No. _____

In The
Supreme Court of the United States

TYLER AYRES, *et al.*,

Petitioners,

v.

INDIRECT PURCHASER PLAINTIFFS, TOSHIBA CORPORATION, SAMSUNG SDI CO., LTD., KONINKLIJKE PHILIPS, N.V., THOMSON SA, HITACHI LTD., PANASONIC CORPORATION, *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

On remand from an appeal successfully challenging a proposed nationwide settlement, class counsel and his clients stopped representing the class members in the Petitioners' states. The Petitioners, still members of the certified national class, moved to intervene-of-right as representatives for the members in their states.

Although agreeing that those class members needed representation, the district court found it lacked subject matter jurisdiction to allow the intervention because the case was within a multi-district litigation (MDL) proceeding under 28 U.S.C. § 1407. The Petitioners appealed. To ensure their appeal was not rendered moot, they later appealed a final judgment approving a new settlement that excised the claims of the class members in their states against the Respondents.

In a single decision, the Ninth Circuit: (i) affirmed the final judgment on the basis that the Petitioners lacked standing to challenge it; and (ii) dismissed the intervention appeal as moot because the court was affirming the final judgment.

The decision has deepened a circuit split that the Fourth and Fifth Circuits have expressly acknowledged.

The questions presented are:

1. Does a final judgment moot a pending appeal from an order denying intervention-of-right?

2. Does a district court possess subject matter jurisdiction to allow class members to intervene-of-right directly into a case coordinated in an MDL proceeding?

RULE 14.1 STATEMENT

In addition to the petitioner listed in the caption, the following individuals were the appellants below and are petitioners here: Kerry Murphy, Jay Erickson, John Heenan, Jeff Johnson, Chris Seufert, William J. Trentham, Nikki Crawley, Hope Hitchcock, D. Bruce Johnson, Mike Bratcher, Eleanor Lewis, Robert Stephenson, and Warren Cutlip.

The Indirect Purchaser Plaintiffs referred to in the caption as respondents were plaintiff-appellees below, representing themselves and a certified class, and are: Brian Luscher, Jeffrey Figone, Carmen Gonzalez, Dana Ross, Steven Ganz, Lawyer's Choice Suites, Inc., David Rooks, Sandra Reebok, Travis Burau, Southern Office Supply, Inc., Kerry Lee Hall, Lisa Reynolds, Barry Kushner, Misti Walker, Steven Fink, David Norby, Ryan Rizzo, Charles Jenkins, Gregory Painter, Conrad Party, Janet Ackerman, Mary Ann Stephenson, Patricia Andrews, Gary Hanson, Frank Warner, Albert Sidney Crigler, Margaret Slagle, John Larch, Louise Wood, Donna Ellingson-Mack, and Brigid Terry.

RULE 14.1 STATEMENT—Continued

In addition to the respondent entities listed in the caption, the following entities were defendant-appellees below and are respondents here: Samsung SDI America, Inc., Samsung SDI Mexico S.A. de C.V., Samsung SDI Brasil Ltda., Shenzhen Samsung SDI Co., Ltd., Tianjin Samsung SDI Co., Ltd., Samsung SDI (Malaysia) San. Bhd., Philips North America LLC, Philips Taiwan Limited, Philips do Brasil, Ltda., Thomson Consumer Electronics, Inc., Technologies Displays Americas LLC, Hitachi Displays, Ltd. (n/k/a Japan Display, Inc.), Hitachi Asia, Ltd., Hitachi America, Ltd., Hitachi Electronic Devices (USA) Inc., Panasonic Corporation of North America, MT Picture Display Co., Ltd., Toshiba America, Inc., Toshiba America Information Systems, Inc., Toshiba America Consumer Products, LLC, Toshiba America Electronic Components, Inc.

RELATED CASES

- *In Re Cathode Ray Tube (CRT) Litigation*, MDL No. 1917, Master File No. 4:07-cv-5944-JST, U.S. District Court for the Northern District of California. Judgment entered July 29, 2020.
- *Indirect Purchaser Plaintiffs v. John Finn, et al. v. Toshiba Corporation, et al.*, No. 16-16368, U.S. Court of Appeals for the Ninth Circuit. Judgment entered February 13, 2019.
- *Indirect Purchaser Plaintiffs v. Sean Hull, et al. v. Toshiba Corporation, et al.*, No. 16-16371, U.S. Court of Appeals for the Ninth Circuit. Judgment entered February 13, 2019.
- *Indirect Purchaser Plaintiffs v. Anthony Gianasca, et al. v. Toshiba Corporation, et al.*, No. 16-16373, U.S. Court of Appeals for the Ninth Circuit. Judgment entered February 13, 2019.
- *Indirect Purchaser Plaintiffs v. Donnie Clifton, et al. v. Toshiba Corporation, et al.*, No. 16-16374, U.S. Court of Appeals for the Ninth Circuit. Judgment entered February 13, 2019.
- *Indirect Purchaser Plaintiffs v. Dan L. Williams & Co., et al. v. Toshiba Corporation, et al.*, No. 16-16378, U.S. Court of Appeals for the Ninth Circuit. Judgment entered February 13, 2019.
- *Indirect Purchaser Plaintiffs v. Rockhurst University, et al. v. Toshiba Corporation, et al.*, No. 16-16379, U.S. Court of Appeals for the Ninth Circuit. Judgment entered February 13, 2019.

RELATED CASES—Continued

- *Indirect Purchaser Plaintiffs v. Anthony Gianasca, et al. v. Toshiba Corporation, et al.*, No. 16-16400, U.S. Court of Appeals for the Ninth Circuit. Judgment entered February 13, 2019.
- *Indirect Purchaser Plaintiffs v. Toshiba Corporation, et al. v. Tyler Ayres, et al.*, No. 20-15697, U.S. Court of Appeals for the Ninth Circuit. Judgment entered September 22, 2021.
- *Indirect Purchaser Plaintiffs v. Toshiba Corporation, et al. v. Tyler Ayres, et al.*, No. 20-15697, U.S. Court of Appeals for the Ninth Circuit. Judgment entered March 3, 2022.
- *Indirect Purchaser Plaintiffs v. Toshiba Corporation, et al. v. Eleanor Lewis*, No. 20-15704, U.S. Court of Appeals for the Ninth Circuit. Judgment entered September 22, 2021.
- *Indirect Purchaser Plaintiffs v. Toshiba Corporation, et al. v. Eleanor Lewis*, No. 20-15704, U.S. Court of Appeals for the Ninth Circuit. Judgment entered March 3, 2022.
- *Indirect Purchaser Plaintiffs v. Toshiba Corporation, et al. v. Anthony Gianasca, et al.*, No. 20-16081, U.S. Court of Appeals for the Ninth Circuit. Judgment entered September 22, 2021.
- *Indirect Purchaser Plaintiffs v. Toshiba Corporation, et al. v. Anthony Gianasca, et al.*, No. 20-16081, U.S. Court of Appeals for the Ninth Circuit. Judgment entered March 3, 2022.

