343 (W.D. La. 2000) (“[T]he original decision was vacated . . . and decisions so vacated have no precedential value.”).

7. See *Mich. v. Akins*, 675 N.W.2d 863, 871 n. 8 (Mich. App. 2003) (“A Court of Appeals’ opinion that has been vacated by a majority of the Supreme Court without an expression of approval or disapproval of this Court’s reasoning is not precedentially binding.”); see also *Key v. Grayson*, 163 F. Supp. 2d 697, 712 n. 6 (E.D. Mich. 2001) (pointing out that a vacated decision “has no value in terms of precedent”).

8. See *Mass. Bonding & Ins. Co. v. Steele*, 248 N.W. 648, 649 (Neb. 1933) (“Any expressions in [a] vacated opinion have no force as a precedent.”).

9. See *State ex rel. Ney v. DeCourcy*, 612 N.E.2d 386, 389 (Ohio App. 1st Dist. 1992) (“Once vacated, . . . a decision has no precedential value and must be treated as a nullity.”); see also *In re Title Ins. Antitrust Cases*, 702 F. Supp. 2d 840, 892 n. 22 (N.D. Ohio 2010) (concluding that a vacated decision “had no precedential value”); cf. *Swan Super Cleaners, Inc. v. Tyler*, 549 N.E.2d 526, 531 (Ohio App. 10th Dist. 1988) (“[O]ur decision . . . is now of little precedential effect because the Ohio Supreme Court vacated the decision.”).

10. See *State ex rel. State Office for Servs. to Children & Families v. Williams*, 7 P.3d 655, 657 n. 5 (Or. App. 2000) (finding that a vacated opinion had “no precedential value”).

11. See *State v. Hahn*, 586 N.W.2d 5, 11 (Wis. App. 1998) (“Our decision . . . was vacated by the supreme court and therefore has no precedential value.”), *review denied*, 589 N.W.2d 629 (Wis. 1998); see also *Arnold v. City of Appleton*, 97 F. Supp. 2d 937, 947 (E.D. Wis. 2000) (noting that a vacated panel decision was of “no precedential value”).

12. See *Wertheim v. Pima Co.*, 122 P.3d 1, 5 n. 2 (Ariz. App. Div. 2 2005) (citing *Wetherill v. Basham*, 3 P.3d 1118 (Ariz. App. Div. 2 2000), for the proposition that “[v]acated opinions have no precedential value”); see also *Ariz. Laborers, Local 395 Pension Trust Fund v. Nevarez*, 661 F. Supp. 365, 369 (D. Ariz. 1987) (“A vacated decision has no precedential or authoritative effect.”).

13. See *Jones v. Superintendent, Va. State Farm*, 465 F.2d 1091, 1094 (4th Cir. 1972) (noting that “any decision is by definition a precedent”); *Rainey v. Borough of Derry*, 641 A.2d 698, 705 (Pa. Commw. Ct. 1994) (pointing out that “[o]f course, all published opinions are precedential to some degree”); cf. *Schaaf v. Kaufman*, 850 A.2d 655, 659 n. 5 (Pa. Super. 2004) (“The word ‘precedent’ has two meanings, which sometimes causes confusion. It can mean any case that stands for a particular principle, whether the case controls the outcome of a particular matter or not. . . . ‘Precedent’ also means a decision that ‘must be followed when similar circumstances arise.’” (quoting *Black’s Law Dictionary*)).

14. See e.g. *In re Okura & Co. (Am.), Inc.*, 249 B.R. 596, 611 n. 10 (Bankr. S.D.N.Y. 2000) (“The Trustee argues that because this decision was vacated it has no precedential value. This argument is misguided. While it may be true that the act of vacating an opinion diminishes its value as binding precedent, it has no effect on the persuasiveness of the decision.”).

15. See e.g. *Salitros v. Chrysler Corp.*, 306 F.3d 562, 575 n. 2 (8th Cir. 2002) (“A vacated decision is deprived of its precedential effect.”); *Cousineau v. U.S.*, 493 F.2d 692,

Nevertheless, the courts are not uniform in their treatment of vacated opinions.¹⁶ For example, several courts have indicated that vacated opinions retain their precedential value in some circumstances.¹⁷ Even in jurisdictions in which vacated opinions cannot be cited as precedent¹⁸ (at least in the stronger, binding sense),¹⁹ litigants presumably could cite them for some

694 n. 1 (9th Cir. 1074) (asserting that “vacated opinions are, of course, of no legal precedence”); see also *Newdow v. Cong. of the U.S.*, 383 F. Supp. 2d 1229, 1240 (E.D. Cal. 2005) (“[A] vacated decision has no precedential authority.”), *rev’d sub nom. Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007 (9th Cir. 2010); *U.S. v. McDermott*, 822 F. Supp. 582, 586 (N.D. Iowa 1993) (stating that a “vacated decision retains no precedential value”); *Blum v. 1st Auto & Cas. Ins. Co.*, 786 N.W.2d 78, 96 ¶ 88 (Wis. 2010) (Roggensack, J., concurring in part and dissenting in part) (“In federal court . . . an opinion that has been ‘vacated’ has no precedential authority.”).

16. See Charles A. Sullivan, *On Vacation*, 43 Houston L. Rev. 1143, 1151 (2006) (noting that “the question of whether vacated opinions are law remains unresolved”); Robert Scott Lewis, *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership: Settlement Conditioned on Vacatur?* 47 Ala. L. Rev. 883, 887 (1996) (noting that “there is no bright-line rule regarding the precedential value of a vacated judgment”).

17. See e.g. *Endsley v. Luna*, 750 F. Supp. 2d 1074, 1088 n. 6 (C.D. Cal. 2010) (“[T]he Ninth Circuit and others have taken the position that a vacated judgment retains precedential authority on those issues not addressed in the order vacating it.”); see also *Coalition to End the Permanent Cong. v. Runyon*, 979 F.2d 219, 221 n. 2 (D.C. Cir. 1992) (Silberman, J., dissenting from *per curiam* disposition) (asserting that a vacated opinion “still may carry . . . precedential value”).

18. See e.g. *Natl. Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 317 n. 31 (D.C. Cir. 1988) (“[I]t is elementary that a vacated district court decision is not binding precedent and should not be cited as such.”); *Burt Rigid Box, Inc. v. Travelers Prop. Cas. Corp.*, 126 F. Supp. 2d 596, 640–41 (W.D.N.Y. 2001) (asserting that a vacated opinion “is not a proper precedent on which to rely”), *aff’d in part and rev’d in part*, 302 F.3d 83 (2d Cir. 2002); *Holiday v. Kinslow*, 659 N.E.2d 647, 650 n. 3 (Ind. App. 2d Dist. 1995) (“[T]he court of appeals decision in the case is vacated and cannot be cited as precedent.”).

19. See *Ferguson v. Tex.*, 335 S.W.3d 676, 688 n. 2 (Tex. App.—Houston 14th 2011) (Frost, J., concurring) (noting, in a discussion of unpublished, rather than vacated, decisions, that “[a] ‘binding precedent’ is ‘[a] precedent the court must follow,’ and a ‘persuasive precedent’ is ‘[a] precedent that a court may either follow or reject, but that is entitled to respect and careful consideration’” (quoting *Black’s Law Dictionary*)); see also *Gulfstream Aerospace Corp. v. Camp Sys. Intl., Inc.*, 84 U.S.P.Q. 2d 1126, 1127 (S.D. Ga. 2007) (“[T]he law uses ‘precedent’ in two very different ways. In the weaker sense, ‘precedent’ merely refers to any authoritative pronouncement of a court that other courts have an obligation to respect; in this sense, any court decision may be a ‘persuasive precedent,’ although precisely what that means—how respectful a court must be—is unclear. The second, and stronger, sense is ‘binding precedent,’ which means that a lower court . . . is required to follow the decision.”); cf. *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1123 (7th Cir. 1987) (“Any decision may have persuasive force, and invite—indeed compel—the careful and respectful attention of a court confronted with a similar case.”).

other purpose,²⁰ including their ability to persuade the court in a subsequent case.²¹

Under a procedural rule adopted by the Ohio Supreme Court, for example, vacated and therefore non-precedential Ohio appellate court opinions issued after May 1, 2002, can “be cited as legal authority and weighted as deemed appropriate” in subsequent Ohio state court cases.²² However, there is no comparable rule addressing whether—or when—vacated appellate opinions can be cited in Arizona state court litigation,²³

20. See e.g. *L.W. v. W. Golf Assn.*, 675 N.E.2d 760, 762 n. 2 (Ind. App. 2d Dist. 1997) (“[T]he court of appeals decision is vacated and held for naught. . . . Accordingly, we allude to it not as precedential, but as reflective of the current state of the law, as drawn from the authorities cited therein.”), *aff’d in part and vacated in part*, 712 N.E.2d 983 (Ind. 1999); cf. *Giese v. Pierce Chem. Co.*, 43 F. Supp. 2d 98, 103 n. 1 (D. Mass. 1999) (noting, in the unpublished-opinion context, that the fact that an opinion cannot be cited as precedent “hardly means . . . that it cannot be cited at all”); George M. Weaver, *The Precedential Value of Unpublished Judicial Opinions*, 39 Mercer L. Rev. 477, 490 (1988) (asserting that “[i]t does not follow from the nonprecedential status of unpublished opinions that they should not be citable for any purpose”).

21. See e.g. *McKenzie v. Day*, 57 F.3d 1493, 1494 (9th Cir. 1995) (“Although the opinion was subsequently vacated, [it] remains persuasive authority, and we adopt its analysis . . . as our own.”); see also Weaver, *supra* n. 20, at 491 (“[I]t is well recognized that nonprecedential judicial opinions may have persuasive value.”); cf. *Brooks v. U.S.*, 695 F.2d 984, 988 (5th Cir. 1983) (“Plaintiffs do not contend that the vacated opinion is binding precedent anywhere but that, as ‘the most pertinent statement of the governing law, even if . . . not directly binding,’ it merits court consideration.”) (quoting *Los Angeles Co. v. Davis*, 440 U.S. 625, 646 (1979) (Powell, J., dissenting)).

22. *Premier Assocs., Ltd. v. Loper*, 778 N.E.2d 630, 637 n. 2 (Ohio App. 2d Dist. 2002) (quoting Ohio Sup. Ct. R. Rep. Op. 4(b)). The then-applicable Ohio rule appears to have been enacted primarily to address the precedential effect of unpublished opinions, and its successor, Ohio Sup. Ct. Rep. Op. R. 3.4, now provides that “[a]ll opinions of the courts of appeals issued after May 1, 2002 may be cited as legal authority and weighted as deemed appropriate by the courts without regard to whether the opinion was published or in what form it was published.” *Id.*

23. Division Two of the Arizona Court of Appeals reputedly will not “rely on vacated cases as authority,” although citing a vacated opinion to the court is permissible “so long as the vacated status is also stated.” Susan M. Freeman & Paul G. Ulrich, *Civil Appeals*, in 1A *Arizona Appellate Handbook* § 3.7.2.6.1, at 3-148 (5th ed. St. B. of Ariz. 2010). However, courts within the division do not scrupulously adhere to this practice. See e.g. *Gainok v. Featherston*, 641 P.2d 909, 910 n. 2 (Ariz. App. Div. 2 1982) (finding UCC applicable to a sale of realty because “[t]his question was so decided in . . . an opinion that was vacated by the Arizona Supreme Court”). In addition, the reader should note that Division Two has jurisdiction over appeals in cases arising in only seven of Arizona’s fifteen counties, Ariz. Rev. Stat. Ann. § 12-120; *Senor T’s Rest. v. Indus. Commn.*, 641 P.2d 877, 881 (Ariz. App. Div. 1 1981) (Froeb, J., concurring), *vacated*, 641 P.2d 848 (Ariz. 1982), and there is no evidence that either the Arizona Supreme Court or Division One of the Arizona Court of Appeals has adopted a similar (or any other) policy concerning the citation of vacated

and the analogous authority in other jurisdictions is conflicting.²⁴

This article attempts to shed light on this important and unsettled issue.²⁵ Although the article focuses on the Arizona courts' treatment of vacated opinions,²⁶ the analysis should be useful in other states as well.²⁷ This is particularly true in states that, like Arizona,²⁸ have adopted appellate procedural rules analogous to the Federal Rules of Appellate Procedure,²⁹ one

opinions. *Cf. Bassett v. Bassett*, 671 A.2d 661, 662 (Pa. 1995) ("Rules of Appellate Procedure [are] intended to promote uniformity in appellate practice. Uniformity would clearly be undermined by allowing [practices] to vary from county to county.").

24. *Compare Potomac Dev. Corp. v. Dist. of Columbia*, 28 A.3d 531, 544 n. 4 (D.C. 2011) ("Because of the persuasiveness of the vacated opinion . . . we draw on it here.") and *Myers v. U.S.*, 15 A.3d 688, 691 n. 8 (D.C. 2011) ("Because it was vacated, the *Wilson* decision is no longer a binding precedent. Nevertheless, it does provide some useful guidance here." (citation omitted)) with *Mfrs. Life Ins. Co. v. Super. Ct.*, 895 P.2d 56, 63 (Cal. 1995) (alluding to "the impropriety of citing and relying on a vacated [California] Court of Appeal opinion") and *Lawrence v. U.S.*, 488 A.2d 923, 924 n. 3 (D.C. 1985) (stating that a vacated opinion "cannot be cited as authority"); see generally Martha J. Dragich, *Will the Federal Courts of Appeals Perish If They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose A Greater Threat?* 44 Am. U. L. Rev. 757, 793 (1995) (noting that "courts disagree about the propriety of relying on a vacated opinion, even for persuasive effect").

25. See *Sullivan*, *supra* n. 16, at 1144 (arguing that "vacated opinions have begun to play an increasingly significant role in the development of the law, a role that remains largely unappreciated and completely unexamined").

26. Arizona has considerable—and conflicting—case law touching upon the present topic. However, the article's focus on Arizona law also reflects the fact that Arizona is the jurisdiction in which the author is licensed to practice. *Cf.* Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice By Transactional Lawyers*, 36 S. Tex. L. Rev. 665, 673 (1995) ("[L]awyers often find that they must work with the law of a jurisdiction in which they are not admitted to practice. Generally, a lawyer is required . . . to know and apply, with roughly equal competence, the law from the lawyer's home state as well as the law from a foreign jurisdiction.").

27. See generally *Ritchie v. Grand Canyon Scenic Rides*, 799 P.2d 801, 805 (Ariz. 1990) ("[P]rocedural uniformity on a national scale is a generally desirable goal to which state courts aspire.").

28. See *Maxwell v. Aetna Life Ins. Co.*, 625 P.2d 939, 941 (Ariz. App. Div. 1 1981) ("The present civil appellate rules have as their source not only our former court rules, but the Federal Rules of Appellate Procedure.").

29. See e.g. *Jefferson v. Pneumo Servs. Corp.*, 699 S.W.2d 181, 185 (Tenn. App. Middle Section 1985) ("[Our] criteria are substantially similar to those found in . . . the Federal Rules of Appellate Procedure as well as analogous rules adopted by other states. Therefore, decisions from these jurisdictions can provide persuasive precedents when we are called upon to construe our own rules.").

purpose of which is to promote uniformity of appellate procedure throughout the country.³⁰

Part II of the article contains a discussion of the courts' general view of the precedential value of vacated opinions. In Part III, the author discusses the persuasive value of opinions vacated for reasons that do not cast doubt on the propositions for which they are cited. Part IV considers the propriety of citing vacated opinions for propositions that were repudiated by the vacating court. In Part V, the author discusses the "depublication" of appellate court opinions,³¹ and the impact of this controversial practice on the citation of vacated opinions. The author ultimately concludes that a vacated Arizona appellate court opinion—indeed, a vacated opinion issued by any court³²—should be citable for its persuasive value,³³ as long as the citing party advises the court of the fact that the opinion was vacated.

II. VACATED OPINIONS ARE NOT "PRECEDENT."

As Arizona's appellate court of last resort,³⁴ the Arizona

30. See *Minority Employers of Tenn. Dept. of Empl. Sec., Inc. v. Tenn. Dept. of Empl. Sec.*, 901 F.2d 1327, 1335 n. 4 (6th Cir. 1990) ("[I]t is the special domain of the Supreme Court, assisted by input from the judicial conference of the United States, to promulgate Federal Rules of Appellate Procedure for uniform application throughout all of the circuits." (citation omitted)); cf. *Tandy Elecs., Inc. v. Fletcher*, 554 So. 2d 308, 311 (Miss. 1989) ("The rules at issue here have been patterned after the Federal Rules of Appellate Procedure. We have said many times that the federal construction of rules we have adopted are 'persuasive of what our construction of our similarly worded rule ought to be.'" (quoting *Smith v. H.C. Bailey Cos.*, 477 So. 2d 224, 233 (Miss. 1985))).

31. See e.g. *Ariz. R. Civ. App. P. 28(f)*; *Ariz. R. Sup. Ct. 111(g)*. For an academic discussion of the Arizona Supreme Court's authority to depublish opinions, see Michael A. Berch, *Analysis of Arizona's Depublication Rule and Practice*, 32 *Ariz. St. L.J.* 175 (2000).

32. See e.g. *Starkins v. Bateman*, 724 P.2d 1206, 1211 (*Ariz. App. Div. 1* 1986) ("[T]he District of Columbia Circuit gave the [present] matter extensive consideration in *Tavoulareas v. Piro*, 759 F.2d 90, vacated for rehearing en banc, 763 F.2d 1472 (D.C. Cir. 1985). . . . While we do not rely on *Tavoulareas* as precedent, there is much in the [vacated] majority opinion that we find persuasive.").

33. Cf. Berch, *supra* n. 31, at 200 (asserting that the Arizona appellate courts "should . . . allow[] the citation of all decisions for their persuasive value, if any").

34. See *Chavez v. Campbell*, 397 F. Supp. 1285, 1287 (D. Ariz. 1973); *Calvert v. Farmers Ins. Co. of Ariz.*, 697 P.2d 684, 690 (Ariz. 1985); see also *Ariz. Podiatry Assn. v. Dir. of Ins.*, 422 P.2d 108, 112 (Ariz. 1966) ("If a right of appeal is granted, then the ultimate right to determine the appeal rests in the supreme court . . .").

Supreme Court can affirm, reverse, or modify a decision of the state's intermediate appellate court,³⁵ the Arizona Court of Appeals.³⁶ Like other state courts of last resort,³⁷ the Arizona Supreme Court also has the authority to vacate opinions issued by the state's intermediate appellate court,³⁸ which it often does when it disagrees with the lower court's reasoning.³⁹ When the supreme court exercises its authority to vacate an Arizona Court of Appeals opinion,⁴⁰ the vacated opinion is no longer

35. See *Miller v. Bd. of Supervisors of Pinal Co.*, 855 P.2d 1357, 1361 (Ariz. 1993) (citing Ariz. Rev. Stat. Ann. § 12-2103).

36. See *Judd v. Indus. Comm. Of Ariz.*, 532 P.2d 196, 201 (Ariz. App. Div. 1 1975) (“[W]e are an intermediate appellate court.”).

37. See e.g. *Powell v. Anderson*, 660 N.W.2d 107, 113 (Minn. 2003) (“[J]urisdiction to vacate a final decision of the court of appeals arises under Minnesota Rule of Civil Appellate Procedure 102 Such jurisdiction also exists in this court under our supervisory power to ensure the fair administration of justice.”); *Crist v. Moffatt*, 389 S.E.2d 41, 44 (N.C. 1990) (“[W]e elect to vacate the Court of Appeals opinion . . . and to consider the case on the merits. We do so pursuant to the Constitution of North Carolina, article IV, section 12(1), which gives this Court jurisdiction ‘to review upon appeal any decision of the courts below, upon any matter of law or legal inference,’ and gives it ‘general supervision and control over the proceedings of the other courts.’”).

38. See *S.W. Sav. & Loan Assn. v. Mason*, 751 P.2d 526, 527 (Ariz. 1988) (referring to the supreme court's “discretion to order that [an] opinion of the court of appeals be vacated”); cf. *Reilly v. Waukesha Co.*, 535 N.W.2d 51, 54 (Wis. App.) (“Appellate review, of course, includes the power to vacate any order or judgment properly before the appellate court.”), *review denied*, 537 N.W.2d 572 (Wis. 1995).

39. See e.g. *Ft. Lowell-NSS Ltd. Partn. v. Kelly*, 800 P.2d 962, 966 (Ariz. 1990) (“Because we disagreed with the opinion of the court of appeals, we . . . vacate the opinion of the court of appeals”); *Godbehere v. Phoenix Newspapers, Inc.*, 783 P.2d 781, 790 (Ariz. 1989) (“Because we disagree with the court of appeals’ reasoning, we vacate [its] opinion and remand to the trial court for further proceedings consistent with this opinion.”); *State v. Glover*, 767 P.2d 12, 14 (Ariz. 1988) (“We disagree with the analysis of the Court of Appeals and vacate the decision.”); *Chaney Bldg. Co. v. City of Tucson*, 716 P.2d 28, 30 (Ariz. 1986) (“We disagree with the appeals court opinion and vacate [it].”); *Edsall v. Super. Ct. in and for Pima Co.*, 693 P.2d 895, 904 (Ariz. 1984) (“Because we disagree with the reasoning of the Court of Appeals, the opinion of the Court of Appeals is vacated.”).

40. Both the Arizona Supreme Court and the Arizona Court of Appeals also occasionally vacate their own opinions, either in whole or in part. See e.g. *Clouse ex rel. Clouse v. State*, 16 P.3d 757, 759 ¶ 7 (Ariz. 2001); *State v. Alvarez*, 143 P.3d 668, 669 ¶ 2 (Ariz. App. Div. 2 2006); *State v. Ibanez*, 72 P.3d 354, 355 ¶ 3 (Ariz. App. Div. 1 2003); see also *Wheeler v. Goulart*, 623 A.2d 1177, 1178 (D.C. 1993) (“[S]ubstantial authority has recognized that the vacation by a deciding appellate court of its own opinion once rendered is a discretionary matter”). One state appellate court has observed that “[a]n appellate opinion which has been . . . vacated by the court which rendered it is ordinarily of no precedential value and is not to be cited as controlling authority for any purpose.” *Occidental Life Ins. Co. of Cal. v. State Bd. of Equalization*, 185 Cal. Rptr. 779, 781 n.1

considered precedential,⁴¹ and courts in subsequent cases are unlikely to be persuaded by (or perhaps even willing to consider)⁴² the court of appeals' repudiated reasoning.⁴³

In *Stroud v. Dorr-Oliver, Inc.*,⁴⁴ for example, the appellant cited an Arizona Court of Appeals opinion, *Santanello v. Cooper*,⁴⁵ that the Arizona Supreme Court had later vacated.⁴⁶ In refusing to consider the court of appeals' analysis in *Santanello*,⁴⁷ the supreme court in *Stroud* stated that "[o]nce an

(Cal. App. 2d Dist. 1982); see also Sullivan, *supra* n. 16, at 1165 (observing that an opinion "may be vacated by either the entering court itself or by a higher court, and . . . may in either instance be vacated for reasons that cast its premises into doubt").

41. See *Stephenson v. Nastro*, 967 P.2d 616, 621 ¶ 15 (Ariz. App. Div. 1 1998) (holding that a case that "has been vacated by [the] supreme court . . . is of no precedential value"); *Francis v. Ariz. Dept. of Transp.*, 963 P.2d 1092, 1094 ¶ 11 (Ariz. App. Div. 1 1988) (noting that a court of appeals opinion "became binding precedent when it was published," and "remains so until . . . it is vacated by our supreme court"); cf. *Viault v. U.S.*, 609 F. Supp. 2d 518, 526 n.5 (E.D.N.C. 2009) (noting that an opinion "lost its precedential value when [it] . . . was vacated").

42. See e.g. *John M. v. Ariz. Dept. of Econ. Sec.*, 173 P.3d 1021, 1024 ¶ 8 (Ariz. App. Div. 2 2007) ("In support of his argument, [the appellant] relies heavily on *Donald W., Sr. v. Arizona Department of Economic Security*, 215 Ariz. 199, 159 P.3d 65 (App. 2007), but the supreme court has since vacated relevant portions of the decision Consequently, we do not consider that decision." (citation omitted)); cf. *Moallin v. Cangemi*, 427 F. Supp. 2d 908, 923 n. 8 (D. Minn. 2006) ("The Court, while aware of the vacated opinion, has not afforded it any weight given its subsequent vacation."); see generally *Franklin Sav. Corp. v. U.S.*, 56 Fed. Cl. 720, 734 n. 18 (2003) ("It does not take a prophet . . . to divine that a court would not, and could not, consider the contents of a vacated opinion."), *aff'd*, 97 F. Appx. 331 (Fed. Cir. 2004).

43. See e.g. *State v. Pitre*, 107 P.3d 939, 942 ¶ 7 (Ariz. App. Div. 1 2005) (declining to follow a prior Arizona Court of Appeals decision because "the Arizona Supreme Court vacated in relevant part that portion of [the] decision . . . that formed the basis for [the appellant's] appeal"), *remanded for reconsideration*, 2005 WL 3275916 (Ariz. Nov. 29, 2005), *vacated*, 2006 WL 1686506 (Ariz. App. Div. 1 Feb. 7, 2006); see also *St. Paul Fire & Marine Ins. Co. v. Muniz*, 504 P.2d 546, 547 (Ariz. App. Div. 2 1972) (reaching "a different conclusion" than in a prior vacated opinion because the Arizona Supreme Court "expressed reservations" about the opinion's reasoning).

44. 542 P.2d 1102 (Ariz. 1975).

45. 468 P.2d 390 (Ariz. App. Div. 1 1970), *vacated*, 475 P.2d 246 (Ariz. 1970).

46. See *Santanello v. Cooper*, 475 P.2d 246, 247 (Ariz. 1970).

47. The Arizona Supreme Court is not obligated to follow any Arizona Court of Appeals opinion, vacated or otherwise. See *Wilderness World, Inc. v. Dept. of Revenue*, 895 P.2d 108, 112 (Ariz. 1995) ("[W]e, as the court of last resort . . . are not bound by a court of appeals opinion."); cf. *Francis*, 963 P.2d at 1094 ¶ 10 ("Under the doctrine of stare decisis, once a point of law has been established, it must be followed by all courts of lower rank in subsequent cases where the same legal issue is raised." (emphasis added)). Nevertheless, Arizona Court of Appeals decisions may be "highly persuasive" in

opinion of the Court of Appeals has been vacated by this court, it is of no force and effect and is not authority.”⁴⁸ The Arizona Court of Appeals has characterized vacated opinions in essentially the same manner,⁴⁹ as have courts in a number of other jurisdictions.⁵⁰

In *Bolm v. Custodian of Records of Tucson Police Department*,⁵¹ the Arizona Court of Appeals interpreted *Stroud* to prohibit litigants from even citing vacated Arizona appellate court opinions in subsequent cases.⁵² In *McMurray v. Dream Catcher USA, Inc.*,⁵³ the court of appeals extended this reasoning one step further, characterizing its own prior reliance on its vacated opinion in *Mark Lighting Fixture Co. v. General Electric Supply Co.*⁵⁴ in *Harris v. Reserve Life Insurance Co.*⁵⁵ as inappropriate because vacated opinions are not precedential.⁵⁶ Again, the Arizona courts are not alone in holding these views.⁵⁷

subsequent cases. *Pena v. Indus. Commn. of Ariz.*, 683 P.2d 309, 315 (Ariz. App. Div. 1 1984).

48. *Stroud*, 542 P.2d at 1110 n. 2.

49. See e.g. *Natl. Indem. Co. v. St. Paul Ins. Co.*, 724 P.2d 578, 579 (Ariz. App. Div. 1 1985) (citing *Stroud*), *approved in part and vacated in part*, 724 P.2d 544 (Ariz. 1986); see also *State v. Groshong*, 852 P.2d 1251, 1253 (Ariz. App. Div. 2 1993) (“[W]e cannot ignore the fact that the decision on which [the trial court] relied has . . . been vacated. It is no longer the law.”).

50. See e.g. *Musnick v. King Motor Co. of Fort Lauderdale*, 325 F.3d 1255, 1257 n. 1 (11th Cir. 2003) (“A vacated decision has no effect whatsoever.”); *Creighton v. Anderson*, 922 F.2d 443, 449 (8th Cir. 1990) (“A vacated opinion has no further force and effect.”); *Schmidt v. Cline*, 127 F. Supp. 2d 1169, 1177 (D. Kan. 2000) (“Cases which are vacated are rendered void and can have no effect.”); *Pauley ex rel. Pauley v. Reinohl*, 848 A.2d 561, 566 (Del. 2003) (“A vacated decision has no force and effect.”), *vacated*, 848 A.2d 569 (Del. 2004).

51. 969 P.2d 200 (Ariz. App. Div. 2 1998).

52. See *id.* at 203 n. 2 (“The City’s citation to this court’s decision in *State v. Roscoe*, 182 Ariz. 332, 897 P.2d 634 (App. 1994), is inappropriate because our supreme court vacated that opinion.” (citing *Stroud*)); see also *State v. Ward*, 2009 WL 1419464 at *4 n. 2 (Ariz. App. Div. 2 May 20, 2009) (“We note with disapproval that, in support of [a] proposition in his opening brief, [the appellant] cites an appellate decision that has been vacated by our supreme court.”).

53. 202 P.3d 536 (Ariz. App. Div. 2 2009).

54. 745 P.2d 123 (Ariz. App. Div. 1 1986), *vacated*, 745 P.2d 85 (Ariz. 1987).

55. 762 P.2d 1334 (Ariz. App. Div. 1 1988).

56. See *McMurray*, 202 P.3d at 540 ¶ 12 (“[T]o the extent the relevant part of the *Harris* decision . . . relied on *Mark Lighting*, it did so inappropriately. ‘Vacated cases have no precedential value.’” (quoting *Wertheim*, 122 P.3d at 5 n. 5)). Despite its analysis in

III. THE IMPACT OF OPINIONS VACATED ON "OTHER GROUNDS"

Like its counterparts in other states,⁵⁸ the Arizona Supreme Court occasionally vacates an opinion for a reason that does not necessarily reflect disagreement with the lower court's substantive analysis,⁵⁹ such as when the appellant lacked standing⁶⁰ or the case was moot—or not yet ripe⁶¹—when the

McMurray, the Arizona Court of Appeals also cited *Mark Lighting* with approval in *Britt v. Steffen*, 205 P.3d 357, 359–60 (Ariz. App. Div. 1 2008).

57. See e.g. *Faus Group, Inc. v. U.S.*, 358 F. Supp. 2d 1244, 1254 n. 17 (Ct. Intl. Trade 2004) ("Because the [relevant] portion of the decision was vacated, reliance [on] or citation thereto is precluded."); *Gilmore Steel Corp. v. U.S.*, 585 F. Supp. 670, 674 n. 3 (Ct. Intl. Trade 1984) (characterizing the plaintiff's reliance on a vacated opinion as "ill-founded since, having been vacated, it is no longer binding precedent"); *Cash in Advance*, 612 S.E.2d at 102 ("[T]he trial court's reliance upon the vacated opinion . . . is not well founded, as the opinion has no precedential value."); see also *N.W. Resource Info. Ctr., Inc. v. N.W. Power Planning Council*, 35 F.3d 1371, 1385–86 (9th Cir. 1994) (asserting that a court's reliance on a vacated judicial decision "if allowed, would undermine the validity and authoritativeness of final decisions").

58. See e.g. *State ex rel. State Office for Servs. to Children & Families v. Williams*, 7 P.3d 655, 657–58 n. 5 (Or. App. 2000) (discussing a prior opinion that "was vacated because the case became moot before the opinion issued"); see also *Goldman v. Goldman*, 883 P.2d 164, 166 n.3 (Okla. 1994) ("When a dispute becomes moot . . . before an appellate court, . . . the then-extant appellate pronouncement will sometimes be vacated, often in response to a motion by one or by all the parties."); *Guardian ad Litem v. State ex rel. C.D.*, 245 P.3d 724, 730 (Utah 2010) ("If a case becomes moot after an appeal has been filed, the decision of whether to vacate the lower court's order is a matter of discretion.").

59. See e.g. *Hogan v. Washington Mut. Bank*, 277 P.3d 781, 784 ¶ 13 (Ariz. 2012) ("[A]lthough we agree with the result reached by the court of appeals, its opinion is vacated."); *State v. Lara*, 830 P.2d 803, 806 (Ariz. 1992) ("Although we agree with the result reached by the Court of Appeals in *Malone*, its opinion in that case is . . . vacated as having been superseded by this opinion."); *Shelby v. Action Scaffolding, Inc.*, 827 P.2d 462, 469 (Ariz. 1992) ("Although the court of appeals properly applied the Settlement-First Formula, we vacate its opinion."), *superseded*, 975 P.2d 114, 117 n. 1 (Ariz. App. Div. 1 1999); *Calvert v. Farmers Ins. Co. of Ariz.*, 697 P.2d 684, 686 (Ariz. 1985) ("We agree with the Court of Appeals that the [insurer's] . . . exclusionary provision contravenes the policy underlying our uninsured motorist statute. We vacate the Court of Appeals' opinion, however, to fully explain our reasoning."); see also *Hanen v. Willis*, 423 P.2d 95, 96 (Ariz. 1967) ("This Court has vacated the decision of the Court of Appeals for the purpose of review.").