RELATED CASES—Continued

- *Indirect Purchaser Plaintiffs v. Toshiba Corporation, et al. v. Eleanor Lewis*, No. 20-16685, U.S. Court of Appeals for the Ninth Circuit. Judgment entered September 22, 2021.
- *Indirect Purchaser Plaintiffs v. Toshiba Corporation, et al. v. Eleanor Lewis*, No. 20-16685, U.S. Court of Appeals for the Ninth Circuit. Judgment entered December 23, 2021.
- *Indirect Purchaser Plaintiffs v. Jeff Speaect, et al. v. Toshiba Corporation, et al.*, No. 20-16686, U.S. Court of Appeals for the Ninth Circuit. Judgment entered September 22, 2021.
- *Indirect Purchaser Plaintiffs v. Jeff Speaect, et al. v. Toshiba Corporation, et al.*, No. 20-16686, U.S. Court of Appeals for the Ninth Circuit. Judgment entered December 23, 2021.
- *Indirect Purchaser Plaintiffs v. Toshiba Corporation, et al. v. Scott Caldwell, et al.*, No. 20-16691, U.S. Court of Appeals for the Ninth Circuit. Judgment entered September 22, 2021.
- *Indirect Purchaser Plaintiffs v. Toshiba Corporation, et al. v. Scott Caldwell, et al.*, No. 20-16691, U.S. Court of Appeals for the Ninth Circuit. Judgment entered December 23, 2021.
- *Indirect Purchaser Plaintiffs v. Toshiba Corporation, et al. v. Tyler Ayres, et al.*, No. 20-16699, U.S. Court of Appeals for the Ninth Circuit. Judgment entered September 22, 2021.

RELATED CASES—Continued

- *Indirect Purchaser Plaintiffs v. Toshiba Corporation, et al. v. Tyler Ayres, et al.*, No. 20-16699, U.S. Court of Appeals for the Ninth Circuit. Judgment entered December 23, 2021.

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OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

The Petitioners pray that the Supreme Court grant a writ of certiorari to review the judgment of the court below.

OPINIONS BELOW

The opinion of the court of appeals (i) dismissing the Petitioners' denial-of-intervention appeal, and (ii) finding they had no standing to appeal the district court's later-entered final judgment (App. 1-10) is reported at *In re Cathode Ray Tube Antitrust Litig.*, 20-15697, 2021 WL 4306895 (9th Cir. Sept. 22, 2021). The final order of the district court denying the Petitioners' motion to intervene as sub-class representatives (App. 130a-138a) is unreported. The district court's final judgment (App. 25-30) is reported at *In re Cathode Ray Tube Antitrust Litig.*, 4:07-CV-5944-JST, 2020 WL 5224343 (N.D. Cal. July 29, 2020).

JURISDICTION

The judgment of the court of appeals was entered on September 22, 2021. (App. 1-10). A timely petition for rehearing and rehearing en banc was denied on December 23, 2021 as to appeal numbers 20-16685, 20-16686, 20-16691, and 20-16699 (App. 164-172) and on March 2, 2022 as to appeal numbers 20-15697, 20-15704, and 20-16081. (App. 173-175). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the appendix to this petition. (App. 176-191).

STATEMENT

A. Proceedings through the First Appeal

1. a. From the mid-1990s to the mid-2000s, some of the most dominant players in the technology industry conspired to fix the prices of cathode ray tubes (CRTs)—making televisions, computer monitors and similar products substantially more expensive than they would otherwise be. Once the conspiracy came to light, plaintiffs from around the country filed direct and indirect purchaser suits in federal courts in their home states. The Judicial Panel on Multidistrict Litigation coordinated the cases in the Northern District of California. (DE 122).

b. After the cases were coordinated, the district court appointed lead class counsel (Lead Counsel) for a putative nationwide class of indirect purchasers of CRTs. (DE 282). Lead Counsel filed a Consolidated Amended Complaint that alleged: (1) federal antitrust claims under the Sherman Act and Clayton Act for equitable relief for persons in all 50 states; (2) violations of state antitrust laws; (3) violations of state consumer and unfair competition statutes; and

(4) claims for unjust enrichment and disgorgement of profits. (DE 437).[1]

2. a. In 2015, Lead Counsel reached settlements with Phillips, Panasonic, Hitachi, Toshiba, Samsung SDI, Thomas, and TDA (the Defendants) with a proposed fund of over $576 million (DE 4351:9-10).

Under the terms of the settlement, only class members in 22 state subclasses would receive compensation; yet every indirect purchaser in the country would release their claims against the Defendants (i.e., the Respondents in this proceeding). (DE 3861:6-7, 26).

b. Some class members objected to the settlement. (DE 4351:12). The scheme was unfair, they explained, because several of the 29 states not included in the monetary recovery were "repealer states" having laws that would allow their citizens to recover monetary damages. (DE 4351:31-41). The class members in those states were releasing their state law damages

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[1] Within the world of antitrust price-fixing litigation, the term "indirect product purchaser" refers to those persons who bought the product at issue from someone other than the defendant—typically from a retailer or wholesaler. Since the Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977), only indirect product purchasers residing in certain states may bring antitrust *damages* suits against product manufacturers. "Currently, thirty-five states and the District of Columbia effectively repealed *Illinois Brick* (known as "repealer states") in one form or another [to allow state-law damages claims by indirect purchasers], but fifteen states have not (known as "non-repealer states")." *Stromberg v. Qualcomm Inc.*, 14 F.4th 1059, 1064 (9th Cir. 2021) (citing Practical Law Antitrust, *State Illinois Brick Repealer Laws Chart*, Westlaw, https://bit.ly/3foROqr).

claims and, like the class member objectors in "non-repealer" states, their federal equitable claims for nothing. (DE 4351:38-41).

c. Despite the class-member objections, the district court entered an order granting final approval to the settlement, and then entered a final judgment of dismissal with respect to the Defendants. (DE 4712: 36-37; 4717).

3. a. Several class-member objectors appealed the district court's final approval order to the Ninth Circuit. At oral argument, the appellate panel expressed serious concerns about the settlement's fairness given that it released claims without providing compensation for their release. (DE 5335:4; 5335-1:transcript pages 38-53).

b. Shortly after oral argument, Lead Counsel filed a motion in the district court for an indicative ruling under Federal Rule of Civil Procedure 62.1, asking whether the court would allow Lead Counsel to amend the settlement if the Ninth Circuit permitted it to do so through a limited remand. (DE 5335). Lead Counsel offered to reduce plaintiff class counsel's attorney's fee award by $6 million (from $158,606,250 to $152,606,250) and use that money to allow indirect purchasers in the three omitted repealer states that had appellant-objectors—Massachusetts, Missouri, and New Hampshire—to file claims against that fund. (DE 5335:5-9).

The district court denied the motion for an indicative ruling. (DE 5362). The court expressly agreed with

the objector-appellants that Lead Counsel's settlement had been unfair because it forced class members "to release their claims without compensation." (DE 5362:1). The court further conceded that, "with the benefit of hindsight," it should not have approved the settlement. *Id*.

The district court also expressed "concerns about the adequacy of the counsel who negotiated that settlement or whether they may have faced a conflict of interest" when doing so. *Id*. In the district court's view, even in seeking to amend their settlement mid-appeal, "Lead Counsel appear[ed] to be bargaining with the [district court] to reduce the perceived value of the claims of the class members in the Omitted Repealer States." (DE 5362:2). Such a conflict, the district court explained, would "require[] further exploration and potentially the appointment of separate counsel" for the ORS. *Id*.

c. In light of the district court's concession, the Ninth Circuit "remand[ed] th[e] case so that the district court [could] reconsider its approval of the settlement." (App. 161-163). The Ninth Circuit cautioned that the settlement's unfairness "necessarily affect[ed]" other issues on appeal, including Lead Counsels' "adequacy of representation under Federal Rule[] of Civil Procedure 23" and "the attorneys' fees awarded to Lead Counsel." (App. 161). The Ninth Circuit expressly chose not to vacate the district court's final approval order—leaving the national certified class intact. (App. 163).