60. See e.g. *Bennett v. Brownlow*, 119 P.3d 460, 463 ¶ 19 (Ariz. 2005) ("[W]e hold that [appellant] lacks standing to maintain this action. We vacate the court of appeals opinion and remand the case to the superior court with instructions to dismiss the complaint."); *State v. Musser*, 977 P.2d 131, 131 ¶ 1 (Ariz. 1999) ("Because we hold that the court erred in granting appellant standing to challenge the constitutionality of the statute, we vacate the decision of the court of appeals and reinstate appellant's conviction."); see also *Ruiz v.*

opinion was issued.⁶² The supreme court also may vacate only part of an opinion with which it disagrees,⁶³ in which case it may or may not express agreement with the reasoning in the remainder of the opinion.⁶⁴ Neither the supreme court in

Hull, 957 P.2d 984, 987 n. 1 (Ariz. 1988) (“[T]he Ninth Circuit’s opinion in *Yniguez v. AEO* was vacated by the United States Supreme Court because *Yniguez* lacked standing.”).

61. *Cf. Kapuwai v. City and Co. of Honolulu*, 211 P.3d 750, 751 (Haw. 2009) (“[T]he issue of attorney’s fees and costs was not ripe for decision. Accordingly, we vacate Section II of the [lower court’s] opinion relating to attorney’s fees and costs.”); *Crompton v. Mitchell*, 281 S.E.2d 1, 2 n. 1 (N.C. 1981) (“The controversy herein presented has been previously decided by the Court of Appeals. Without expressing our view as to the merits, we vacated this opinion on the ground it was prematurely decided.” (citations omitted)).

62. *See e.g. Sanson v. Gonzales*, 688 P.2d 641, 642 (Ariz. 1984) (“Concluding . . . that the issues . . . are moot, we order that . . . the opinion of the court of appeals is vacated.”); *Bd. of Supervisors v. Robinson*, 463 P.2d 536, 537 (Ariz. 1970) (“[T]he case was moot even before it reached the Court of Appeals, and long before it reached this Court. . . . [T]he decision of the Court of Appeals is vacated” (citation omitted)); *cf. State v. Million*, 556 P.2d 338, 342 (Ariz. App. Div. 1 1976) (“[A] motion to dismiss the case . . . was granted by the trial court. That being so, the issues are moot. . . . The . . . appeal is dismissed and the opinion previously made by this court is vacated.”).

63. *See e.g. Paradigm Ins. Co. v. Langerman Law Off.*, 24 P.3d 593, 602 ¶ 31 (Ariz. 2001) (“[W]e vacate the court of appeals’ opinion in part . . . and remand to the trial court for further proceedings consistent with this opinion.”); *CS & W Contractors, Inc. v. S.W. Sav. & Loan Assn.*, 883 P.2d 404, 406 (Ariz. 1994) (“Although we partially vacated the court of appeals’ opinion on review, we did not disturb the holding that there should be some sort of apportionment”); *Luedtke v. Ariz. Family Rests. of Tucson, Inc.*, 774 P.2d 804, 804 (Ariz. 1989) (“As we have granted review, we exercise our discretion and vacate . . . part of the court of appeals’ opinion”); *Tanque Verde Enters. v. City of Tucson*, 691 P.2d 302, 304–05 (Ariz. 1984) (“[A]s the Court of Appeals grounded its opinion concerning confiscation on erroneous assumptions of law, we vacate that portion of the opinion.”); *see also Rawlings v. Apodaco*, 726 P.2d 565, 580 (Ariz. 1986) (“The court of appeals ruled upon several issues other than that pertaining to bad faith. We accepted review only on the bad faith question. Thus, although differing with the court of appeals on that issue, we should not have vacated the other portions of its opinion.”).

64. *Compare Morris v. Achen Constr. Co.*, 747 P.2d 1211, 1213 (Ariz. 1987) (“We vacate parts IV and V of the court of appeals’ opinion. . . . Since we do not reach the question presented by issue I.B, we express no opinion relative to the propriety of the language of the recoupment instruction referred to in the court of appeals’ opinion.”) *with Bank of Am. v. J. & S. Auto Repairs*, 694 P.2d 246, 247 (Ariz. 1985) (“We agree with the Court of Appeals’ statutory analysis . . . and approve that part of the opinion. We disagree, however, with its discussion on unjust enrichment and the Restatement of Restitution, and thus vacate that portion of the opinion.”) *and Cohen v. State*, 588 P.2d 299, 301 (Ariz. 1978) (“We agree with the Court of Appeals on issues 2 and 4, and adopt their opinion . . . in that regard. In all other respects the opinion is vacated.”); *see also Hendry v. Indus. Commn.*, 532 P.2d 882, 885 (Ariz. App. Div. 1) (“Although the Supreme Court vacated the Court of Appeals opinion, the Supreme Court specifically approved portions of the Court of Appeals opinion.”), *vacated*, 538 P.2d 382 (Ariz. 1975).

*Stroud*⁶⁵ nor the court of appeals in *Bolm*⁶⁶ or *McMurray*⁶⁷ discussed the fact that at least some of the legal analysis in an opinion vacated under these circumstances may remain valid.⁶⁸

Summarizing Arizona appellate practice, two respected Arizona appellate attorneys have asserted that a vacated opinion can be cited as authority in subsequent cases if it was “vacated on other grounds”⁶⁹—that is, on grounds that do not call into question the proposition for which the opinion is being cited.⁷⁰ While this is the view prevailing in several other states⁷¹ and

65. 542 P.2d 1102.

66. 969 P.2d 200.

67. 202 P.3d 536.

68. See e.g. *Grupe v. Cal. Coastal Commn.*, 212 Cal. Rptr. 578, 588 n. 9 (Cal. App. 1st Dist. 1985) (“Since the case was not vacated because of any infirmity in the court’s reasoning, we believe it still has instructive, if not precedential, value.”); see also *Garcia v. Spun Steak Co.*, 13 F.3d 296, 301 (9th Cir. 1993) (Reinhardt, J., dissenting from denial of rehearing en banc) (“[T]he validity of a case’s reasoning is unaffected when it is vacated as moot.”); *Smothers v. Benitez*, 806 F. Supp. 299, 307 n. 12 (D.P.R. 1992) (“While a decision which has been vacated as moot has no precedential value . . . the reasoning remains persuasive.”).

69. Susan M. Freeman & Paul G. Ulrich, *Arizona Civil Appellate Procedure*, 24 Ariz. St. L.J. 1211, 1281 (1992). Freeman and Ulrich are coauthors of the *Arizona Appellate Handbook* chapter on civil appeals. See Freeman & Ulrich, *supra* n. 23. The handbook “was prepared and published by a committee appointed by [the Arizona Supreme] Court with the assistance of volunteer members of the State Bar of Arizona.” *State v. Smith*, 591 P.2d 978, 980 n. 1 (Ariz. 1979); see also *Evans v. Arthur*, 678 P.2d 943, 945 (Ariz. 1984) (“The handbook is a practical guide to appellate procedure, published by the Appellate Handbook Committee of the State Bar as part of the bar’s continuing legal education activities.”). The Arizona Supreme Court has described the handbook as “a valuable and helpful tool for all Arizona appellate practitioners,” and cautioned that “in the absence of contrary authority, it would be prudent for Arizona practitioners to follow the Arizona Appellate Handbook.” *Barassi v. Matison*, 636 P.2d 1200, 1202 n. 4 (Ariz. 1981).

70. See Sullivan, *supra* n. 16, at 1148 (“[C]iting an opinion ‘vacated on other grounds’ is merely noting that the views cited were not directly contradicted by the higher court’s actions.”); cf. *Wolens v. Am. Airlines, Inc.*, 1988 WL 116828 at *3 n. 3 (N.D. Ill. Oct. 25, 1988) (“If . . . [a] reversed case is still good law for the proposition for which it is cited, . . . the proper citation form is ‘reversed on other grounds.’”).

71. See e.g. *West v. State*, 797 A.2d 1278, 1282 (Md. 2002) (“A [Maryland] Court of Special Appeals’ opinion . . . vacated in its entirety by this Court on another ground, may, depending on the strength of its reasoning, constitute some persuasive authority in the same sense as other dicta may constitute persuasive authority.”); see also *Buell-Wilson v. Ford Motor Co.*, 73 Cal. Rptr. 3d 277, 336 (Cal. App. 4th Dist.) (“The California Supreme Court routinely cites and relies on cases . . . ‘vacated on other grounds.’”), *superseded*, 187 P.3d 887 (Cal. 2008), *review dismissed*, 207 P.3d 1 (Cal. 2009).

some federal courts,⁷² the Arizona Supreme Court decision the authors cited for the proposition, *O'Hara v. Superior Court*,⁷³ does not directly support it,⁷⁴ and there is colorable support for a contrary conclusion.⁷⁵

The Arizona Court of Appeals implicitly addressed this issue in a series of cases decided before the Arizona Supreme Court characterized vacated opinions as being of no force and effect in *Stroud*.⁷⁶ In the first such case, *St. Gregory's Church v. O'Connor*,⁷⁷ the court of appeals quoted with approval from its prior opinion in *Myers v. Rollette*,⁷⁸ stating: "We recognize that . . . our decision [in *Myers*] was vacated. . . . We do not find in the Supreme Court opinion that our above-quoted statement was discredited by the Supreme Court and we feel free to again repeat the same statement."⁷⁹ Essentially the same view was

72. See e.g. *Nez Perce Tribe*, 847 F. Supp. at 808 ("On occasion, the Ninth Circuit has relied on a reported opinion which has been subsequently vacated on other grounds."); see also *Piper v. Perrin*, 560 F. Supp. 253, 256 n. 6 (D.N.H. 1983) ("Although *Love v. Fitzharris* was vacated on other grounds, its holding has since been cited as persuasive authority in several cases . . .").

73. 674 P.2d 310 (Ariz. 1983).

74. The *O'Hara* court merely cited a case that was vacated on other grounds. See *id.* at 313 (citing *Adams v. Indus. Commn.*, 547 P.2d 1089 (Ariz. App. Div. 1 1976), *vacated on other grounds*, 552 P.2d 764 (Ariz. 1976)). The court did not discuss whether it is appropriate for courts to rely on vacated decisions, let alone whether litigants may do so. But see Sullivan, *supra* n. 16, at 1146 ("[T]he numerous courts that cite a vacated opinion while adding the modifying 'on other grounds' strongly suggest . . . the opinion retains some force precisely because that vacatur was predicated on grounds other than those for which the opinion is now being cited.").

75. See e.g. *Natl. Indem. Co. v. St. Paul Ins. Co.*, 724 P.2d 578, 579 (Ariz. App. Div. 1 1985) ("This opinion . . . was vacated on other grounds by the Arizona Supreme Court Once an opinion of the Court of Appeals has been vacated by the Arizona Supreme Court, it is of no force and effect and is not authority."), *approved in part and vacated in part*, 724 P.2d 544 (Ariz. 1986); see also *Frank v. United Airlines, Inc.*, 216 F.3d 845, 862 (9th Cir. 2000) (O'Scannlain, J., concurring in part and dissenting in part) ("The majority makes much of the fact that *Arnett* was vacated 'on other grounds,' but the majority's distinction does not alter the fact that *Arnett* is utterly devoid of legal force." (citation omitted)); *Durning v. CitiBank, N.A.*, 950 F.2d 1419, 1424 n. 2 (9th Cir. 1991) ("Although the [appellant] contends that the decision [on which it relies] was 'vacated on other grounds,' we find that contention curious. A decision may be reversed on other grounds, but a decision that has been vacated has no precedential authority whatsoever.").

76. See nn. 44–48, *supra*, and accompanying text.

77. 477 P.2d 540 (Ariz. App. 1 1970).

78. 429 P.2d 677 (Ariz. App. 1967), *vacated*, 439 P.2d 497 (1968).

79. *St. Gregory's Church*, 477 P.2d at 544; cf. *Cabazon Band of Mission Indians v. Smith*, 249 F.3d 1101, 1112 (Browning, J., dissenting) ("Since the Court has never

expressed in two other pre-*Stroud* court of appeals decisions, *Verdex Steel & Construction Co. v. Board of Supervisors*⁸⁰ and *Chavez v. Industrial Commission*.⁸¹ Courts in other states have reached similar results.⁸²

The Arizona Court of Appeals took a less deferential view of a prior vacated opinion in *Balestrieri v. Hartford Accident and Indemnity Co.*,⁸³ another case decided shortly before *Stroud*.⁸⁴ The plaintiff in *Balestrieri* relied on the court of appeals' prior opinion in *Mazon v. Farmers Insurance Exchange*⁸⁵ in arguing that an insurer violated its statutory obligation to provide uninsured motorist coverage⁸⁶ when it limited the coverage available under its policy to situations in

renounced the result or rationale of *Queets* on substantive grounds, we should accept the vacated opinion as solidly reasoned and formally embrace it as of precedential value."), *withdrawn*, 271 F.3d 910 (9th Cir. 2001).

80. 509 P.2d 240 (Ariz. App. Div. 1 1973). The *Verdex Steel* court "recognize[d] that the Court of Appeals opinion . . . was vacated on review" and noted that it "concur[red] with the reasoning of the Court of Appeals, [on] an issue expressly not decided on review." *Id.* at 243; cf. *Valenciano v. Bateman*, 323 F. Supp. 600, 602-03 (D. Ariz. 1971) (following a vacated Arizona Court of Appeals opinion because the opinion "was vacated by the Arizona Supreme Court . . . without discussion of the merits").

81. 520 P.2d 1178 (Ariz. App. Div. 1 1974), *vacated*, 529 P.2d 1181 (Ariz. 1974). In *Chavez*, the court stated: "[W]e cite our *Verdugo* opinion . . . with the full realization that . . . our opinion was vacated. We believe that the observation [in the opinion concerning] the appropriate remedy is still viable." *Id.* at 1180.

82. See e.g. *Boxdorfer v. DaimlerChrysler Corp.*, 790 N.E.2d 391, 394 n. 2 (Ill. App. 2003) ("We fully acknowledge that *Reichert* was vacated by the Illinois Supreme Court. . . . Although we realize that *Reichert* is no longer precedential, we mention it because we continue to agree with its analysis . . ."); *Erickson v. Am. Golf Corp.*, 96 P.3d 843, 847 (Or. App. 2004) ("[O]ur opinion in *Banister I* was vacated by the [Oregon] Supreme Court. . . . [H]owever, that action on the Supreme Court's part does not imply a rejection of our analysis. In its memorandum opinion vacating our opinion, the court expressly declared that it was vacating the opinion without expressing an opinion on the merits. That disposition left us free to adhere to *Banister I*." (citation and internal punctuation omitted)).

83. 526 P.2d 779 (Ariz. App. Div. 1 1974), *vacated*, 540 P.2d 126 (Ariz. 1975), *overruled*, *Lowing v. Allstate Ins. Co.*, 859 P.2d 724, 732 (Ariz. 1993).

84. The Supreme Court did not discuss the court of appeals' opinion in *Balestrieri* when it decided *Stroud* the following year, perhaps—somewhat ironically—because it had recently vacated the *Balestrieri* opinion. See *Balestrieri v. Hartford Accident & Indem. Ins. Co.*, 540 P.2d 126, 126 (Ariz. 1975).

85. 475 P.2d 957 (Ariz. App. Div. 2 1970), *vacated*, 491 P.2d 455 (Ariz. 1971).

86. By statute in Arizona, an insurer must "extend a written notice offering uninsured motorist coverage to an insured in an amount equal to the insured's liability coverage." *Progressive Cas. Ins. Co. v. Estate of Palomera-Ruiz*, 231 P.3d 384, 385 ¶ 1 (Ariz. App. Div. 1 2010).

which there is physical contact between the insured (or the insured's vehicle) and an uninsured motor vehicle.⁸⁷

The *Balestrieri* court acknowledged the potential relevance of its analysis in *Mazon*,⁸⁸ but noted that the Arizona Supreme Court vacated the *Mazon* opinion.⁸⁹ Although the supreme court declined to address the portion of *Mazon* on which the plaintiff in *Balestrieri* was relying,⁹⁰ leaving open the possibility that the court of appeals' interpretation of the uninsured motorist statute remained valid,⁹¹ the *Balestrieri* court held that the issue of whether an insurer can limit its uninsured motorist coverage to physical contact situations was a matter of first impression in Arizona.⁹²

The analysis in *Balestrieri* is consistent with the conclusions reached by several other courts⁹³ (including, in one

87. See *Balestrieri*, 526 P.2d at 780 (discussing Ariz. Rev. Stat. Ann. § 20-259.01 (2002)). For an academic discussion of this issue, see Robert K. Lewis, Student Author, *The Physical Contact Rule for Uninsured Motorist Coverage in Arizona: Where We Were, Where We Are, Where We Ought To Be*, 36 Ariz. L. Rev. 1033 (1994).

88. See *Balestrieri*, 526 P.2d at 780 ("[O]ur decision in *Mazon* . . . [held] that uninsured motorist coverage which required physical contact with the uninsured automobile violated [the uninsured motorist statute].").