B. Post-Remand Proceedings and Second Appeal

1. a. On remand, Lead Counsel and his named, representative clients pursued a renewed settlement, but only on behalf of the class members in the same 22 repealer states who were to be compensated in the failed, original settlement. They thus left class members in over half of the states that they had been representing without representation to continue their claims on remand. (DE 5587:2-3).

This no-longer-represented contingent was comprised of two groups of class members: (i) citizens of repealer states that had laws allowing for indirect purchasers to recover money in antitrust litigation (referred to in the lower courts as the Omitted Repealer States (ORS) because Lead Counsel had omitted them from the monetary relief in the first settlement); and (ii) citizens of non-repealer states, who while having no state-law damages claims, had federal equitable claims for monetary recovery (referred to as the Non-Repealer States (NRS)). (DE 5449:2; 5451-1:1).

As the district court recognized, with respect to those no-longer-represented groups there was an apparent "agreement among the parties that there [was] an adequacy of counsel issue which [was] sufficient to require the appointment of separate counsel" for the ORS and NRS. (DE 5444:15). The court accordingly appointed four law firms as "Interim Lead Counsel" for ORS and NRS subclasses. (DE 5518).

b. Although there was still a certified national class seeking relief under federal price-fixing law, and the district court had appointed counsel to represent ORS and NRS subclasses, the court-appointed class representatives for the national class were not from ORS or NRS states. They thus could not make allegations specific to those states. Accordingly, members of the certified nationwide class from the ORS and NRS states would need to be promoted to named class representatives.

To fill those roles, the Petitioners—as ORS and NRS class members—moved to intervene-of-right under Federal Rule of Civil Procedure 24 and, simultaneously, sought leave, under Federal Rule of Civil Procedure 15, to amend the consolidated complaint that had always included them as national class members. (DE 5565; 5567). As they explained, the class members in the ORS and NRS states were already part of the case by virtue of their inclusion as members in the certified nationwide class, but they were no longer represented. Intervention would allow the creation of subclasses to remedy that defect. (DE 5567:2).

Relying on the relation-back doctrine, the ORS sub-class representatives sought to amend the consolidated MDL complaint to assert the ORS subclasses' state-law damages claims, which were based on the same or substantially similar underlying conduct as the pending federal price-fixing claims that had always been asserted on their behalf. (DE 5567:12-13,

16-19).[2] The NRS subclass representative, asserting only the pre-existing federal claims, sought to amend solely to plead the existence of the NRS subclass. (DE 5565:4).

Both the Defendants and Lead Counsel opposed intervention. The Defendants opposed primarily by arguing that the intervention motions were untimely. (DE 5592:5-11, 19-20). They claimed the Petitioners' motions were the product of a "decade-long delay," and that they should have been filed much earlier. (DE 5592:6). Alternatively, the Defendants argued that even if the intervention was timely it would serve no purpose, asserting that the Petitioners could bring their claims in a new lawsuit, so intervention was unnecessary. (DE 5592:11-15).

Lead Counsel objected on procedural grounds. Although taking "no position on whether the [ORS] and [NRS] Plaintiffs should be allowed to intervene," Lead Counsel contended that the Petitioners, despite being members of the national class he represented, "ha[d] no authority to make or amend the allegations" in the consolidated MDL complaint that Lead Counsel had filed for the national class he represented, and should not be allowed to do so. (DE 5593:1-2, 5-10).

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[2] As the Defendants themselves conceded below, "IPPs in the 22 States, the ORS Subclass, and the NRS Subclass make the same basic antitrust allegations" and, accordingly, "much of the same evidence presented in a potential 22 States trial would have to be presented again in the subsequent trial for the [ORS and NRS Plaintiffs]." (DE 5525:5, 7).

The district court agreed. (App. 139-148). Although finding that the motions "may 'provide[] enough information to state a claim and for the court to grant intervention,'" the court decided the Petitioners would need to file a "separate pleading" setting forth their claims, instead of seeking to amend the consolidated MDL complaint that Lead Counsel had filed. (App. 142, 147).

c. The Petitioners then filed renewed motions to intervene along with the court-ordered "separate pleadings." (DE 5643; 5645). Aside from attaching the "separate pleadings," their renewed motions remained substantively the same. *Id*.

The Defendants again opposed the motions to intervene raising each of their prior arguments (DE 5663:6-13, 27-28). But they added a new argument: latching onto the district court's "separate pleading" requirement, the Defendants contended the district court lacked subject matter jurisdiction to permit the Petitioners to file their complaints-in-intervention because the class action (where they were already class members) was located in an MDL proceeding. (DE 5663:21-23).

The Defendants argued that "[t]he subject-matter jurisdiction of an MDL court is limited to claims that have been filed in or removed to federal court and transferred to the MDL court." (DE 5663:22) From that, they argued that because the proposed ORS and NRS class representatives had not first filed separate actions in a "home federal court," the district court

lacked jurisdiction over the proposed subclass representatives and their claims for the class members in their states. (DE 5663:22-23).

Agreeing with the Defendants, the district court denied the motions to intervene. (App. 130-138). The court explained that "the MDL statute does not permit movants' direct intervention into the MDL proceedings, whether by filing separate complaints or amending IPP Plaintiffs' operative complaint." (App. 133). In the district court's view, even when a motion to intervene-of-right is filed by an actual class member seeking to remedy inadequate representation by enabling the court to create a subclass (a subclass the court itself said was necessary (DE 5444:15)), separate "[c]ases must already be pending in a federal court before they can be added to an existing MDL." (App. 134).

The Petitioners moved to alter or amend the order denying their renewed motions to intervene. (DE 5688; 5689). They argued that the court's jurisdictional determination amounted to clear error because, if it were correct, it would make Rule 24 intervention impossible in MDL proceedings, even though that rule indisputably provides the proper procedure for the intervention of unnamed class members to remedy inadequate representation. (DE 5688:2-3; 5689:6). Such a conclusion would, in turn, eviscerate the requisite procedural due process protections Rule 23 grants judges in class action litigation. (DE 5688:2).

2. a. During the intervention proceedings, Lead Counsel entered into proposed amended settlements with the Defendants on behalf of the 22 states that would have been compensated in the original settlement. That new proposed global settlement was identical to the first, apart from three changes:

- Only the class members in the 22 state subclasses would explicitly release their price-fixing claims;
- All the other class members—the ORS and NRS members—would, instead of releasing their claims this time around, simply have their claims against the Defendants excised from the litigation because the Defendants would be entirely dismissed from the case; and
- The Defendants' settlement payment would be reduced by 5.35%, and IPP's attorney fee award would be reduced by $29 million (from $158,606,250 to $129,606,250) "to fully offset the reduction in the settlement amounts."