89. See *id.* ("[O]n review, our Supreme Court found error in a different area of our decision and vacated the entire case . . ."). In *Mazon*, the supreme court held that the court of appeals erred in rejecting the trial court's determination that there was no causal connection between the injury the plaintiff in that case suffered when hit by a stone thrown from an uninsured motorist's vehicle "and the ownership, maintenance or use of that vehicle," as also was necessary in order to trigger coverage under the terms of the policy at issue. *Mazon v. Farmers Ins. Exch.*, 491 P.2d 455, 457 (Ariz. 1971).

90. See *Balestrieri*, 526 P.2d at 780 ("The court expressly refused to decide the issue before us today . . .").

91. In *Hartford Accident & Indemnity Co. v. Novak*, 520 P.2d 1368, 1373 & n. 1 (Wash. 1974), for example, the Washington Supreme Court "agree[d] with the reasoning of the Arizona Court of Appeals in *Mazon*," noting that the court's opinion in that case was vacated "on grounds other than the failure of physical contact by the offending vehicle."

92. See *Balestrieri*, 526 P.2d at 780. A number of states "have held the physical contact requirement void as contrary to statutory mandate for uninsured motorist coverage." *State Farm Mut. Auto. Ins. Co. v. Brudnock*, 727 P.2d 321, 324 (Ariz. 1986) (Feldman, J., dissenting), *overruled*, *Lowing v. Allstate Ins. Co.*, 859 P.2d 724, 732 (Ariz. 1993). The Arizona Supreme Court ultimately reached the same conclusion. See *Lowing*, 859 P.2d at 732 ("Physical contact requirements, by restricting coverage to only those unidentified drivers who actually hit the insured, are in direct conflict with the statute and are void.").

93. See e.g. *Nez Perce Tribe*, 847 F. Supp. at 807-08 ("[The prior opinion] was vacated . . . on other grounds in a subsequent en banc decision. . . . Therefore, it appears that this Court is required to address and determine an issue of first impression without the benefit of any binding precedent for guidance or direction."); *State v. Akins*, 675 N.W.2d 863, 871

instance, the federal district court in Arizona⁹⁴), and suggests that in Arizona state court litigation, at least,⁹⁵ an opinion vacated “on other grounds” is not precedential in the stronger, binding sense.⁹⁶ However, neither the analysis in *Balestrieri* nor the Arizona Supreme Court’s subsequent characterization of vacated opinions as being of no force and effect in *Stroud*⁹⁷ has prevented litigants from citing vacated Arizona appellate court opinions in support of their legal arguments,⁹⁸ or Arizona courts from relying on those opinions when deciding cases.⁹⁹ Indeed,

(Mich. App. 2003) (“Because [our prior decision] was vacated, this issue is before the Court once again as an issue of first impression.”).

94. See *Ariz. Laborers, Teamsters & Cement Masons Local 395 Pension Trust Fund v. Nevarez*, 661 F. Supp. 365, 369 (D. Ariz. 1987) (“A vacated decision has no precedential or authoritative effect. Consequently, this court must determine the [issue] as if the matter was one of first impression in the Ninth Circuit.” (footnote omitted)); but see *Prize Energy Resources, L.P. v. Santa Fe Pac. R.R. Co.*, 2009 WL 1804986 at *1 (D. Ariz. June 24, 2009) (“Because it was vacated on grounds other than those relevant to this case, *Mark Lighting* still has precedential value.”).

95. In some jurisdictions an opinion vacated on other grounds may remain precedential. See e.g. *EEOC v. City of Norfolk Police Dept.*, 45 F.3d 80, 83 (4th Cir. 1995) (assuming without deciding that a decision vacated on other grounds was “still entitled to some precedential value”); *U.S. ex rel. Foust v. Group Hospitalization & Med. Servs., Inc.*, 26 F. Supp. 2d 60, 72 (D.D.C. 1998) (suggesting that a case might “remain[] valid precedent after being vacated on other grounds”).

96. Cf. *Corporate Mgmt. Advisors, Inc. v. Artjen Complexus, Inc.*, 561 F.3d 1294, 1295 n. 1 (11th Cir. 2009) (“Although we . . . previously addressed this question in *In re First National Bank of Boston*, as that case was vacated on other grounds, we have no binding precedent to guide us.”); *Jackson v. Ga. Dept. of Transp.*, 16 F.3d 1573, 1578 n. 7 (11th Cir. 1994) (“[T]he opinion . . . was vacated on unrelated grounds and is not binding precedent”); *City of Roseville v. Norton*, 219 F. Supp. 2d 130, 155 (D.D.C. 2002) (“[T]he *State of South Dakota* decision was vacated, albeit on other grounds, and, therefore, has no precedential value.”).

97. 542 P.2d 1102; see nn. 44–48, *supra*, and accompanying text.

98. See e.g. *Wheeler v. Yuma Sch. Dist. No. One*, 750 P.2d 860, 867 (Ariz. 1988); *Taeger v. Catholic Family & Community Servs.*, 995 P.2d 721, 733 ¶ 41 (Ariz. App. Div. 1 1999); *Clark Equip. Co. v. Ariz. Prop. & Cas. Ins. Guar. Fund*, 943 P.2d 793, 799 (Ariz. App. Div. 1 1997); *Purvis v. Hartford Accident & Indem. Co.*, 877 P.2d 827, 830 (Ariz. App. Div. 1 1994); *Kadish v. Ariz. State Land Dept.*, 868 P.2d 335, 342 n. 4 (Ariz. App. Div. 1 1993); *Bus. Fin. Servs., Inc. v. AGN Dev. Corp.*, 694 P.2d 1217, 1222 (Ariz. App. Div. 1 1984).

99. See e.g. *Cota v. Indus. Indem. Co.*, 687 P.2d 1281, 1284 (Ariz. App. Div. 1 1984) (“Although Division 2’s opinion . . . has been vacated, we find its reasoning . . . sound.”); see also *Ruiz*, 957 P.2d at 987 n. 1 (agreeing “with the result and with much of the reasoning” of a federal appellate court opinion that was “vacated on other grounds unrelated to the merits”); see generally *Sullivan*, *supra* n. 16, at 1193 (“[T]he recurrent citation of vacated opinions suggests that courts do not view them as ‘erased’ by vacatur.”).

the reasoning of a vacated opinion (or for that matter any other non-precedential opinion)¹⁰⁰ may be particularly useful to a court considering an issue on which there is no prior binding precedent¹⁰¹—that is, an issue of first impression.¹⁰²

This conclusion is supported by cases from other jurisdictions,¹⁰³ and is illustrated by a series of Arizona cases decided subsequent to *Stroud*,¹⁰⁴ beginning with the Arizona Court of Appeals' decision in *Arizona Corporation Commission v. Citizens Utilities Co.*¹⁰⁵ The *Citizens Utilities* court addressed the impact of the prior vacated opinion in *Sun City Water Co. v. Arizona Corporation Commission*,¹⁰⁶ where the court of appeals held that a trial court's role in reviewing an Arizona Corporation Commission rate decision is limited to determining whether the

100. See Amy E. Sloan, *If You Can't Beat 'Em Join 'Em: A Pragmatic Approach to Nonprecedential Opinions in the Federal Appellate Courts*, 86 Neb. L. Rev. 895, 933 (2008) ("Nonprecedential opinions . . . gain prominence . . . when they . . . address a question of first impression, such that there are no prior precedential opinions for the court to follow.").

101. See e.g. *Duran v. Safeway Stores, Inc.*, 726 P.2d 1102, 1104 (Ariz. App. Div. 2 1986) ("Although the only Arizona decision directly on point was vacated on other grounds, we believe the reasoning in that case . . . to be correct." (citation omitted)); *L.W.*, 675 N.E.2d at 762 n. 2 ("[T]he court of appeals decision is vacated and held for naught. However, inasmuch as our Supreme Court has not yet written to the issue, we have no reason to reject the reasoning as set forth in [the vacated opinion].").

102. See *Detroit Edison Co. v. Mich. Dept. Envtl. Quality*, 29 F. Supp. 2d 786, 791 (E.D. Mich. 1998) (asserting that "the very definition of a question of first impression" is that "no precedent compels an answer"); *Fiore v. White*, 757 A.2d 842, 848 (Pa. 2000) ("A case of first impression is one that presents an 'entirely novel question of law,' which 'cannot be governed by any existing precedent.'" (quoting *Black's Law Dictionary*)).

103. See e.g. *Cobell v. Kempthorne*, 532 F. Supp. 2d 37, 94 n. 16 (D.D.C. 2008) (observing that "vacated holdings, in the absence of contrary authority, remain persuasive precedent" (discussing *Action Alliance of Senior Citizens v. Sullivan*, 930 F.2d 77, 83 (D.C. Cir. 1991))), *vacated and remanded sub nom. Cobell v. Salazar*, 573 F.3d 808 (D.C. Cir. 2009); *Boehner v. McDermott*, 332 F. Supp. 2d 149, 156 (D.D.C. 2004) (noting that "a vacated opinion may serve as a valuable source of guidance on the legal issues raised in the absence of contrary authority").

104. See e.g. *Pavlik v. Chinle Unified Sch. Dist.*, 985 P.2d 633, 637 ¶ 16 n. 2 (Ariz. App. Div. 1 1999) ("The supreme court vacated the court of appeals decision . . . on grounds unrelated to the [present] question. For the purposes of this decision, we assume that the reasoning of the court of appeals decision on [that] issue remains valid." (citation omitted)); see also *Sullivan*, *supra* n. 16, at 1188 ("[T]he subsequent history description 'vacated on other grounds' suggests that the opinion continues to have force on the grounds not implicated by the vacatur.").

105. 584 P.2d 1175 (Ariz. App. Div. 1 1978).

106. 547 P.2d 1104 (Ariz. App. Div. 1), *vacated*, 556 P.2d 1126 (Ariz. 1976).

Commission's decision was supported by substantial evidence.¹⁰⁷ In *Citizens Utilities*, the court of appeals held that because its opinion in *Sun City Water* was vacated on grounds that did not cast doubt on its analysis of the scope of judicial review,¹⁰⁸ that aspect of its opinion remained valid.¹⁰⁹

The Arizona Court of Appeals subsequently reached a similar result in *Clugston v. Moore*.¹¹⁰ The trial court in *Clugston* entered summary judgment against a non-defaulting defendant based on factual admissions deemed to have been made by another defendant against whom default was entered after he failed to appear for a court-ordered deposition.¹¹¹ Relying on its prior opinion in *American National Rent-A-Car, Inc. v. McNally*,¹¹² which held that "admissions implied from the default of one defendant are not binding upon a codefendant who answers and places in issue the truth of the allegations admitted by the absent party,"¹¹³ the court of appeals reversed the trial court's judgment in *Clugston*.¹¹⁴ Although the Arizona Supreme Court vacated the court of appeals' opinion in

107. See *id.* at 1108 (citing *Ariz. Corp. Commn. v. Super. Ct.*, 480 P.2d 988 (Ariz. 1971)). The Arizona Corporation Commission is the entity responsible for establishing the rates public utilities charge to the public. See *Litchfield Park Serv. Co. v. Ariz. Corp. Commn.*, 874 P.2d 988, 991 (Ariz. App. Div. 1 1994); *Scates v. Ariz. Corp. Commn.*, 578 P.2d 612, 614 (Ariz. App. Div. 1 1978). The Corporation Commission's rate decisions are "subject to review by the courts only in the manner provided by statute." *Kunkle Transfer & Storage Co. v. Superior Ct.*, 526 P.2d 1270, 1272 (Ariz. App. Div. 1 1974).

108. The Arizona Supreme Court held, in effect, that the court of appeals erred in remanding to the trial court "with directions to return the case to the Commission for further proceedings" because the trial court had no authority "to remand the proceeding back to the Commission for future hearings and determinations," but instead could only "affirm, modify or set aside the Commission's order." *Sun City Water Co. v. Ariz. Corp. Commn.*, 556 P.2d 1126, 1127-1128 (Ariz. 1976).

109. See *Citizens Utils.*, 584 P.2d at 1178 ("While our opinion was vacated, it was on other grounds, and we therefore conclude that our prior determination that the trial court's review is limited to a determination of whether the Commission's order is supported by substantial evidence and therefore not arbitrary is still valid."); but cf. *Mech. Falls Water Co. v. Pub. Utils. Commn.*, 381 A.2d 1080, 1097 n. 29 (Me. 1977) ("We find . . . reliance upon *Sun City* misplaced for that intermediate court decision was subsequently vacated by the Arizona Supreme Court.").

110. 655 P.2d 29 (Ariz. App. Div. 1 1982).

111. See *id.* at 30. Under Arizona law, a "default is treated as an admission, by the defaulting party, of the truth of all well pleaded facts in the case." *Id.* (citing cases).

112. 445 P.2d 91 (Ariz. App. 1968), vacated, 451 P.2d 882 (Ariz. 1969).

113. *Id.* at 96.

114. See *Clugston*, 655 P.2d at 32.

American National,¹¹⁵ it did so on a ground that had no application in *Clugston*.¹¹⁶ The *Clugston* court therefore concluded that the vacating of its prior opinion in *American National* did not reflect “a rejection of the general rule enunciated in the decision” that “default against one defendant is not binding on another.”¹¹⁷

In *Rocky Mountain Fire & Casualty Co. v. Allstate Insurance Co.*,¹¹⁸ the Arizona Court of Appeals held that when two insurers cover the same risk, an insurer who pays to cover the insured’s loss is entitled to recover from the other insurer not only a pro rata share of the amount paid,¹¹⁹ but a pro rata share of any related defense costs as well.¹²⁰ After the Arizona Supreme Court vacated that opinion,¹²¹ the issue arose again in *National Indemnity Co. v. St. Paul Insurance Co.*¹²² Although the *National Indemnity* court acknowledged the supreme court’s statement in *Stroud*¹²³ that a vacated opinion “is of no force and effect and is not authority,”¹²⁴ it also noted that its opinion in *Rocky Mountain* had been vacated “on other grounds.”¹²⁵ While the question thus technically remained an open one,¹²⁶ the *National Indemnity* court readopted the part of the *Rocky*

115. See *Am. Natl. Rent-A-Car, Inc. v. McNally*, 451 P.2d 882, 885 (Ariz. 1969).

116. The supreme court’s decision in *American National* was based on a statute that made a vehicle owner vicariously liable for the negligence of an individual renting the vehicle if the owner had not acquired liability insurance. See *Clugston*, 655 P.2d at 31 (discussing *American National*).

117. *Id.*

118. 474 P.2d 38 (Ariz. App. Div. 1 1970), *vacated*, 485 P.2d 552 (Ariz. 1971).

119. See *id.* at 43 (“[W]here the primary purpose of both insurance policies is to provide expanded coverage and secondarily to limit liability and exposure in the event other insurance is available we will give effect to that intent in an equitable manner by requiring both insurers to provide coverage on a pro rata basis.”).

120. See *id.* at 44 (“[E]ach [insurer] has an obligation to defend the [insured], the cost of such defense to be borne on the same pro rata basis as liability.”).

121. See *Rocky Mountain Fire & Cas. Co. v. Allstate Ins. Co.*, 485 P.2d 552 (Ariz. 1971).

122. 724 P.2d 578 (Ariz. App. Div. 1 1985), *approved in part and vacated in part*, 724 P.2d 544 (Ariz. 1986).

123. 542 P.2d 1102.

124. *National Indemnity*, 724 P.2d at 579 (citing *Stroud*).

125. *Id.*

126. See e.g. *Anderberg v. Masonite Corp.*, 176 F.R.D. 682, 688 (N.D. Ga. 1997) (stating that an unaddressed issue “remains an open question” when an “opinion was . . . vacated on other grounds”); see also nn. 83–96, *supra*, and accompanying text.

Mountain opinion that required contribution by the non-defending insurer to the defense costs shouldered by the defending insurer.¹²⁷

Finally, in *Kammert Brothers Enterprises, Inc. v. Tanque Verde Plaza Co.*,¹²⁸ the Arizona Court of Appeals held that a modification of a contract required to be in writing under the statute of frauds also must be in writing in order to be enforceable.¹²⁹ Although the Arizona Supreme Court vacated the court of appeals' opinion,¹³⁰ the supreme court did not reject the proposition that the statute of frauds precludes the oral modification of a contract governed by the statute.¹³¹ When the issue arose again in *Best v. Edwards*,¹³² the court of appeals adhered to its prior holding in *Kammert Brothers*,¹³³ which reflects the view prevailing in the majority of other states as well.¹³⁴

127. *National Indemnity*, 724 P.2d at 580. Without discussing *Stroud*, the court of appeals readopted another aspect of its *Rocky Mountain* opinion in *Industrial Indemnity Co. v. Beeson*, 647 P.2d 634, 639–40 (Ariz. App. Div. 1 1982); cf. *U.S. v. Anderson*, 705 F. Supp. 2d 1, 7 (D.D.C. 2010) (“[A]lthough the vacated opinion is no longer the law of the case, the Court still feels the logic of the prior decision . . . mandates its reasoning be accepted and its outcome followed. Were the question to reach the Court of Appeals again, it would likely be decided in the same manner . . .”) (citations omitted).