(DE 5587:3, 30-31).

b. On its face, eliminating the ORS and NRS price-fixing claims against the Defendants in the MDL actions might not appear prejudicial; after all, there would be no explicit *release* of those claims, and ORS and NRS class members could re-file their claims in a new case. Any such appearance is misleading.

When the ORS and NRS Plaintiffs sought intervention-of-right, the nationwide price-fixing claims

had been pending for over 10 years. As long as those claims remained pending against the Defendants, the Petitioners could assert claims on behalf of the persons in their states that would relate back and, thus, would be protected against any statute-of-limitations defense. But a *newly-filed* suit would be subject to the defense that it was facially time-barred. Eliminating the ORS and NRS claims against the Defendants would thus be tantamount to a release of those claims and highly prejudicial to the ORS and NRS class members.[3]

The Petitioners raised those concerns in opposition to preliminary approval, explaining that, upon finality, all pending actions against the Defendants would be dismissed; thus, even if the Petitioners were successful in reversing the order denying their motions to intervene as class representatives, the claims of the Defendants in the actions into which they were entitled to intervene would no longer be pending. (DE 5607:5-6). They would be forced to file new actions, which the Defendants could (and would) argue were time-barred. (DE 5607:6).

c. Between denying the motions to intervene and denying the motions to alter or amend the intervention order, the district court granted preliminary approval to the re-worked settlement. (App. 98-129). The

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[3] The Defendants were explicit that ORS and NRS claims were time-barred and that unless the Petitioners intervened directly into the class action, the relation-back argument would be lost: the "relation-back argument fails unless they are permitted to amend the existing complaint. . . ." (DE 5726:7).

court did not address the ORS and NRS opposition, concluding that—because the ORS and NRS claims were not being released by the amended settlements—ORS and NRS class members had "no standing to object" to the settlements. (App. 107).

d. Once their motion to alter or amend the order denying them intervention-of-right was denied (App. 89-97), the Petitioners filed notices of appeal. (DE 5709, 5711).[4] They then moved to stay the final approval proceedings—set for two months later—until the Ninth Circuit decided their intervention-of-right appeal. (DE 5718). In light of the Ninth Circuit's "divergent precedents" on whether a subsequently-entered final judgment moots an already-pending intervention appeal,[5] the Petitioners asserted that it was "possible" that final approval (and the entry of a corresponding final judgment) could moot their intervention appeal; accordingly, it was appropriate to stay those approval proceedings until their intervention appeal was resolved. (DE 5718:8-9).

Both Lead Counsel and the Defendants opposed the motion to stay—arguing that there was no *possibility* that the entry of a final judgment post-final-approval could moot the pending intervention appeal. (DE 5726:8-9; 5727:5). Lead Counsel was particularly clear that final approval and entry of final judgment

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[4] Orders denying motions to intervene-of-right are deemed final orders for the denied movants. *Prete v. Bradbury*, 438 F.3d 949, 959 n.14 (9th Cir. 2006).

[5] *DeOtte v. State*, 20 F.4th 1055, 1066 (5th Cir. 2021) (citing *CVLR Performance Horses, Inc. v. Wynne*, 792 F.3d 469, 474 (4th Cir. 2015)).

could not moot the Petitioners' intervention appeal—citing the Petitioners' "opportunity to appeal any final judgment in this action" and stating, based on their opportunity to appeal the final judgment, that the Ninth Circuit could still "provide an effective remedy on appeal. . . ." (DE 5727:5) (quoting *United States v. Sprint Commc'ns, Inc.*, 855 F.3d 985, 990 (9th Cir. 2017)). Addressing the divergent branch of Ninth Circuit mootness precedent under which a final judgment may moot a pending intervention appeal, Lead Counsel argued that those cases simply "do not accurately represent the current state of the law" in the Ninth Circuit. (DE 5727:5 n.4).

The district court found that the Petitioners' mootness concerns were "unfounded," and denied their motion to stay. (App. 84-88).

3. a. While their motion to stay was still pending, the Petitioners filed objections to the final approval of the amended settlement. (DE 5732). They explained that they had standing to object to the settlements because final approval would excise their claims against the Defendants and, thus, could moot their pending appeal from the district court's order denying their motions to intervene-of-right because "[o]nce the underlying litigation [was] dismissed following settlement approval, there may 'no longer [be] any action in which [to] intervene.' " (DE 5732:4) (quoting *United States v. Ford*, 650 F.2d 1141, 1143 (9th Cir. 1981)). They also re-asserted their argument that the new settlement adversely affected their rights because it exposed the Petitioners to an anticipated

statute-of-limitations challenge if they were forced to file new actions. (DE 5732:7-8).

In response to the Petitioners' contention that they had standing to object to the settlements, Lead Counsel and the Defendants again argued that the Petitioners' mootness concerns were unfounded, with each quoting the same Ninth Circuit holding from *Sprint Communications*: "the parties' settlement and dismissal of a case after the denial of a motion to intervene does not as a rule moot a putative-intervenor's appeal." (DE 5757:7; 5758:16) (quoting *Sprint Communications, Inc.*, 855 F.3d 990).

b. After the district court denied the Petitioners' motion to stay, they filed a motion in the Ninth Circuit seeking to stay the final approval proceedings until the court of appeals could resolve their appeal from the order denying the motions to intervene. (Appellate DE 20-1 in Appeal No. 20-15704). Again acknowledging the Ninth Circuit's conflicting precedent on whether the entry of a final judgment moots a pending intervention appeal (*Id*. at 15-16), the Petitioners argued that a stay was appropriate. (*Id*. at 16).

For the third time, both the Defendants and Lead Counsel argued that those mootness concerns were "legally unsupportable." (Appellate DE 24 & 25 in Appeal No. 20-15704). The Defendants contended that Ninth Circuit law was clear: "an appeal from a denial of intervention * * * is not moot if the underlying litigation remains 'alive' in [the Ninth Circuit] because there is also an appeal pending from the final

judgment." (Appellate DE 24 in Appeal No. 20-15704 at 11-12) (citing *Canatella v. California*, 404 F.3d 1106, 1110 n.1 (9th Cir. 2005)). Lead Counsel was equally emphatic that mootness was a non-issue, arguing that the entry of a final judgment could not moot the intervention appeal. (Appellate DE 25 in Appeal No. 20-15704 at 8-9).

The Ninth Circuit denied the motion for stay—explicitly finding that the Petitioners had "not shown that they are likely to suffer irreparable injury in the absence of stay." (App. 33).

c. The district court then entered an order granting final approval to Lead Counsel's amended settlement. (App. 34-76). The court concluded—once again—that the Petitioners lacked standing to object. (App. 46-49).

Regarding the Petitioners' assertion that they had standing to object because the settlement could adversely impact them (by potentially mooting their pending intervention appeal or preventing them from utilizing the relation-back doctrine), the district court found that such a danger was not akin to the "[f]ormal legal prejudice" sufficient to allow a non-party to a settlement to object. (App. 48-49). In the district court's view, "[a]t most," the "settlement puts [them] at something of a tactical disadvantage in the continuing litigation." (App. 49) (quoting *Waller v. Fin. Corp. of Am.*, 828 F.2d 579, 584 (9th Cir. 1987) (alteration in original)).