128. 420 P.2d 592 (Ariz. App. 1966), *vacated*, 428 P.2d 678 (Ariz. 1967).

129. *See id.* at 603 (“Generally, . . . a contract required by the statute of frauds to be in writing cannot be changed or modified by a subsequent oral agreement, although there is authority to the contrary.” (quoting 17 *Am. Jur. 2d Contracts* § 466, at 937 (1964))).

130. *See Kammert Bros. Enters., Inc. v. Tanque Verde Plaza Co.*, 428 P.2d 678, 680 (Ariz. 1967).

131. *See Best v. Edwards*, 176 P.3d 695, 699 ¶ 18 (Ariz. App. Div. 1 2008) (“The [supreme] court . . . did not disagree with our conclusion [in *Kammert Bros.*] that the statute of frauds applied to a material modification of an agreement that was required to be in writing.”).

132. 176 P.3d 695 (Ariz. App. Div. 1 2008).

133. *See id.* at 700 ¶ 19 (“We . . . conclude that an amendment to a real estate option purchase agreement that modifies a material term, such as the option’s expiration date, must comply with the statute of frauds. . . . To excuse the requirement of a signed written agreement in these circumstances would undercut the very protections afforded by the statute and create the types of opportunities for fraud that the statute aims to avoid.”).

134. *See id.* at 699 ¶ 18 (“[O]ur review of decisions from other jurisdictions reflects that the majority rule we cited in *Kammert* remains unchanged.”); *see also Coombs v. Ouzounian*, 465 P.2d 356, 358 & n. 4 (Utah 1970) (citing the vacated *Kammert Brothers* opinion for the proposition that an “extension of a contract which is required to be in writing is not enforceable, by the majority rule, in the absence of an estoppel, if it does not comply with the statute of frauds”).

IV. THE IMPACT OF OPINIONS VACATED ON THE MERITS

Despite the analysis in *Stroud*¹³⁵ and its progeny,¹³⁶ the cases discussed in Part III suggest that litigants should be able to cite as persuasive authority appellate court opinions that were vacated on grounds that do not call into question the propositions for which they are cited.¹³⁷ However, there are also cogent reasons for permitting litigants to cite opinions that were vacated on the merits¹³⁸ (that is, to cite vacated opinions for propositions that were repudiated by the vacating court¹³⁹), as long as the court to which the opinion is being cited is informed that its precedential authority has been undermined by the vacatur.¹⁴⁰

135. 542 P.2d 1102.

136. See nn. 44–56, *supra*, and accompanying text.

137. See *U.S. v. Barona*, 56 F.3d 1087, 1092 n. 1 (9th Cir. 1995) (asserting that “a vacated opinion may be looked to as persuasive authority if its reasoning is unaffected by the decision to vacate”); *Nez Perce Tribe*, 847 F. Supp. at 808 (“[T]o avoid considering sound legal reasoning and analysis . . . solely because it is set forth in an opinion that has been vacated on other grounds is not good judgment and is likewise subject to criticism.”); Henry G. Watkins, *The Fourth Amendment and the INS: An Update on Locating the Undocumented and a Discussion on Judicial Avoidance of Race-Based Investigative Targeting in Constitutional Analysis*, 28 San Diego L. Rev. 499, 557 (1991) (“[F]ew would pretend that a decision vacated on grounds other than the merits did not exist, and few would not refer to or repeat its reasoning if the issue were again raised before the same court.”).

138. See e.g. *Ballesteros v. Am. Standard Ins. Co.*, 222 P.3d 292, 296 ¶ 9 (Ariz. App. Div. 2 2009) (finding the analysis in an opinion vacated “in its entirety” to be “instructive” but not entitled to “dispositive weight”), *vacated*, 248 P.3d 193 (2011); see also *Cisco Sys., Inc. v. Telcordia Techs., Inc.*, 590 F. Supp. 2d 828, 831 (E.D. Tex. 2008) (“The analysis and logic of [a vacated] opinion may be used for whatever authority . . . another court may deem appropriate. This is the same non-binding persuasive value any non-vacated opinion has”); *Boehner*, 332 F. Supp. 2d at 156 (“[P]rudence counsels against wholly disregarding the residual authority of [a] vacated opinion.”); see generally Sullivan, *supra* n. 16, at 1178 (“[T]he notion that a vacated precedent is somehow erased, and cannot even be cited, seems extreme.”).

139. See e.g. *U.S. v. Emerson*, 432 F. Supp. 2d 128, 133 n. 7 (D. Me. 2006) (“*Crudup* was vacated on the very ground for which the government cites it.”); *U.S. v. Watson*, 1999 WL 458147 at *1 n. 1 (E.D.N.Y. Apr. 22, 1999) (“[T]he ‘part’ of the cited opinion that was vacated . . . was precisely the holding on which defendant relies.”).

140. See *Gould v. Kemper Natl. Ins. Cos.*, 1995 WL 573426 at *2 (N.D. Ill. Sept. 7, 1995) (“Citation to vacated cases is not per se prohibited, but . . . the citation must be qualified by the appropriate subsequent history (i.e., ‘vacated on other grounds’).”); *In re Miller*, 482 P.2d 326, 329 n. 1 (Nev. 1971) (“[A lawyer] should not cite authorities he knows have been vacated . . . without making a full disclosure to the court and counsel.”).

Like the highest courts in other states,¹⁴¹ the Arizona Supreme Court may vacate an opinion with which it disagrees (as opposed to, for example, simply reversing the lower court's decision)¹⁴² in order to discourage courts and litigants from relying on the opinion in subsequent cases.¹⁴³ In *Clay v. Arizona Interscholastic Association*,¹⁴⁴ for example, the court, departing from its usual practice,¹⁴⁵ retained jurisdiction to decide a case that had become moot because it disagreed with the analysis used by the court of appeals.¹⁴⁶ Finding no error in the trial court's resolution of the parties' dispute, which the court of

141. See e.g. *People ex rel. Black v. Dukes*, 449 N.E.2d 856, 858 (Ill. 1983) ("To prevent the appellate court's resolution of the issues presented to it from standing as precedent for future cases, we vacate the judgments of both the appellate and circuit courts without comment on the merits."); *State Accident Ins. Fund Corp.*, 719 P.2d 853, 854 (Or. 1986) ("[D]ismissing the petition for review . . . would let the decision of the Court of Appeals stand as a precedent though it may be incorrect. We therefore conclude that the better course is to vacate the decision of the Court of Appeals . . .").

142. See *Blum*, 786 N.W.2d at 96 ¶ 89 (Roggensack, J., concurring in part and dissenting in part) ("A decision may be reversed . . . or vacated, in its entirety or in part. Each of those terms has a different meaning. A decision is 'reversed' in '[a]n appellate court's overturning of a lower court's decision.' . . . A decision is 'vacated' in order 'to nullify or cancel; make void; [or] invalidate' the decision. There may be good reasons to treat differently court of appeals decisions that are reversed . . . and vacated; however, no one has explored this issue." (quoting *Black's Law Dictionary*)).

143. See e.g. *Rinderknecht v. Maricopa Co. Emp. Merit Sys.*, 526 P.2d 713, 714 (Ariz. 1974) ("Because the opinion of the Court of Appeals has been published and may be relied upon if not vacated, we feel that it is proper to . . . vacate the opinion of the Court of Appeals . . . in this matter."); cf. *Victor v. Hopkins*, 90 F.3d 276, 281 n. 3 (8th Cir. 1996) ("We discourage citation of any vacated case as authority.").

144. 779 P.2d 349 (Ariz. 1989).

145. See *Miceli v. Indus. Commn.*, 659 P.2d 30, 32 (Ariz. 1983) ("This court will ordinarily not entertain or decide issues which have become moot."); *Fraternal Order of Police Lodge 2 v. Phoenix Emp. Relations Bd.*, 650 P.2d 428, 429 (Ariz. 1982) ("[S]ince the first time we considered the issue, our Court has consistently held that it will refrain from considering moot or abstract questions.").

146. See *Clay*, 779 P.2d at 349-50; cf. *Saunders v. Bd. of Pardons*, 847 P.2d 1124, 1126 n. 1 (Ariz. 1993) ("We retain jurisdiction in this case . . . because we disagree with the court of appeals' decision . . ." (vacating court of appeals' opinion)); *Ariz. Osteopathic Med. Assn. v. Fridena*, 463 P.2d 825, 826-27 (Ariz. 1970) (retaining jurisdiction to vacate a court of appeals opinion "[d]espite the mootness of [the] case," because "the Court of Appeals' handling of [a] question . . . deserve[d] some discussion").

appeals had reversed,¹⁴⁷ the supreme court vacated the court of appeals' opinion and affirmed the trial court's decision.¹⁴⁸

Conversely, the Arizona Supreme Court has noted that the deference to be accorded a judicial opinion ultimately depends on the strength of the court's reasoning.¹⁴⁹ This observation is as applicable to vacated opinions as it is to any other non-binding judicial decision.¹⁵⁰ Indeed, one federal court asserted that "a logical and well-reasoned decision, despite vacatur, is always persuasive authority, regardless of its . . . ability to bind."¹⁵¹

In this regard, vacated opinions rarely disappear from the reservoir of legal thought available to courts and future

147. See *Clay*, 779 P.2d at 351.

148. See *id.* at 352. Federal courts also occasionally vacate lower court opinions in order to discourage future reliance upon them. See e.g. *In re TMT Trailer Ferry, Inc.*, 457 F.2d 103, 103 (5th Cir. 1972) ("[W]e vacate the decision below . . . so that it will spawn no legal consequences."); *Ocean Conservancy v. Natl. Marine Fisheries Serv.*, 416 F. Supp. 2d 972, 981 (D. Haw. 2006) ("The Ninth Circuit has . . . explained that district court opinions are vacated to remove preclusive and precedential effects."); see also *Coalition to End the Permanent Congress*, 979 F.2d at 221 n. 2 (Silberman, J., dissenting from *per curiam* disposition) ("[T]he very reason we vacate is to remove a decision's precedential effects.").

149. See *Lowling*, 859 P.2d at 730 ("Ultimately, the degree of adherence demanded by a prior judicial decision depends upon its merits . . ."); cf. Clark Neily, *The Florida Supreme Court vs. School Choice: A "Uniformly" Horrid Decision*, 10 Tex. Rev. L. & Pol. 401, 426 (2006) ("[T]he persuasiveness of non-binding judicial opinions depends significantly on the quality of the decision itself—the power of its logic, the strength of its reasoning, the quality of its scholarship, and its fidelity to . . . the record before it.").

150. See *IBM Credit Corp. v. United Home for Aged Hebrews*, 848 F. Supp. 495, 497 (S.D.N.Y. 1994) ("Once a decision has been filed and [is] in the public domain, its influence . . . is based solely upon future readers' views of its merits, whether vacated . . . or not . . ."); *West*, 797 A.2d at 1282 (holding that a vacated opinion "may, depending upon the strength of its reasoning, constitute some persuasive authority in the same sense as other dicta may constitute persuasive authority"); cf. *Link Snacks, Inc. v. Fed. Ins. Co.*, 664 F. Supp. 2d 944, 962 (W.D. Wis. 2009) ("[O]nce an opinion is issued and . . . sent into the ether, any 'damage' has already been done. Other judges may adopt or reject the conclusions in the opinion, regardless of whether or not the opinion was 'vacated.'").

151. *In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey*, 160 B.R. 882, 898 (Bankr. S.D.N.Y. 1993); cf. *Benavides v. Jackson Natl. Life Ins. Co.*, 820 F. Supp. 1284, 1289 (D. Colo. 1993) ("Their precedential value can be diminished by an appellate court's vacation, but [opinions] can never be erased and their reasoning may continue to be followed."); Robert P. Deyling, *Dangerous Precedent: Federal Government Attempts to Vacate Judicial Decisions Upon Settlement*, 27 J. Marshall L. Rev. 689, 693 n. 32 (1994) ("[A] vacated decision . . . may still retain a measure of its persuasive value. Another court, for example, may conclude that the legal analysis contained in a vacated decision is correct, and adopt it in a subsequent case.").

litigants,¹⁵² despite the efforts of some courts to portray them as nonexistent.¹⁵³ Vacated opinions instead almost invariably remain in the public domain in one form or another,¹⁵⁴ where they may be located through diligent research and cited as persuasive authority in subsequent cases despite their lack of precedential value.¹⁵⁵

By way of analogy, courts and litigants freely cite reversed and overruled opinions,¹⁵⁶ plurality opinions,¹⁵⁷ and concurring

152. See e.g. *Panduit Corp. v. Dennison Mfg. Co.*, 810 F.2d 1561, 1575 n. 33 (Fed. Cir. 1987) ("Though our earlier judgment has been vacated, our earlier opinion . . . remains in the books."); *United Retail & Wholesale Employees Teamsters Union Loc. No. 115 Pension Plan v. Yahn & McDonnell, Inc.*, 787 F.2d 128, 136 n. 11 (3d Cir. 1986) (discussing a "vacated panel decision . . . published in the bound federal reporter"); see generally *Alvarado v. Bd. Of Trustees of Montgomery Community College*, 848 F.2d 457, 459 (4th Cir. 1988) ("It is common for . . . decisions to appear in published reporters even though they have been vacated.").

153. See e.g. *Okpalobi v. Causeway Med. Suite*, 244 F.3d 405, 432 (5th Cir. 2001) (Higginbotham, J., concurring) ("The panel opinion no longer exists. It was vacated by the order granting en banc review."); *Ayers v. Robinson*, 887 F. Supp. 1049, 1059 n. 2 (N.D. Ill. 1995) ("As a technical matter, a vacated opinion becomes no opinion at all."); *People v. Super. Ct.*, 252 Cal. Rptr. 335, 338 & n. 4 (Cal. App. 5th Dist. 1988) (asserting that a vacated opinion "is no longer citable authority" because "it is as if the . . . opinion never existed" and there is thus "no opinion now in existence to rely upon"), *disapproved on other grounds*, *People v. Heitzman*, 886 P.2d 1229, 1241 n. 17 (Cal. 1994); *Robinson v. Gazvoda*, 783 N.E.2d 1245, 1249 (Ind. App. 1st Dist. 2003) ("[T]he opinion to which Gazvoda cited has been vacated. Thus, the precedent Gazvoda relies upon no longer exists." (citation omitted)); see also *Montgomery v. Carr*, 101 F.3d 1117, 1128 n. 6 (6th Cir. 1996) ("*Shahar* has now been vacated . . . and does not formally exist as persuasive authority."); *City of Santa Monica v. Stewart*, 24 Cal. Rptr. 3d 72, 79 n. 2 (Cal. App. 2d Dist. 2005) (asserting that a "decision [that] has been vacated . . . does not legally exist").

154. See *U.S. v. Garcia*, 605 F.2d 349, 364 n. 5 (7th Cir. 1979) (Swygert, J., dissenting) (noting that "the reasoning of [a vacated] opinion remains in the public domain"); *People v. Ford*, 635 P.2d 1176, 1180 (Cal. 1981) ("A copy of [a vacated California Court of Appeal] opinion . . . remains available in the public records of this court and the Court of Appeal.").

155. See e.g. *NASD Dispute Resolution, Inc. v. Jud. Council of State of Cal.*, 488 F.3d 1065, 1069 (9th Cir. 2007) (noting that a vacated district court opinion would "not be ripped from Federal Supplement 2d," and thus would "still be citable for its persuasive weight"); *Natl. Black Police Assn. v. Dist. of Columbia*, 108 F.3d 346, 354 (D.C. Cir. 1997) ("[S]ince the district court's opinion will remain 'on the books' even if vacated, albeit without any preclusive effect, future courts will be able to consult its reasoning."); Henry E. Klingeman, Student Author, *Settlement Pending Appeal: An Argument for Vacatur*, 58 Fordham L. Rev. 233, 246 (1989) ("A well-reason, albeit vacated, . . . decision that remains in the reporters will influence future judges and litigants, who may look to it when faced with similar facts and issues.").

156. See e.g. *Maximov v. U.S.*, 299 F.2d 565, 571 (2d Cir. 1962) ("[W]e believe [the Ninth Circuit's] decision to be erroneous, and accept instead the reasoning . . . in the decision there reversed . . ."); *In re M.M.*, 65 Cal. Rptr. 3d 273, 283 n. 10 (Cal. App. 1st

and dissenting opinions.¹⁵⁸ None of these opinions are precedential.¹⁵⁹ Like vacated opinions,¹⁶⁰ they instead merely reflect their authors' views of "what the law should be"¹⁶¹ (or in

Dist. 2007) ("Although the district court's judgment . . . was reversed, we may still rely on its opinion as persuasive authority."); *People ex rel. State Bd. of Equalization v. Pitcher*, 138 P. 509, 514 (Colo. 1914) ("[C]ertain language found in the overruled opinion is so pertinent to the question now being considered that we are constrained to adopt it."); see also Frank B. Cross et al., *The Reagan Revolution in the Network of Law*, 57 Emory L.J. 1227, 1250 (2008) ("[O]verruled decisions remain in the [legal] network and may be cited even after being overruled.").

157. See e.g. *State v. Lajeunesse*, 555 P.2d 120, 122 (Ariz. App. Div. 1 1976) ("[W]e are persuaded by the plurality opinion of the United States Supreme Court in *Cardwell v. Lewis* . . ."); see also *State v. Zamora*, 202 P.3d 528, 535 n. 8 (Ariz. App. Div. 1 2009) ("In a plurality decision, when 'no single rationale explaining the result enjoys the assent of [a majority of the Court], the holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds.'" (quoting *U.S. v. Williams*, 435 F.3d 1148, 1157 (9th Cir. 2006))).

158. See e.g. *Hood v. Mercy Healthcare Ariz.*, 23 F. Supp. 2d 1125, 1130 (D. Ariz. 1997) ("The Court finds particularly persuasive[] the concurring opinion . . . in *Brook v. Claridge Hotel and Casino*"); *Fund Manager, Pub. Safety Personnel Ret. Sys. v. Corbin*, 778 P.2d 1244, 1251 (Ariz. App. Div. 1 1988) ("We are . . . unpersuaded by *State Public Intervenor v. Wisconsin Department of Natural Resources*, 115 Wis.2d 28, 339 N.W.2d 324 (1983). . . . We find the dissent in that case more persuasive than the majority opinion."), *aff'd in part, dismissed in part, sub nom The Fund Manager v. Corbin*, 778 P.2d 1260 (Ariz. 1989); see also *Airparts Co., Inc. v. Custom Benefit Servs. of Austin, Inc.*, 828 F. Supp. 870, 877 (D. Kan. 1993) ("The reasoning of . . . dissenting opinions may provide invaluable guidance where there is no controlling precedent on point."), *rev'd on other grounds*, 28 F.3d 1062 (10th Cir. 1994); *Hawkins v. State*, 637 S.E.2d 422, 423 (Ga. App. 2006) ("Although they may be persuasive, dissenting opinions do not constitute binding authority.").

159. See *U.S. v. Prandy-Binett*, 5 F.3d 560, 562 (D.C. Cir. 1993) (Silberman, J., concurring in the denial of rehearing en banc) ("[A]ll concurring opinions . . . lack precedential force."); *Renteria v. U.S.*, 452 F. Supp. 2d 910, 920 (D. Ariz. 2006) ("Obviously, a dissenting opinion has no precedential value."); *Hearn v. R.J. Reynolds Tobacco Co.*, 279 F. Supp. 2d 1096, 1111 (D. Ariz. 2003) (observing that "reversed opinions carry no precedential value"); *James v. Phoenix Gen. Hosp., Inc.*, 744 P.2d 695, 699 (Ariz. 1987) ("[P]lurality decisions . . . have no precedential authority."); *Blum*, 786 N.W.2d at 92 ¶ 57 ("A court of appeals decision loses all precedential value when it is overruled . . .").

160. See Thomas L. Fowler, *Holding, Dictum . . . Whatever*, 25 N.C. Cent. L.J. 139, 156 (2003) (observing that a vacated opinion "may be useful in predicting what the law . . . will be but it does not establish what the law presently is").

161. *Davis v. State*, 886 So. 2d 332, 336 (Fla. 5th Dist. App. 2004) (Thompson, J., dissenting) (characterizing dissenting opinions); see also *Skeens v. Miller*, 628 A.2d 185, 193 (Md. 1993) (Eldridge, J., dissenting) ("The concurring opinion . . . represented the view of only one judge, the author of the concurring opinion."); cf. *Buck v. Cmmw.*, 432 S.E.2d 180, 183 (Va. App. 1993) ("A dissent represents only the dissenter's view of a majority decision.").

the case of reversed and overruled opinions, what the law once was),¹⁶² and “not what the law is.”¹⁶³ Although courts considering the same or similar issues in other cases are likely to be interested in these non-precedential opinions in part because they were written by judges,¹⁶⁴ courts and litigants also occasionally rely on non-judicial legal writings, such as law review articles and legal treatises,¹⁶⁵ to support their positions.¹⁶⁶ Not only do these authorities also lack binding precedential force,¹⁶⁷ but they often advocate positions directly contrary to

162. See *Hanks v. McDanell*, 210 S.W.2d 784, 787–88 (Ky. App. 1948) (“[S]ome courts have held that an overruled opinion was never the law. That theory . . . is as fallacious as it would be to say that a repealed statute was never the law.”); cf. *Forster Shipbuilding Co. v. Los Angeles Co.*, 353 P.2d 736, 740–41 (Cal. 1960) (“Under traditional theory an overruled decision . . . merely misstated the law. The overruling decision is deemed to state what the law was from the beginning . . .”).

163. *Davis*, 886 So. 2d at 336 (Thompson, J., dissenting); see also *State ex rel. Ronan v. Super. Ct.*, 390 P.2d 109, 115 (Ariz. 1964) (noting that dissenting opinions “might prove persuasive to a court considering a change in the rules” but do not constitute “authority as to what the law now is”); *State ex rel. Washington State Fin. Comm. v. Martin*, 384 P.2d 833, 844 (Wash. 1963) (“What is overruled is not *the* law, but nonlaw.”).

164. See e.g. *In re Greathouse*, 248 N.W. 735, 738 (Minn. 1933) (asserting that “dissenting or concurring opinions . . . are important only as expressions of a jurist”); see also Sullivan, *supra* n. 16, at 1200 (“[P]erhaps it could be said that . . . judicial decisions, even if not binding, should be looked to simply because they are judicial decisions.”).

165. See e.g. *Stockton v. McFarland*, 106 P.2d 328, 330 (Ariz. 1940) (“[T]he reasoning of . . . distinguished [treatise] writers . . . [is] certainly worthy of our consideration . . .”); *Jeter v. Mayo Clinic Ariz.*, 121 P.3d 1256, 1265 n. 6 (Ariz. App. Div. 1 2005) (finding it appropriate “to rely on legal and medical–legal treatises” when there is a “lack of case law on the issue”); *Moore v. Montes*, 529 P.2d 716, 721 (Ariz. App. Div. 1 1974) (“Our evaluation of the relevant policies of the country of Mexico vis-à-vis those of Arizona has . . . been greatly facilitated by a particularly cogent law review article . . .”).

166. See *U.S. v. Eagleboy*, 200 F.3d 1137, 1140 (8th Cir. 1999) (noting that “treatises, law review articles, public records, and the like . . . may be cited . . . in support of a legal theory”); *Bunker v. Co. of Orange*, 126 Cal. Rptr. 2d 825, 835 (Cal. App. 4th Dist. 2002) (noting that “a treatise or law review article . . . could shed light on the legal issues in a case” even though the “treatise or law review article reflected the author’s own view”); *Miller v. U.S.*, 14 A.3d 1094, 1108 n. 16 (D.C. 2011) (“Judicial opinions routinely cite treatises, the various Restatements of the Law, and law review articles.”).

167. See e.g. *Kim v. Mansoori*, 153 P.3d 1086, 1090 ¶ 9 (Ariz. App. Div. 2 2007) (noting that “the Arizona Appellate Handbook . . . is not precedential authority”); see also *Natural Res. Def. Council v. Hodel*, 618 F. Supp. 848, 868 (E.D. Cal. 1985) (discussing “the lack of precedential value in a law review article”); *Hulit v. State*, 982 S.W.2d 431, 446 (Tex. Crim. App. 1998) (Baird, J., dissenting) (“[L]aw review articles and academic treatises . . . may be instructive but have no precedential authority.”); Weaver, *supra* n. 20, at 490 (“Among the legal materials that are frequently cited are . . . vacated decisions, reversed decisions, overruled decisions, plurality opinions, equally divided affirmances, concurring

existing precedent.¹⁶⁸ Courts and litigants increasingly cite even non-legal sources in support of their legal arguments,¹⁶⁹ despite the fact that those sources are even less authoritative than non-precedential judicial opinions.¹⁷⁰

These various nonbinding authorities occasionally play an important role in altering established precedent.¹⁷¹ Vacated opinions can—and do—contribute to the law’s development in a similar manner.¹⁷² In *Young v. Bach*,¹⁷³ for example, the Arizona

opinions, dissenting opinions, . . . law review articles, treatises, legal encyclopedias, and the restatements of law. Yet, none of these materials are precedent.”).

168. See e.g. *Hamilton v. Needham*, 519 A.2d 172, 176 (D.C. 1986) (discussing a “leading scholarly work advocating a change in the existing law”); *Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.*, 938 S.W.2d 469, 472 n. 3 (Tex. App.—Austin 1995) (“Several law review articles advocate changing the jurisprudence of this state . . .”), *rev’d*, 948 S.W.2d 293 (Tex. 1997).

169. See *Berthoff v. U.S.*, 140 F. Supp. 2d 50, 52 n. 1 (D. Mass. 2001) (“This Court’s citation to nonlegal sources is not unique; courts generally are increasingly citing nonlegal sources.” (citing Frederick Shauer & Virginia J. Wise, *Nonlegal Information and the Delegation of Law*, 29 J. Legal Stud. 495, 500–13 (2000))); Ellie Margolis, *Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs*, 34 U.S.F. L. Rev. 197, 207 (2000) (“[T]here has been a marked increase in courts’ citation to non-legal material in support of their opinions.”); Weaver, *supra* n. 20, at 490 (“Courts and litigants cite a great variety of legal and nonlegal materials that are not precedent.”).

170. See Ellie Margolis, *Authority Without Borders: The World Wide Web and the Delegalization of Law*, 41 Seton Hall L. Rev. 909, 919 (2011) (“If binding, primary authority is at the top of the hierarchy of traditional legal authority, then nonlegal sources are at the bottom. Under traditional notions of precedent and stare decisis, nonlegal sources carry no weight at all.” (footnote omitted)); Sullivan, *supra* n. 16, at 1200–01 (“[Judicial] decisions . . . are more likely to be correct and well reasoned than, say, an op-ed in the local newspaper.” (footnotes omitted)).

171. See *Buehman v. Bechtel*, 114 P.2d 227, 230 (Ariz. 1941) (“In the course of time, dissenting opinions frequently become the law . . .”); *R.C. Equity Grp., LLC v. Zoning Commn. of Borough of Newton*, 939 A.2d 1122, 1140 n. 11 (Conn. 2008) (Norcott, J., dissenting) (“[O]ne of the fundamental purposes of a dissenting opinion . . . is to contribute to the subsequent development of the law, via legislation or judicial decision making.”); *Rivera v. Phila. Theological Seminary of St. Charles Borromeo, Inc.*, 580 A.2d 1341, 1347 n. 1 (Pa. Super. 1990) (Cirillo, J., concurring) (“The value, significance and influence of dissenting opinions in the development of the law are well known to the bench, the practicing bar, and the legislature.”).

172. See e.g. *McKenzie*, 57 F.3d at 1494 (“Although the opinion was subsequently vacated, *Richmond* remains persuasive authority, and we adopt its analysis . . . as our own.”); *Ballam v. U.S.*, 806 F.2d 1017, 1020 (Fed. Cir. 1986) (“It is suggested, ‘to save judicial resources,’ we should adopt the vacated decision as our own, which possibly we could do by taking its words as ours. . . . We agree generally with what it says, and are greatly aided by its analysis.”), *overruled on other grounds*, *Owen v. U.S.*, 851 F.2d 1404, 1416 (Fed. Cir. 1988); see also *Nez Perce Tribe*, 847 F. Supp. at 808 (“The Court is of the view that the rationale of the [vacated] opinion is persuasive and thus has considered its

Supreme Court relied on the Arizona Court of Appeals' vacated opinion in *Allison v. Owens*¹⁷⁴ to overrule in part the supreme court's own intervening decision in *Allison*,¹⁷⁵ in which it had vacated the relevant portion of the court of appeals' decision.¹⁷⁶ Because it involved the use of a vacated opinion to overrule the very decision that vacated it,¹⁷⁷ *Young* is a particularly striking example of the influence vacated and therefore "non-precedential" opinions can have on existing legal doctrine.¹⁷⁸

In another important example, the Arizona Court of Appeals in *State v. Feld*¹⁷⁹ adopted the reasoning in *4447 Corp. v. Goldsmith*,¹⁸⁰ a vacated Indiana Court of Appeals decision that lacks precedential value in either Indiana¹⁸¹ or Arizona.¹⁸²

legal analysis and language in the same context as if it had been a law review article or other non-binding, but well reasoned legal authority."); see also Sullivan, *supra* n. 16, at 1148 ("[A] vacated opinion is not precedent in the sense that it binds anyone; but such opinions may remain . . . at least as persuasive as many other nonbinding judicial statements.").

173. 484 P.2d 176 (Ariz. 1971).

174. 421 P.2d 929 (Ariz. App. 1966), *aff'd in part and vacated in part*, 433 P.2d 968 (Ariz. 1967).

175. *Allison v. Owens*, 433 P.2d 968 (Ariz. 1967), *overruled in part*, *Young v. Bach*, 484 P.2d 176, 178-79 (Ariz. 1971).

176. See *Young*, 484 P.2d at 178-79. Indeed, the *Young* court quoted at some length from the vacated court of appeals opinion. See *id.* at 178 (quoting *Allison*, 421 P.2d at 932).

177. Cf. *People v. Ford*, 635 P.2d 1176, 1179 (Cal. 1981) ("[I]n appropriate cases we have adopted as the opinion of this court all or part of a superseded Court of Appeal opinion . . .").

178. See generally Judith Resnick, *Whose Judgment?: Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. Rev. 1471, 1476-77 (1994) ("[V]acated opinions have a tendency to reappear as 'law' and are relied upon by other courts despite having been vacated . . ."); Sullivan, *supra* n. 16, at 1153 ("[V]acated opinions continue to exert a largely unrecognized influence in our legal system . . . that sometimes seems to operate as if it were binding precedent.").

179. 745 P.2d 146 (Ariz. App. Div. 1 1987).

180. 479 N.E.2d 578 (Ind. App. 4th Dist. 1985), *vacated*, 504 N.E.2d 559 (Ind. 1987).

181. See *Fort v. C.W. Keller Trucking, Inc.*, 330 F.3d 1006, 1012 (7th Cir. 2003) (asserting that an Indiana Court of Appeals decision that "was vacated by the Indiana Supreme Court . . . has no precedential value"); cf. *Bentz v. City of Kendallville*, 577 F.3d 776, 780 n. 4 (7th Cir. 2009) (finding the analysis in a vacated Indiana Court of Appeals opinion persuasive).

182. See *Bunker's Glass Co. v. Pilkington PLC*, 47 P.3d 1119, 1129 ¶ 40 (Ariz. App. Div. 1 2002) ("[T]he laws of other jurisdictions, while sometimes instructive, are not binding upon us. . . . Arizona may not follow the course taken by other states . . ."); cf. *State ex rel. Romley v. Rayes*, 75 P.3d 148, 151 ¶ 11 (Ariz. App. Div. 1 2003) (noting that a

Despite having reached a seemingly contrary result in an earlier case,¹⁸³ the *Feld* court found the reasoning of the vacated opinion to be “more comprehensive and persuasive than the Indiana Supreme Court’s reversal of that decision.”¹⁸⁴

The Arizona Court of Appeals cannot disregard an Arizona Supreme Court opinion,¹⁸⁵ as it may do in the case of an opinion issued by the highest court of Indiana or another sister state.¹⁸⁶ Nevertheless, the court of appeals certainly may disagree with the reasoning of an Arizona Supreme Court opinion,¹⁸⁷ and when it does,¹⁸⁸ it is likely to find the reasoning of its own

vacated federal appellate court opinion “has no precedential value” in Arizona state court litigation).

183. See *Ariz. Mgmt. Corp. v. Kallof*, 688 P.2d 710, 714 n. 2 (Ariz. App. Div. 1984) (“[A]ppellant relies on *Shideler v. Dwyer*, 386 N.E.2d 1211 (Ind. App. 1979). However, overlooked by appellant, this case was vacated by a later Indiana Supreme Court decision which does not support appellant’s position.”); cf. *Patterson v. Gladwin Corp.*, 835 So. 2d 137, 153 (Ala. 2002) (“Litigants who rely on opinions of intermediate appellate courts that conflict with opinions of the jurisdiction’s highest court do so at their own risk.”).

184. *Feld*, 745 P.2d at 152; cf. *Intl. Harvester Co. v. Super. Ct.*, 157 Cal. Rptr. 324, 329 n. 3 (Cal. App. 2d Dist. 1979) (“[T]he Oklahoma Supreme Court, while rejecting the opinion of the California Supreme Court in *American Motorcycle Assn. v. Superior Court*, . . . found our vacated opinion in that case reported in 135 Cal. Rptr. 497 to be ‘very persuasive.’” (quoting *Laubach v. Morgan*, 588 P.2d 1071, 1075 (Okla. 1978), *superseded*, *Barringer v. Baptist Healthcare of Okla.*, 22 P.3d 695, 698 (Okla. 2001))).