After the trial court granted final approval to the settlement, the Petitioners moved to intervene in the district court for the limited purpose of appealing the final approval order. (DE 5792). The district court denied the motion to intervene. (App. 11-24). The court concluded they could not appeal the order rejecting their objections for the same reason they lacked standing to object in the first place: they were "not members of the settling class" and, therefore, "cannot show a protectable interest in the settlement." (App. 19). The ORS and NRS Plaintiffs timely appealed the orders denying them leave to intervene to appeal the final approval order and entering final judgment. (DE 5828, 5831).

4. The Ninth Circuit consolidated the Petitioners' intervention-of-right appeal and their later appeal from the final judgment. A single panel was thus tasked with addressing: (1) the district court's order denying the Petitioners' motions to intervene-of-right and act as replacement class representatives; and (2) the later-entered orders granting final approval to the amended settlements, entering judgment, and denying the Petitioners' motion to intervene for the limited purpose of appealing that order.

The court of appeals resolved the issues in two steps that reversed the sequence that the district court entered the orders on review. *First*, the court addressed the appeal from the final judgment, concluding that the Petitioners lacked standing to appeal: "The ORS and NRS objectors [i.e., the Petitioners who earlier appealed the denial of their motion to intervene-of-right]

lack standing to appeal the district court's [later-entered] approval of the current settlement agreements." (App. 8).

The court reasoned that—because the ORS and NRS claims were not explicitly released by the settlement—the Petitioners could not show that they would suffer "formal legal prejudice as a result of the settlement." (App. 7) (quoting *Waller v. Fin. Corp. of Am.*, 828 F.2d 579, 583 (9th Cir. 1987)). The court acknowledged that affirmance could "weaken" the Petitioners' ability to use the relation-back doctrine,[6] but decided that was no more than the loss of a "tactical advantage" and was not "sufficient to create standing to appeal." (App. 7-8a). The court's standing analysis simply elided the fact that the Petitioners were simultaneously prosecuting an earlier-filed intervention appeal in which they were seeking to become parties to the very action the final judgment terminated. (App. 6-9).

Second, the Ninth Circuit held in the same order that the Petitioners intervention-of-right appeal was mooted because of the appellate court's concurrent affirmance of the later-entered final judgment approving the settlements: "Our affirmance of the amended settlements moots the pending appeals by the [A]ppellants related to intervention in the district court. . . .

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[6] The court did not explain how a relation-back argument would survive the affirmance of the district court's order excising the ORS and NRS claims against the Defendants from the case.

There is no longer an action against Defendants into which the [A]ppellants can intervene." (App. 9).

The Petitioners filed a petition for rehearing and rehearing en banc. (Appellate DE 88 in Appeal No. 20-15697). The Ninth Circuit denied that petition. (App. 164-175).

REASONS FOR GRANTING THE PETITION

This case presents an acknowledged circuit split over whether a final judgment moots a prior-pending intervention appeal—a recurring issue that should be resolved by this Court. As the Fifth Circuit recently observed, "[T]he Third, Tenth, and Eleventh Circuits allow the appeal of a motion denying intervention to continue after dismissal, the Second Circuit does not, and the Ninth and D.C. Circuits have divergent precedents." *DeOtte v. State*, 20 F.4th 1055, 1066 (5th Cir. 2021) (citing *CVLR Performance Horses, Inc. v. Wynne*, 792 F.3d 469, 474 (4th Cir. 2015)); *see also CVLR Performance Horses*, 792 F.3d at 474 ("Our circuit has not squarely addressed whether dismissal of the underlying action automatically moots a pending appeal of the district court's denial of a motion to intervene, and our sister circuits have differed in their approaches to the issue.").

Unfortunately for the Petitioners (and the citizens in the states they would represent), the Ninth Circuit has, once again, dismissed an intervention appeal as moot based on a final judgment that came after that

appeal had been lodged. This case presents the Court an opportunity to resolve the circuits' disarray over whether a later-entered final judgment moots an already-pending appeal from an order denying intervention-as-of-right.

This case also discretely presents an important federal jurisdictional and procedural issue arising out of the MDL statute. The Petitioners were members of a certified national class when they sought to intervene-of-right into their class action as class representatives for the persons in their states. It was undisputed that class counsel and the existing class representatives, on remand from *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 753 Fed. Appx. 438, 442 (9th Cir. 2019), were no longer representing the class members from those states. Because the class members in those states lacked any, let alone constitutionally-adequate, representation to continue their long-pending price-fixing claims, the district court appointed counsel for the no-longer-represented states, and the Petitioners sought to intervene as the subclass representatives for those states.

The district court ruled that it lacked subject matter jurisdiction to allow such direct intervention into the pending class action because the national class had been certified in actions coordinated within an MDL proceeding. The court held that any new class representatives would need to first to file a new case in a home district and then seek transfer into the ongoing MDL class proceedings.

The Court should grant certiorari, vacate the judgment below, and remand for further proceedings so that the Petitioners may intervene and represent the ORS and NRS subclass members.

I. The courts of appeals are divided over whether a final judgment moots a pending appeal from an order denying intervention.

The circuits are divided over whether a final judgment moots a pending appeal from an order denying intervention. The Third, Fourth, Fifth, Seventh, Eighth, Tenth and Eleventh Circuits, *infra*, "allow the appeal of a motion denying intervention to continue after dismissal, the Second Circuit does not, and the Ninth and D.C. Circuits have divergent precedents." *DeOtte*, 20 F.4th at 1066 (citing *CVLR Performance Horses*, 792 F.3d at 474).

A. The Ninth Circuit's decision directly conflicts with the decisions of seven circuits.

This case arises out of another decision in which the Ninth Circuit has followed the minority rule and denied a putative intervenor the right to appellate review because of a later-entered final judgment. The decision directly conflicts with the following decisions of the Third, Fourth, Fifth, Seventh, Eighth, Tenth and Eleventh Circuits:

Third Circuit. *See Neidig v. Rendina*, 298 Fed. Appx. 115, 116 n.1 (3d Cir. 2008) ("The fact that the civil rights action has been dismissed, however, does not render [the intervenor's] appeal of the denial of his motion to intervene in that suit moot.").

Fourth Circuit. *See CVLR Performance Horses*, 792 F.3d at 475 ("We find more persuasive the reasoning of those courts holding that dismissal of the underlying action does not automatically moot a preexisting appeal of the denial of a motion to intervene.").

Fifth Circuit. *See Sommers v. Bank of Am., N.A.*, 835 F.3d 509, 513 n.5 (5th Cir. 2016) ("Our caselaw does not forbid intervention as of right in a jurisdictionally and procedurally proper suit that has been dismissed voluntarily."); *accord DeOtte v. State*, 20 F.4th 1055, 1066 (5th Cir. 2021).

Seventh Circuit. *See CE Design, Ltd. v. Cy's Crab House N., Inc.*, 731 F.3d 725, 730 (7th Cir. 2013) (a later-entered final judgment in the underlying case does not render moot an appeal from an order denying intervention if the would-be intervenor also appeals the final judgment); *see also In re Synthroid Mktg. Litig.*, 264 F.3d 712, 716 (7th Cir. 2001) (a denied would-be intervenor can avoid appellate mootness by "fil[ing] two notices of appeal: one from the denial of intervention and a second springing or contingent appeal from the final judgment—which will kick in if [the intervenors] are successful on the first.").