185. See *State v. Rosengren*, 14 P.3d 303, 311 ¶ 26 (Ariz. App. Div. 2 2001) (“This court, of course, may not disregard or deviate from controlling decisions of our supreme court.”); *Mohave Co. v. City of Kingman*, 761 P.2d 1076, 1080 (Ariz. App. Div. 1 1988) (“We recognize that this court is not at liberty to disregard prior decisions of the Arizona Supreme Court on issues subsequently presented to us.”).

186. See *State ex rel. Ariz. Dept. of Revenue v. Talley Indus., Inc.*, 893 P.2d 17, 22 (Ariz. App. Div. 1 1994) (“We are not bound by the decisions of . . . other states whose courts of last resort have settled [an] issue.”); *Lopez v. Ariz. Water Co.*, 530 P.2d 1132, 1134 (Ariz. App. Div. 2 1975) (“[T]his court is bound by prior decisions of the highest court of this State.” (emphasis added)).

187. See *Rosengren*, 14 P.3d at 311 ¶ 26 (“Although one may question the rationale and wisdom of the . . . rules set forth in [supreme court] cases . . . , we are not free to depart from them.”); *Gomez v. Indus. Commn.*, 716 P.2d 32, 34 n. 1 (Ariz. App. Div. 2 1985) (“One of the proper functions of an intermediate appellate court is to voice criticism of existing law.”); see generally *Ky. Farmers Bank v. Nutter*, 107 Lab. Cas. (CCH) ¶ 55,809, at 77,463 (Ky. App. 1987) (Gudgel, J., dissenting) (“It is one thing for members of an intermediate appellate court to criticize yet follow an existing supreme court precedent, but quite another to simply ignore that precedent.”).

188. See e.g. *State Farm Mut. Auto. Ins. Co. v. Karasek*, 523 P.2d 1324, 1327 (Ariz. App. Div. 1 1974) (“Were we not bound by the legal principles enunciated by the Arizona Supreme Court . . . we might reach a contrary result”); *Heimke v. Munoz*, 462 P.2d 819, 821–22 (Ariz. App. Div. 1 1969) (“[W]e would decide the [present] question

vacated opinions to be at least as persuasive as that of an opinion issued by an intermediate appellate court in another state.¹⁸⁹ In part for this reason, a vacated Arizona Court of Appeals opinion should be citable for its persuasive value in subsequent Arizona state court litigation,¹⁹⁰ even if the proposition for which the opinion is being cited was rejected by the Arizona Supreme Court when it vacated the opinion.¹⁹¹

V. THE EFFECT OF DEPUBLICATION

Courts can direct that the opinions they vacate not be cited in subsequent cases.¹⁹² The Arizona Court of Appeals, for

differently if presented to us without the guidance of prior Arizona Supreme Court decisions on the point”), *vacated*, 470 P.2d 107 (Ariz. 1970); *see also Howe v. Haught*, 462 P.2d 395, 398 (Ariz. App. Div. 2 1969) (Howard, J., concurring) (“I agree with the [majority’s] decision only because we are bound by the decisions of our Supreme Court. I am, however, convinced that we are perpetuating . . . a wrong rule of law.”).

189. *See Kotterman v. Killian*, 972 P.2d 606, 624 ¶ 68 (Ariz. 1999) (“[W]hile [another state’s] judicial decisions may prove useful, they certainly do not control Arizona law. We alone must decide how persuasive the legal opinions of other jurisdictions will be to our holdings.”); *Walden Books Co. v. Dept. of Revenue*, 12 P.3d 809, 814 ¶ 23 (Ariz. App. Div. 1 2000) (“We find no reason for out-of-state . . . decisions to be more citable than in-state . . . decisions.”).

190. *See Sullivan, supra* n. 16, at 1171 (“[A]n overturned opinion from . . . the [court] deciding the case is as persuasive (or as unpersuasive) as authority from another jurisdiction: neither binds, but both can persuade. Some citations of vacated opinions are explicitly justified on this ground.”); *cf. Michael W. Loudenslager*, Student Author, *Erasing the Law: The Implications of Settlements Conditioned Upon Vacatur or Reversal of Judgments*, 50 Wash. & Lee L. Rev. 1229, 1258 (1993) (“Courts often rely on persuasive precedent in their legal reasoning. . . . [W]ell-reasoned persuasive precedent may convince a court to create exceptions to binding precedent.”).

191. *See In re Meml. Hosp. of Iowa Co., Inc.* 862 F.2d 1299, 1302 (7th Cir. 1988) (“[D]ecisions have persuasive force as precedent that may save other judges and litigants time in future cases. Some of this force . . . does not vanish on vacatur, although such an order clouds and diminishes the significance of the holding.”).

192. *See e.g. U.S. v. Aderoju*, 847 F. Supp. 2d 864, 864 (E.D. Va. 2012) (“[T]he Memorandum Opinion . . . is vacated and withdrawn, and shall not be cited as precedent or authority in any future judicial action.”); *Green Constr. Co. v. Natl. Union Fire Ins.*, 975 F. Supp. 1365, 1366 (W.D. Mo. 1996) (“[T]he Memorandum Opinion . . . is vacated. Accordingly, the order should not be relied upon for the proposition of law stated therein.” (capitalization omitted)); *Hubbard v. Hubbard*, 690 N.E.2d 1219, 1221 n. 2 (Ind. App. 1998) (“We admonish counsel that . . . our opinion has been vacated and may not be cited as law.”).

example, can order that its vacated opinions not be published.¹⁹³ Similarly, if the Arizona Supreme Court disagrees with the reasoning in a court of appeals opinion, it not only can vacate the opinion,¹⁹⁴ but also can order that the opinion be “depublished.”¹⁹⁵ In either of these situations (which also may arise in other states),¹⁹⁶ the vacated opinion not only would no longer be precedential,¹⁹⁷ but Arizona’s appellate procedural rules would prohibit litigants from citing the opinion in subsequent cases.¹⁹⁸ This would be so even if the opinion

193. See e.g. *State v. Junkin*, 599 P.2d 244, 246 (Ariz. App. Div. 2 1979) (“The original opinion and the opinion on rehearing are hereby vacated and will remain unpublished.”); see also Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 Cornell L. Rev. 589, 620 n. 163 (1991) (“[B]oth the West Publishing System and the on-line Reporting Services (LEXIS and WESTLAW) permit the courts to withdraw from publication opinions which have been vacated . . .”).

194. See nn. 37–39, *supra*, and accompanying text.

195. See e.g. *Martinez v. Indus. Commn.*, 962 P.2d 903, 905 ¶ 11 (Ariz. 1998) (“[B]ecause the court disagreed with the court of appeals’ analysis, though it agreed with the result, we ordered the court of appeals’ opinion be depublished.”); see also Freeman & Ulrich, *supra* n. 69, at 1316 (“[O]nce the supreme court has jurisdiction concerning the appeal it may . . . exercise its discretion to order that the court of appeals’ decision be vacated or depublished (either in whole or in part).”); cf. *Whiting v. State*, 966 P.2d 1082, 1083 (Haw. 1998) (“[B]ecause we disagree with the [intermediate court of appeal’s] reasoning and conclusion, we vacate [its] opinion and order it depublished.”).

196. See e.g. *Hart v. Massanari*, 266 F.3d 1155, 1174 n. 30 (9th Cir. 2001) (“The California Supreme Court may ‘depublish’ a court of appeal opinion—i.e., strip a published decision of its precedential effect.”). Although the practice of depublishing lower court opinions originated in California, the Hawaii Supreme Court also depublishes opinions, “and Michigan adopted the practice briefly, abandoning it in 1997.” Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 Stan. L. Rev. 1435, 1479 (2004). There is also “scattered evidence that other courts are doing it . . . without official mandate in the form of court rules.” *Id.*; see e.g. *H.R. v. Revlett*, 998 S.W.2d 778, 779 (Ky. App. 1999) (discussing a Kentucky Court of Appeals opinion that “was ordered depublished by the [Kentucky] Supreme Court”); *In re Marriage of Pletz*, 873 P.2d 489, 489 (Wash. 1994) (“While the court does not reach the merits of the case, the Court of Appeals opinion is depublished.”).

197. See *Qwest Corp. v. City of Chandler*, 217 P.3d 424, 431 ¶ 21 n. 5 (Ariz. App. Div. 1 2009) (“[A]n unpublished decision . . . has no precedential value.”); *State v. Rodriguez*, 7 P.3d 148, 151 n. 5 (Ariz. App. Div. 2 2000) (“*Ryan v. Arellano* . . . has been depublished by our supreme court and has no precedential value.”).

198. See *Walden Books*, 12 P.3d at 814 ¶ 21 (citing Ariz. R. Civ. P. 28(c) for the proposition that it is “improper to cite unpublished decisions as authority”); *FDIC v. Adams*, 931 P.2d 1095, 1103 (Ariz. App. Div. 1 1996) (“It is well-settled that a depublished opinion . . . cannot be cited as authority in any court.”).

actually continued to appear in a bound reporter¹⁹⁹ or a readily accessible electronic database.²⁰⁰

The increasingly prevalent practice of depublishing appellate court opinions,²⁰¹ and court rules prohibiting the citation of those and other unpublished decisions,²⁰² have been

199. See e.g. *State v. Cuevas*, 153 P.3d 414 (Ariz. App. Div. 2 2007), *review denied and ordered depublished*, 171 P.3d 599 (Ariz. 2007); *Hamblin v. State*, 143 P.3d 388 (Ariz. App. Div. 1 2006), *review denied and ordered depublished*, 151 P.3d 533 (Ariz. 2007); *State ex rel. Mendez v. Am. Support Found., Inc.*, 100 P.3d 932 (Ariz. App. Div. 1 2004), *review denied and ordered depublished*, 109 P.3d 571 (Ariz. 2005); *State v. Darnell*, 98 P.3d 617 (Ariz. App. Div. 1 2004), *review denied and ordered depublished*, 107 P.3d 923 (Ariz. 2005); *Avila v. Biedess*, 78 P.3d 280 (Ariz. App. Div. 1 2003), *review denied and ordered depublished*, 85 P.3d 474 (Ariz. 2004); *Cummins v. Mold-In Graphic Sys.*, 26 P.3d 518 (Ariz. App. Div. 1 2001), *review denied and ordered depublished*, 38 P.3d 12 (Ariz. 2002); *State ex rel. Miller v. Title USA Ins. Agency of Ariz., Inc.*, 822 P.2d 472 (Ariz. App. Div. 1 1991), *review denied and ordered depublished*, 831 P.2d 1279 (Ariz. 1992); *Chilton v. Ctr. for Biological Diversity, Inc.*, 148 P.3d 91 (Ariz. App. Div. 2 2006), *review denied and ordered depublished*, 171 P.3d 599 (Ariz. 2007); *State v. Ploof*, 141 P.3d 764 (Ariz. App. Div. 2 2006), *review denied and ordered depublished*, 146 P.3d 1007 (Ariz. 2006); *West v. State*, 58 P.3d 28 (Ariz. App. Div. 2 2002), *review denied and ordered depublished*, 65 P.3d 433 (Ariz. 2003); *Pinedo v. Ariz. Dept. of Transp.*, 23 P.3d 90 (Ariz. App. Div. 2 2000), *review denied and ordered depublished*, 38 P.3d 12 (Ariz. 2002), *redesignated as memorandum decision*, 42 P.3d 17 (Ariz. App. Div. 2 2002); *Smith v. Tucson Airport Auth.*, 882 P.2d 1291 (Ariz. App. Div. 2 1994), *review denied as improvidently granted and ordered depublished*, 899 P.2d 162 (Ariz. 1995); see also e.g. *Giese v. Pierce Chem. Co.*, 43 F. Supp. 2d 98, 103 n. 1 (D. Mass. 1999) (noting that some “unpublished” opinions “are, in fact, promptly published in West’s national reporters and other legal publications”).

200. See e.g. *Ryan v. Arellano ex rel. Co. of Maricopa*, 1999 WL 351079 (Ariz. App. Div. 1 June 4, 1999); *Grubaugh v. DeCosta*, 1999 WL 137640 (Ariz. App. Div. 1 Mar. 16, 1999); *State v. Miller*, 1999 WL 55170 (Ariz. App. Div. 1 Feb. 9, 1999); *State v. Craig*, 1996 WL 162409 (Ariz. App. Div. 1 Apr. 9, 1996); *State v. Prince*, 1996 WL 91519 (Ariz. App. Div. 1 Mar. 5, 1996); *Agri-Tech Ltd. v. N. Am. Bank*, 1990 WL 210645 (Ariz. App. Div. 1 Dec. 20, 1990); *State v. McDonald*, 1990 WL 139445 (Ariz. App. Div. 2 Sept. 25, 1990); see also *People v. Williams*, 98 Cal. Rptr. 3d 770, 777 (Cal. App. 3d Dist. 2009) (“[D]epublished and unpublished decisions are now as readily available as published cases, thanks to the Internet and technologically savvy legal research programs.”).

201. See Eugene R. Anderson et al., *Out of the Frying Pan and Into the Fire: The Emergence of Depublication in the Wake of Vacatur*, 4 J. App. Prac. & Process 475, 489 (2002) (noting “the increase in the use of depublication by courts”); Chris A. Carr & Michael R. Jencks, *The Privatization of Business and Commercial Dispute Resolution: A Misguided Policy Decision*, 88 Ky. L.J. 183, 219 (2000) (“Many higher appellate courts are now depublishing certain decisions because they disagree with a lower court of appeals over a portion of its reasoning.”).

202. See e.g. *England v. Costa*, 216 S.W.3d 585, 590 n. 5 (Ark. 2005) (“California’s court rules prohibit the citation to or reliance on opinions that have not been certified for publication or ordered published.”). The federal appellate rules now permit litigants to cite unpublished opinions issued on or after January 1, 2007. See e.g. *In re Grant*, 635 F.3d 1227, 1231 (D.C. Cir. 2011) (discussing Fed. R. App. P. 32.1). However, “many states still

widely criticized,²⁰³ primarily because they deprive courts and litigants of the ability to cite potentially persuasive authority.²⁰⁴ But regardless of how controversial (or ineffective)²⁰⁵ the practice may be,²⁰⁶ the Arizona Supreme Court's authority to

absolutely prohibit citation of unpublished opinions." Andrew T. Solomon, *Making Unpublished Opinions Precedential: A Recipe for Ethical Problems & Legal Malpractice?* 26 Miss. C. L. Rev. 185, 200 (2007).

203. See *State Farm Mut. Auto. Ins. Co. v. Davis*, 937 F.2d 1415, 1420 n. 4 (9th Cir. 1991) ("California's depublication procedure does not send clear signals."); *Alshrafi v. Am. Airlines, Inc.*, 321 F. Supp. 2d 150, 159 n. 9 (D. Mass. 2004) ("Local rules cabin[ing] litigants' ability to cite unpublished opinions have come under attack recently by the Advisory Committee on Appellate Rules of the United States Judicial Conference."); *In re Amendment of Section (Rule) 809.23(3), Stats.*, 456 N.W.2d 783, 784 (Wis. 1990) (Abrahamson, J., dissenting) ("Nonpublication of selected appellate court opinions and non-citation of unpublished opinions have been hotly debated issues for many years at both the state and national levels.").

204. See *Intel Corp. v. Hartford Accident & Indem. Co.*, 692 F. Supp. 1171, 1192 (N.D. Cal. 1988) (asserting that the reasoning contained in a depublished opinion "remains sound guiding analysis"), *aff'd in part and rev'd in part*, 952 F.2d 1551 (9th Cir. 1991); *Niesig v. Team I*, 545 N.Y.S.2d 153, 162 (N.Y. App. Div. 2d Dept. 1989) ("[A]n order of 'depublishing', whatever effect it has on the strength of a particular decision as binding precedent . . . , has no effect on the persuasive value inherent in the reasoning expressed in the decision."), *aff'd as modified*, 558 N.E.2d 1030 (N.Y. 1990); Carr & Jenks, *supra* n. 201, at 219 ("[D]epublication . . . has resulted in a loss of available contemporary cases to use as a guide in resolving similar disputes." (footnote omitted)).

205. See Berch, *supra* n. 31, at 187 n. 48 ("[O]ne wonders about the efficacy of depublishing orders."). In Arizona, vacated and depublished appellate court opinions that do not appear in a bound volume or a readily accessible electronic database are likely to have been reported in the *Arizona Advance Reports*. See e.g. *Papazian v. Weiss*, 540 Ariz. Adv. Rep. 13 (Ariz. App. Div. 1 2008), *review denied and ordered depublished*, 204 P.3d 390 (Ariz. 2009); *In re Franklin V.*, 260 Ariz. Adv. Rep. 7 (Ariz. App. Div. 11998); *Kana, Inc. v. Burger King Corp.*, 255 Ariz. Adv. Rep. 18 (Ariz. App. Div. 1 1997); *State v. Geffre*, 231 Ariz. Adv. Rep. 11 (Ariz. App. Div. 11996). Thus, "[a]nyone who wishes to read these depublished cases may do so and any careful practitioner will seek to find these cases and, if helpful, 'to adopt' the legal reasoning employed in them." Berch, *supra* n. 31, at 187 n. 48; see also Freeman & Ulrich, *supra* n. 23, § 3.13.5, at 3-174 ("Court of Appeals opinions are usually published in the *Arizona Advance Reports* and *Arizona Business Gazette* within 30 days after they are filed. [¶] A supreme court order precluding . . . formal publication thus will be of only limited practical success.").

206. See e.g. *People v. Loyd*, 547 N.W.2d 666, 668 (Mich. 1996) (statement of Levin, J.) ("This Court has . . . depublished opinions of the Court of Appeals to eliminate precedent without providing . . . reasons therefor. . . . This is 'no way to run the railroad,' and is contrary to the reasons for publishing all the work of this Court in the official *Michigan Reports*"); cf. Shenoa L. Payne, *The Ethical Conundrums of Unpublished Opinions*, 44 Willamette L. Rev. 723, 739 (2008) ("The greatest need in the depublishing system is for . . . a statement as to why the supreme court is depublishing an opinion. Without such a statement, attorneys face great difficulties in predicting and following the body of case law in their jurisdiction."); see generally Vikram David Amar, *Adventures in Direct*

depublish opinions suggests that vacated Arizona appellate court opinions that remain published should be citable for their persuasive value in future cases.²⁰⁷ In fact, one practical criticism of rules prohibiting the citation of depublished opinions is even more compelling when the criticism is extended to vacated opinions that are *not* depublished:

The heart of the difficulty lies in the inherent contradiction between the existence of . . . opinions and the . . . attempt to make those opinions invisible to courts deciding subsequent cases. . . . [O]pinions are precedents in fact; they are important enough to have been published . . . and they are readily found by modern methods of legal research. These salient attributes defy any attempt to suppress these opinions, whether by bans on “citing” them or on “relying on” them or by any other device.²⁰⁸

VI. CONCLUSION

An effective appellate advocate must understand the difference between binding precedent and precedent that is

Democracy: The Top Ten Constitutional Lessons from the California Recall Experience, 92 Cal. L. Rev. 927, 940 n. 62 (2004) (“[T]he . . . practice of ‘depublishing’ opinions . . . is the subject of much recent controversy.”).

207. See Berch, *supra* n. 31, at 201 (“Arizona’s lower courts, and practicing attorneys, may properly rely on those portions, if any, of [an] opinion that have not been depublished.”); cf. *Romo v. Ford Motor Co.*, 6 Cal. Rptr. 3d 793, 797 n. 1 (Cal. App. 5th Dist. 2003) (“The California Supreme Court denied defendant’s . . . request for depublication of our original opinion Although the judgment in this case was vacated . . . that action affected only limited—albeit important—portions of the case. Our original opinion . . . retains the ordinary precedential value of a published opinion of an intermediate appellate court . . . on all [other] points.” (citation omitted)); see generally Elizabeth M. Horton, Student Author, *Selective Publication and the Authority of Precedent in the United States Court of Appeals*, 42 UCLA L. Rev. 1691, 1703 (1995) (“[U]nlike an unpublished opinion, [a] vacated opinion can at least be cited as persuasive authority.”).

208. Stephen R. Barnett, *Depublication Deflating: The California Supreme Court’s Wonderful Law-Making Machine Begins to Self-Destruct*, 45 Hastings L.J. 519, 565 (1994); cf. *City of Sheboygan v. Nytsch*, 722 N.W.2d 626, 632 n. 6 (Wis. App. 2006) (“[T]rying to impose a non-precedent status on decisions by declaring them non-citable is like attempting to throw away a boomerang. The earlier decisions keep coming back because of lawyers’ and judges’ ingrained devotion to the force of stare decisis.” (quoting Paul D. Carrington et al., *Justice on Appeal* 37 (West Pub. Co. 1976))), *remanded*, 750 N.W.2d 475 (Wis. 2008).

merely persuasive²⁰⁹—what one commentator calls “‘non-precedential’ precedent.”²¹⁰ This is precisely the distinction the citation of a vacated opinion calls into play.²¹¹ Vacating an opinion may eliminate its authority as binding precedent,²¹² but it does not necessarily undermine the force of the opinion’s reasoning²¹³—that is, the opinion’s authority as persuasive precedent.²¹⁴

With this distinction in mind, it seems clear that vacated opinions should be citable for their persuasive value,²¹⁵ as long

209. See *Mullen & Mahon, Inc. v. Mobilmed Support Servs., LLC*, 773 A.2d 952, 958 n. 6 (Conn. App. 2001) (“An effective appellate advocate must apply the rules of law to the facts at hand by applying or distinguishing existing legal precedent. . . . [C]ounsel must state the rules of law, provide citations to legal authority that support the claims made, and know the difference between binding and persuasive precedent.”); cf. *Colby*, 811 F.2d at 1123 (“The distinction essential to understanding the doctrine [of *stare decisis*] is between the persuasiveness and the authority of a previous decision.”).

210. Fowler, *supra* n. 160, at 142; see also *Tax Analysts & Advocates v. IRS*, 362 F. Supp. 1298, 1306 (D.D.C. 1973) (“[P]recedent is often only persuasive rather than controlling.”); *Schmier v. S. Court of Cal.*, 117 Cal. Rptr. 2d 497, 503 (Cal. App. 1st Dist. 2002) (“[T]here is a distinction between ‘binding’ and ‘persuasive’ precedent: the former must be followed, but the latter need not be.”).

211. See *Spears v. Stewart*, 283 F.3d 992, 1017 n. 16 (9th Cir. 2002) (“Vacated opinions remain persuasive, although not binding authority.”); *U.S. v. Cisneros*, 456 F. Supp. 2d 826, 839 (S.D. Tex. 2006) (“A vacated decision, while persuasive, is no longer binding precedent.”).

212. See *Francis*, 963 P.2d at 1094 (discussing an Arizona Court of Appeals decision that “became binding precedent when it was published,” and would “remain[] so until . . . vacated by our supreme court”); *Miller v. City of Little Rock*, 743 S.W.2d 9, 12 (Ark. App. 1988) (“The decision of the Arizona Court of Appeals . . . is not precedent; it was vacated on petition for review to the Arizona Supreme Court.”).

213. See *We Are Am./Somos Am., Coal. of Ariz. v. Maricopa Co. Bd. of Supervisors*, 809 F. Supp. 2d 1084, 1101 n. 10 (D. Ariz. 2011) (“Even though *Jones* was vacated . . . and may not be cited as binding precedent, that vacatur did not affect the reasoning therein.” (internal punctuation and citations omitted)).

214. See e.g. *Orhorhaghe v. Immigration & Naturalization Serv.*, 38 F.3d 488, 493 n. 4 (9th Cir. 1994) (“Because the opinion was vacated, [it] is no longer binding . . . precedent. However, it is still persuasive authority.” (citations omitted)); see also *In re “Agent Orange” Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 83 (E.D.N.Y. 2005) (“That [an] opinion was later vacated does not deprive its reasoning of persuasive power.”).

215. See *Coalition to End the Permanent Cong.*, 979 F.2d at 221 n. 2 (Silberman, J., dissenting from *per curiam* disposition) (asserting that “a vacated opinion . . . still may carry ‘persuasive authority,’ and even some precedential value” (quoting *Los Angeles Co. v. Davis*, 440 U.S. at 646 n. 10 (Powell, J., dissenting))); *Cassim v. Educ. Credit Mgmt. Corp. (In re Cassim)*, 395 B.R. 907, 912 n. 3 (B.A.P. 6th Cir. 2008) (“[I]t is appropriate to cite [a vacated opinion] for its persuasive reasoning, if not for its precedential authority.”), *aff’d*, 594 F.3d 432 (6th Cir. 2010); Sullivan, *supra* n. 16, at 1171 (“[A] judge can cite as

as they are published,²¹⁶ and arguably even when they are not.²¹⁷ Although this is particularly true of opinions vacated on grounds that do not cast doubt on the propositions for which they are cited,²¹⁸ the same rule should apply to all vacated opinions.²¹⁹ Indeed, because attorneys have an ethical obligation to pursue (or at least consider pursuing)²²⁰ any legal argument that might advance their clients' interests,²²¹ attorneys who elect not to cite

persuasive anything that in fact persuades her: a novel, a movie, an op-ed, a blog, or perhaps even an obscure law review article. It follows that such a judge could cite a vacated or reversed opinion." (footnotes omitted)).

216. See e.g. *Meml. Hosp. of Iowa Co.*, 862 F.2d at 1302 (noting that some of the persuasive force of a vacated opinion "would remain as long as the court's opinion were available to read"); Luther T. Munford, *The Peacemaker Test: Designing Legal Rights to Reduce Legal Warfare*, 12 Harv. Negot. L. Rev. 377, 405 (2007) ("[A] vacated opinion does not lose all value. If it has been published, it remains on the books for use in other cases. Although not binding, the vacated decision may still be persuasive.").

217. See e.g. *Mattei v. Mattei*, 126 F.3d 794, 801 n. 6 (6th Cir. 1997) ("We find persuasive . . . the reasoning in [a] vacated and unpublished decision."); *Dist. of Columbia v. Cooper*, 445 A.2d 652, 658 (D.C. 1982) (Nebeker, J., dissenting) ("The basis for my dissent appears in the division majority opinion which was vacated before publication. I attach it as an appendix."); *Fischer v. State*, 252 S.W.3d 375, 386 (Tex. Crim. App. 2008) ("The State also cites . . . a vacated and unpublished opinion from the Fourth Circuit."); see generally *Giese v. Pierce Chem. Co.*, 43 F. Supp. 2d 98, 103–04 n. 1 (D. Mass 1999) (asserting that because they "represent the considered opinions of sitting judges deciding actual cases," unpublished opinions should be citable "not as precedent but as one would cite a law review article").

218. See e.g. *Garcia de Rincon v. Dept. of Homeland Sec.*, 539 F.3d 1133, 1141 n. 4 (9th Cir. 2008) ("Li was subsequently vacated . . . and is therefore not binding precedent. We discuss it here nevertheless because [it] is analytically sound, and because it was vacated on grounds unrelated to its analysis."); *Jackson v. Ga. Dept. of Transp.*, 16 F.3d 1573, 1578 n. 7 (11th Cir. 1994) ("Although the opinion . . . was vacated on unrelated grounds and is not binding precedent . . . , its reasoning does have persuasive value."); *Ward v. Union Bond & Trust Co.*, 243 F.2d 476, 480 n. 7 (9th Cir. 1957) ("Although . . . the opinion was vacated on other grounds the case is a useful guide to us.").

219. See *DHX, Inc. v. Allianz AGF MAT, Ltd.*, 425 F.3d 1169, 1176 (9th Cir. 2005) (Beezer, J., concurring) ("[A]t minimum, a vacated opinion still carries informational and perhaps even persuasive or precedential value."); *Meml. Hosp. of Iowa Co.*, 862 F.2d at 1302 (noting that the persuasive force of an opinion "does not vanish on vacatur").

220. See *Best v. Kelly*, 1991 WL 341736 at *3 (E.D.N.Y. Nov. 21, 1991) ("[C]ounsel . . . can obviously decide which cases to cite if he does raise [an] issue. We cannot hold that choice among authorities is behavior below the standard required of attorneys."); cf. *McFarland v. Yukins*, 356 F.3d 688, 710 (6th Cir. 2004) ("[C]ounsel has no obligation to raise every possible claim, and the decision of which among the possible claims to pursue is ordinarily entrusted to counsel's professional judgment." (citations omitted)).

221. See *Dykes v. Hosemann*, 743 F.2d 1488, 1504 n. 7 (11th Cir. 1984) (Hill, J., dissenting) (asserting that an attorney "act[s] properly as an advocate" by "using each arsenal at his disposal"); Margolis, *supra* n. 169, at 206 ("Appellate lawyers are expected

vacated opinions simply because those opinions supposedly have “no precedential value”²²² may be subjecting themselves to potential professional criticism, or worse.²²³

On the other hand, appellate advocates also must be mindful of the subsequent history of the cases they cite, and the importance of calling that history to the court’s attention.²²⁴ In particular, a party citing a vacated opinion should disclose that the opinion was vacated,²²⁵ so that the court and any opposing parties will recognize that the authority of the opinion may be limited.²²⁶ The failure to disclose this subsequent case history could subject the citing party or its attorney to sanctions,²²⁷ or at least to potentially embarrassing judicial criticism.²²⁸

to use all the tools at their disposal in constructing an argument that best represents their clients’ positions.”).

222. *Wertheim*, 122 P.3d at 5 n. 2.

223. See Margolis, *supra* n. 169, at 209 (“An appellate attorney would be considered remiss in failing to discuss a case, or other source of legal authority, which, though not directly binding on the court, has a clear potential to influence the court’s reasoning.”); J. Thomas Sullivan, *Unpublished Opinions and No Citation Rules in the Trial Courts*, 47 *Ariz. L. Rev.* 419, 436 (2005) (“Declining to use . . . prior decisions in the absence of a rule prohibiting their use might subject counsel to meritorious claims of negligence. And in theory, the practice also would arguably constitute an ethical violation by depriving the client of competent representation.”).

224. See e.g. *LeMaster v. USAA Life Ins. Co.*, 922 F. Supp. 581, 584 n. 1 (M.D. Fla. 1996) (“Plaintiff’s counsel support[s] certain propositions by citing to [cases] without providing the Court with the subsequent histories of these cases. . . . The Court finds this type of misleading citation to authority careless and inexcusable.”); *Ins. Co. of Pa. v. Lejeune*, 261 S.W.3d 852, 856 n. 2 (Tex. App.—Texarkana 2008) (“[The appellant] should have discovered the adverse subsequent history during its research and mentioned the fact in its brief.”), *rev’d on other grounds*, 297 S.W.3d 254 (Tex. 2009).

225. See *Navistar Intl. Transp. Corp. v. Freightliner Corp.*, 1998 WL 911776 at *3 n. 6 (N.D. Ill. Dec. 28, 1998) (“Although vacating an opinion . . . does not necessarily negate the logic of the opinion, it is still important to inform a court of the fact of vacatur.”); cf. *Burton v. R.J. Reynolds Tobacco Co. Inc.*, 175 F.R.D. 321, 324 (“[T]here is no reference in the court’s [prior] order to the fact that the opinion . . . was vacated The court was aware of the vacation of the opinion and erred in not so noting.” (citation omitted)), *modified on review*, 177 F.R.D. 491 (D. Kan 1997).

226. See e.g. *Slice v. Sons of Norway*, 866 F. Supp. 397, 401 (D. Minn. 1993) (finding a cited case to be “of limited value” because “as the citation indicates, the . . . opinion was vacated”), *aff’d*, 34 F.3d 630 (8th Cir. 1994); *Weitz Co. v. Mid-Century Ins. Co.*, 181 P.3d 309, 312 (Colo. App. 2007) (“[B]ecause the opinion was vacated we conclude that it has very limited value as precedent.”); see also *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 411 n. 6 (9th Cir. 1996) (asserting that “a vacated case is poor authority”); Deyling, *supra* n. 151, at 693 (stating that “a vacated opinion carries little weight”).

227. See e.g. *Kawitt v. U.S.*, 842 F.2d 951, 954 (7th Cir. 1988) (sanctioning a party for citing a case “without noting that the decision was vacated”); cf. *Horowitz v. Fed. Kemper*

Life Assurance Co., 861 F. Supp. 1252, 1260 n. 7 (E.D. Pa. 1994) ("Defendant's counsel had a duty under Fed. R. Civ. P. 11 to conduct a reasonable investigation into the law and, by citing a vacated holding to this Court, they breached that duty."), *aff'd in part and vacated and remanded in part*, 57 F.3d 300 (3d Cir. 1995).

228. See e.g. *Estate of Thompson v. Sun Life Assurance Co. of Canada*, 2009 WL 855649 at *3 (N.D. Tex. Mar. 31, 2009) ("[T]he Court was forced to warn [counsel] against citing vacated opinions without disclosing such negative history to the Court."), *aff'd*, 354 F. Appx. 183 (5th Cir. 2009); *Navistar*, 1998 WL 911776 at *3 n. 6 ("We are disappointed that plaintiff's counsel failed to inform the court that one of the decisions they cited had been vacated."); *Ind. Family & Soc. Servs. Admin. v. Ace Foster Care & Pediatric Home Nursing Agency Corp.*, 823 N.E.2d 1199, 1204 n. 5 (Ind. App. 5th Dist. 2005) ("[The appellee's] citation does not indicate that our supreme court vacated our court's opinion . . . thereby negating its precedential value. We remind . . . counsel of their duty of candor toward the tribunal . . . and admonish them to check citations more carefully in the future." (citation omitted)).