Eighth Circuit. *See Mausolf v. Babbitt*, 125 F.3d 661, 666 (8th Cir. 1997) (" 'If final judgment is entered

with or after the denial of intervention, . . . the applicant should be permitted to file a protective notice of appeal as to the judgment, to become effective if the denial of intervention is reversed.' A contrary rule would prevent a prospective intervenor who successfully appeals the district court's denial of his intervention motion from securing the ultimate object of such motion—party status to argue the merits of the litigation—if, as was the case here, the appellate court does not resolve the intervention issue prior to the district court's final decision on the merits." (quoting 15A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3902.1, at 113 (2d ed. 1991))).

Tenth Circuit. *See FDIC v. Jennings*, 816 F.2d 1488, 1491 (10th Cir. 1987) ("To allow a settlement between parties to moot an extant appeal . . . might well provide incentives for settlement that would run contrary to the interests of justice.").

Eleventh Circuit. *See Purcell v. BankAtlantic Fin. Corp.*, 85 F.3d 1508, 1511 n.3 (11th Cir. 1996) ("[the intervenor] has standing to appeal the district court's denial of its motion to intervene. If we conclude that [the intervenor] is entitled to intervene as of right, then [the intervenor] has standing as a party to appeal the district court's judgment based on the approved settlement agreement, and we would review that judgment. If we determined that the district court abused its discretion in approving the settlement agreement, then we would reverse the judgment, which included vacatur of the jury verdict, and [the intervenor] would

be granted the relief it seeks. Because we can potentially grant [the intervenor] effective relief, this appeal is not moot [based on entry of final judgment].").

Even within these circuits, however, there is a conflict. Some circuits require the putative intervenor to lodge an appeal from the later-entered judgment. *See*, *e.g.*, *CE Design, Ltd.*, 731 F.3d at 730; *Mausolf*, 125 F.3d at 666. Others do not. *See*, *e.g.*, *CVLR Performance Horses*, 792 F.3d at 475; *Neidig*, 298 Fed. Appx. at 116 n.1; *DeOtte*, 20 F.4th at 1066; *Jennings*, 816 F.2d at 1491. As discussed *infra*, the Ninth Circuit has its own twist on this rule: the denied intervenor's appeal is rendered moot by a later-entered final judgment unless an actual "party" (as opposed to the would-be intervenor) fortuitously appeals the judgment.

B. The Second Circuit holds that dismissal of the underlying case moots a pending intervention appeal.

The Second Circuit has long held—like the Ninth Circuit did in this case—that a denied intervenor loses the right to appellate review if the underlying case concludes before the intervenor's appeal is decided. *See Nat'l Bulk Carriers, Inc. v. Princess Mgmt. Co., Ltd.*, 597 F.2d 819, 825 (2d Cir. 1979) ("We need not reach the merits of [the putative intervenor's] appeal. We believe that our affirmance on the main appeal renders the intervention issue moot."); *see also Kunz v. N.Y. State Comm'n on Judicial Misconduct*, 155 Fed. Appx.

21, 22 (2d Cir. 2005) ("[W]here the action in which a litigant seeks to intervene has been discontinued, the motion to intervene is rendered moot.").

The district courts within the Second Circuit thus consistently hold that a motion to intervene becomes moot once an underlying case is otherwise concluded. *See Marshak v. Original Drifters, Inc.*, 2020 WL 1151564, at *6 (S.D.N.Y. Mar. 10, 2020) ("Given that the underlying petition is dismissed, [the] motion to intervene . . . is denied as moot." (collecting cases within circuit)); *see also 335-7 LLC v. City of New York*, 524 F. Supp. 3d 316, 337 (S.D.N.Y. 2021) ("Because Plaintiffs' complaint has been dismissed in its entirety, 312's motion to intervene is denied as moot." (citing *Marshak*, 2020 WL 1151564, at *6 n.8).

C. The "divergent precedents" of the Ninth Circuit and the District of Columbia Circuit are occasionally (as here) wrong, and always fodder for confusion.

The decisions within the court of appeals for the District of Columbia are themselves in conflict and do little to guide litigants or courts within that jurisdiction. *Compare Energy Transp. Grp., Inc. v. Mar. Admin.*, 956 F.2d 1206, 1210 (D.C. Cir. 1992) ("We first dismiss as moot the appeals from the district court orders denying intervention. The complaints in the underlying litigation were dismissed by agreement of the parties pursuant to the settlement, so there is no longer any action in which to intervene."); *with In re Brewer*,

863 F.3d 861, 870 (D.C. Cir. 2017) ("[I]f a motion to intervene can survive a case becoming otherwise moot, then so too can a motion to intervene survive a stipulated dismissal."); *Alt. Research & Dev. Found. v. Veneman*, 262 F.3d 406, 410 (D.C. Cir. 2001) ("[O]ur jurisdiction . . . is not affected by the fact that the district court denied intervention after the stipulated dismissal was entered; the dismissal does not render the appeal moot.").

As for the Ninth Circuit, this is hardly the first time the court has dismissed a pending intervention appeal as moot because the underlying litigation concluded. *See W. Coast Seafood Processors Ass'n v. Nat. Res. Def. Council, Inc.*, 643 F.3d 701, 704 (9th Cir. 2011) ("Because the underlying litigation is over, we cannot grant WCSPA any 'effective relief' by allowing it to intervene now."); *Hamilton v. County of Los Angeles*, 46 F.3d 1141 (9th Cir. 1995) ("[the putative intervenor's] appeal of the district court's denial of his motion to intervene is moot because the underlying action has been dismissed."); *United States v. Ford*, 650 F.2d 1141, 1143 (9th Cir. 1981) ("Since there is no longer any action in which appellants can intervene, judicial consideration of the [intervention] question would be fruitless.").

Of course, it is also true that the Ninth Circuit, like the District of Columbia Circuit has "divergent precedents," *DeOtte*, 20 F.4th at 1066, and it has also held—subject to a condition unique to the circuit, *infra* at 27-28—that the dismissal of the underlying litigation does not moot an appeal from an earlier-denied

motion to intervene. *See Stadnicki on Behalf of LendingClub Corp. v. Laplanche*, 804 Fed. Appx. 519, 520 (9th Cir. 2020) ("The district court's order granting [plaintiff's] motion to voluntarily dismiss the case does not moot [the pending intervention] appeal"); *Allied Concrete & Supply Co. v. Baker*, 904 F.3d 1053, 1066 (9th Cir. 2018) (an appeal from an order denying intervention-of-right does not become moot upon the entry of a final judgment where "a party has appealed some aspect of the case"); *United States v. Sprint Communications, Inc.*, 855 F.3d 985, 990 (9th Cir. 2017) ("[T]he parties' settlement and dismissal of a case after the denial of a motion to intervene does not as a rule moot a putative-intervenor's appeal."); *DBSI/TRI IV Ltd. P'ship v. United States*, 465 F.3d 1031, 1037 (9th Cir. 2006) (intervention controversy survived final judgment in underlying case because "if it were concluded on appeal that the district court had erred . . . the applicant would have standing to appeal the district court's judgment") (internal quotation marks omitted); *Canatella v. California*, 404 F.3d 1106, 1109 n.1 (9th Cir. 2005) (final judgment in the underlying litigation does not moot a putative intervenor's appeal from an order denying his motion to intervene where the plaintiff appealed that final judgment).

Because the Ninth Circuit has not applied its precedent consistently, trying to reconcile the court's decisions is difficult. Putting aside two anomalous decisions (discussed *infra* at 29), the Ninth Circuit has, however, established a rule at direct odds with the other courts of appeals: an appeal from an order

denying intervention is mooted by a subsequent final judgment unless a *party* happens to keep the case "alive" by appealing that final judgment.

The Ninth Circuit first held that a denied intervenor could not keep a case alive by appealing a final judgment in *Hamilton*. There, the court dismissed the intervention appeal as moot even though the putative intervenor had appealed both the order denying his motion to intervene and the subsequently-entered final judgment terminating the underlying litigation. 46 F.3d at 1141. The court explained that the putative intervenor's appeal from the final judgment could not keep the case alive because, as a non-party who had been denied intervention, "he lack[ed] standing" to appeal that final judgment. *Id.*

Consistent with its reasoning in *Hamilton*, the Ninth Circuit later held in *Canatella* that a final judgment did not moot a would-be intervenor's appeal because the losing *party* "ha[d] kept the underlying action alive by filing a notice of appeal" from the final judgment. 404 F.3d at 1109 n.1. The court then reached the same result in *Allied Concrete & Supply*, 904 F.3d at 1066, holding that an action remains alive and a pending intervention appeal is not moot where "a party has appealed some aspect of the case."

In this case, the Ninth Circuit did precisely what it did in *Hamilton*: it found the Petitioners lacked standing to appeal the final judgment approving the settlement and dismissed the intervention appeal as moot: "ORS and NRS objectors lack standing to appeal

the district court's approval of the current settlement agreements. . . . Our affirmance of the amended settlement agreements moots the pending appeals by the ORS and NRS appellants related to intervention in the district court." (App. 8, 9). That is consistent with the precedent above, but there are two Ninth Circuit decisions[7] that do not conform to that precedent.

In *United States v. Sprint Communications, Inc.*, 855 F.3d 985, 990 (9th Cir. 2017), and *DBSI/TRI IV Ltd. P'ship*, 465 F.3d at 1037, there was no appeal lodged from the final judgment terminating the underlying litigation (neither by the putative intervenor nor by a party). Nevertheless, the Ninth Circuit determined in each of the cases that the dismissal of the underlying case did not moot the pending intervention appeal. *See Sprint Communications, Inc.*, 855 F.3d at 989-90 (intervention appeal not moot despite un-appealed final judgment terminating the underlying litigation because "[i]f [the court] were to conclude [the intervenor] had a right to intervene in the Government's FCA action, he might be able to object to the settlement or otherwise seek his share of the proceeds from the Government."); *see also DBSI/TRI IV Ltd. P'ship*, 465 F.3d at 1037 (same).

* * *

[7] The Petitioners also argued in their petition for rehearing en banc that the Ninth Circuit should abandon its requirement that an order denying intervention and any subsequent final judgment both be appealed for the intervention appeal to avoid mootness. (Appellate DE 88 in Appeal No. 20-15697 at 14).

As two circuits have now explicitly recognized, there is a split among the federal appellate courts as to whether an appeal of a motion denying intervention may continue after dismissal of the underlying action. The majority rule—followed by the Third, Fourth, Fifth, Seventh, Eighth, Tenth and Eleventh Circuits—holds that a final judgment does not moot a pending intervention appeal. The minority rule—followed by the Second Circuit, and a subset of the precedent from the District of Columbia and Ninth Circuits (including the order on review)—find to the contrary. There is also the complicating sub-split (the Third, Fourth, Fifth, and Tenth Circuits versus Seventh, Eighth, and Ninth Circuits) about whether a later-entered final judgment must be appealed to avoid mootness in an intervention appeal.

Such intercircuit conflict justifies review by this Court. *See Hiersche v. United States*, 503 U.S. 923, 925 (1992) ("This Court has a duty to resolve conflicts among the courts of appeal."); *see also Porter v. Nussle*, 534 U.S. 516, 523 (2002) ("grant[ing] certiorari to resolve an intercircuit conflict"); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 32 (1994) (same).

An additional factor weighs in favor of granting review: the Ninth Circuit's precedent is, itself, in disarray with regard to the conflict issue. (*Supra* at 26-27). While intra-circuit conflict is not, by itself, a basis for certiorari review, "when the intracircuit conflict relates to a recurring and important issue or is accompanied by a 'widespread conflict among the circuits," it may become one of the factors inducing the Court to grant

certiorari. SHAPIRO ET AL., SUPREME COURT PRACTICE (10th ed. 2013) (quoting *Commissioner v. Estate of Bosch*, 387 U.S. 456, 457 (1967), and collecting cases). The Court should thus, as it did in *Inyo County, Cal. v. Paiute-Shoshone Indians*, 538 U.S. 701, 709 n.5 (2003), and grant certiorari to address a question where the Ninth Circuit has "divergent views."

II. The question presented regarding a denied intervenor's right to appellate review is important.

A. The intervention-mootness issues in this case implicate the most basic notions of due process.

Intervention-of-right is, of course, a right. If erroneously denied, review should not be frustrated by the happenstance of a later-entered final judgment. Nowhere, however, is the importance of such intervention greater than in the realm of class actions.

The Court has long held that the constitutionality of class action litigation depends on adequate representation by the named plaintiff. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) ("[T]he Due Process Clause . . . requires that the named plaintiff at all times adequately represent the interests of the absent class members.") (citing *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940)). In the absence of such representation, it would be unconstitutional for an absent class member to be bound by a case in which that member did not personally participate. *See Taylor v. Sturgell*,

553 U.S. 880, 884 (2008) (a non-party must be "adequately represented by a party who actively participated in the litigation") (citing *Hansberry*, 311 U.S. at 41).

When representation is inadequate and it is necessary to elevate an unnamed class member to serve as a class representative, the proper method is through intervention under Federal Rule of Civil Procedure 24. *See Reynolds v. Butts*, 312 F.3d 1247, 1250 (11th Cir. 2002) (intervention provides the mechanism through which absent class members protect their interests). Rule 23 expressly anticipates such a procedure, granting district courts the power to enter orders allowing unnamed class members "to intervene" when such intervention becomes necessary "to protect class members" interests. Fed. R. Civ. P. 23(d)(1)(B)(iii).

The Ninth Circuit's decision (following the minority rule) eviscerates an unnamed class member's ability to seek appellate review of an order denying a motion to intervene into a pending, certified class action and, thereby, protect the class member's interests in that class action. By eliminating the ability to seek review of the district court's order denying intervention, the Ninth Circuit's decision has effectively snuffed out a class member's very right to be heard in a case where the member's interests were being inadequately represented. Due process requires more.

B. Allowing parties—especially named class representatives and their counsel—to moot the appellate rights of would-be intervenors invites moral hazard.

"To allow a settlement between parties to moot an extant appeal concerning intervention of right might well provide incentives for settlement that would run contrary to the interests of justice." *FDIC v. Jennings*, 816 F.2d at 1491. Nowhere is this more true than in the realm of class actions.

As the court of appeals explained in *In re Brewer*, "if a stipulated dismissal deprived the court of jurisdiction to hear a motion for intervention filed by absent members of a putative class, then a class action defendant could simply '"buy off" the individual private claims of the named plaintiffs' in order to defeat the class litigation." 863 F.3d at 870 (quoting *Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 338-39 (1980)). That, however, is "a strategy the Supreme Court has said 'would frustrate the objectives of class actions' and 'waste * * * judicial resources by stimulating successive suits' 'contrary to sound judicial administration.'" 863 F.3d at 870 (quoting *Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 338-39 (1980)).

C. The intervention-mootness issues are recurring.

As the numerous cases cited above evidence, the intervention-mootness issues presented in this case come up repeatedly. They have done so for decades, and the split in the circuits remains unresolved. This case presents the Court an opportunity to bring clarity to this important area of law.

III. This case also presents an important federal jurisdictional and procedural issue arising out of the MDL statute.

Because the constitutionality of class action litigation depends on adequate representation by the named plaintiff, the Court has explained that "'[m]embers of a class have a *right* to intervene if their interests are not adequately represented by existing parties.'" *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 594 (2013) (emphasis added) (quoting NEWBERG ON CLASS ACTIONS § 16:7, p. 154 (4th ed. 2002)).

Nevertheless, in the face of an undisputed absence of adequate representation, the district court concluded that it "lack[ed] subject matter jurisdiction" to allow the Petitioners to intervene directly into the MDL proceeding. (App. 134) (citing *In re Farmers Ins. Exch. Claims Representatives Overtime Pay Litig.*,

MDL No. 33-1439, 2008 WL 4763029, at *3 (D. Or. Oct. 28, 2008)).[8]

The district court's construction of the MDL statute stripped the Petitioners of the adequate-representation protections that Rules 23 and 24 provide for absent class members and, so, their due process protections of the Fifth Amendment. The court reached that result based on a purported *jurisdictional* bar created by the MDL statute that prohibits a class member from intervening directly into litigation within an MDL proceeding. In the district court's view, because the MDL statute speaks in terms of coordinating cases that are "pending in different districts" 28 U.S.C. § 1407(a), the only way to become a party to a case in an MDL is to already be a party in a case that is transferred into the proceeding. This reading of the MDL statute elevates its reference to an already-pending case to a jurisdictional pre-requisite that eliminates the possibility of intervention into an MDL proceeding, *id*.

But MDL consolidation amounts to no more than a temporary change of venue. The Judicial Panel of Multidistrict Litigation made this clear over 50 years

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[8] The fact that the Ninth Circuit did not reach the district court's jurisdictional determination does not prevent this Court from addressing that important issue in the first instance. The Court has long held that a "purely legal question . . . is 'appropriate for [the Court's] immediate resolution' notwithstanding that it was not addressed by the Court of Appeals." *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23 (1982)).

ago, analogizing MDL coordination to traditional venue transfer, and stating that "a transfer under Section 1407 is a change of venue for pretrial purposes." *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 495 (J.P.M.L. 1968) (internal citation omitted) (emphasis added); *see also Glasstech, Inc. v. AB Kyro OY*, 769 F.2d 1574, 1576 (Fed. Cir. 1985) (same).

"The Supreme Court has repeatedly advised against giving jurisdictional significance to statutory provisions that do not clearly 'speak in jurisdictional terms.'" *In re Brewer*, 863 F.3d at 870 (quoting *Arbaugh v. Y&H Corp*., 546 U.S. 500, 502 (2006)). Yet that is precisely what the district court did. Although the MDL statute "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts," *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982), the district court construed the statute as placing a jurisdictional limitation on a district court's ability to let an unnamed class-member (or anyone for that matter) intervene into any case that happens to have been MDL-coordinated for pretrial purposes.

The subject matter jurisdiction question presented is important because it implicates the Court's "prime responsibility for the proper functioning of the federal judiciary." SHAPIRO ET AL., SUPREME COURT PRACTICE (10th ed. 2013). To fulfill that responsibility, the Court has granted certiorari in cases where the order on review "has so far departed from the accepted and usual course of proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." *Id*. (collecting cases

including *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998); and *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 225 (1946)).

The district court's jurisdictional determination will also have drastic ramifications on the administration of MDL proceedings, which involve some of the largest and most far-reaching litigation in the country.[9] As of February 15, 2022, there were 185 MDL proceedings pending across 45 districts.[10] These coordinated proceedings—which are utilized across a wide spectrum of practice areas (but are particularly important in the antitrust and products liability realms[11])—often involve hundreds or thousands of actions that would

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[9] The district court's jurisdictional determination is also inconsistent with generally accepted practice within the federal judiciary. *See generally* NEWBERG ON CLASS ACTIONS § 10:29 (5th ed.) ("[N]ew litigants may file directly into the MDL forum itself, either because they are citizens of that forum and it is their natural forum, or because, for other reasons, they have decided that filing there is advantageous to them. Those skipping the MDL's tag-along process and lodging their new cases in the MDL court itself are referred to as 'direct filers.' ").

[10] United States Judicial Panel on Multidistrict Litigation, *MDL Statistics Report—Distribution of Pending MDL Dockets by District* (Feb. 15, 2022), https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-February-15-2022.pdf.

[11] United States Judicial Panel on Multidistrict Litigation, *Calendar Year Statistics*, https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics-2021.pdf (last visited Feb. 17, 2022).

otherwise be proceeding independently through the federal court system.[12]

By construing the MDL statute in a way that creates a jurisdictional bar to intervention, the district court's decision has fundamentally shifted the way that MDL proceedings will be litigated around the country. After nearly 50 years of MDL proceedings, three district courts (including the district court here) have recently found a jurisdictional bar to intervention after a case is coordinated in an MDL. (App. 134); *see also In re Mortgage Elec. Registration Sys. (MERS) Litig.*, No. MD-09-02119-PHX-JAT, 2016 WL 3931820, at *5 (D. Ariz. July 21, 2016) ("As DeBaggis's case was never filed or pending in any court prior to its addition to the [MDL complaint] by Plaintiffs . . . this Court does not have subject-matter jurisdiction over DeBaggis's claims."), *aff'd sub nom. In re Mortgage Elec. Registration Sys., Inc., Litig.*, 719 Fed. Appx. 550, 553 n.1 (9th Cir. 2017) (affirming on other grounds and explaining that the court did "not need to resolve the challenge to the district court's conclusion that DeBaggis was not properly added as a plaintiff to the consolidated actions"); *In re Farmers Ins. Exch. Claims Representatives' Overtime Pay Litig.*, 2008 WL 4763029, at *5 ("I have discovered no authority for this court, as an MDL transferee court, to exercise

[12] United States Judicial Panel on Multidistrict Litigation, *MDL Statistics Report—Distribution of Pending MDL Dockets by Actions Pending* (Feb. 15, 2022), https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-February-15-2022.pdf.

subject matter jurisdiction over state law claims not transferred by the MDL Panel. . . . Consequently, I dismiss these four subclasses for lack of subject matter jurisdiction.").

Since "MDLs typically . . . encompass both individual actions and class actions,"[13] the district court's improper jurisdictional construction will have wide reaching effects within the MDL universe, eviscerating the protections that Rules 23 and 24 provide for absent class members in actions that happen to be coordinated in MDL proceedings. Because the district court's jurisdictional construction is precisely the type of analysis this Court has "repeatedly advised against," *In re Brewer*, 863 F.3d at 870, the Court should exercise its supervisory power and grant certiorari to review this important issue.

[13] NEWBERG ON CLASS ACTIONS § 10:28 (5th ed.).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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