No. _____

In The Supreme Court of the United States

LANCE LABER,

Petitioner,

v.

MILBERG LLP, *et al.*,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court's decision in *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), which allowed unnamed putative class members to intervene for the purpose of appealing the denial of class certification following dismissal of the named plaintiff's individual claims, remains good law following this Court's decision in *Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017).

PARTIES TO THE PROCEEDINGS

The sole petitioner here (intervenor-appellant below) is Lance Laber. The claims of the original named plaintiffs, Philip Bobbitt and John J. Sampson, were voluntarily dismissed with prejudice.

Milberg LLP, Melvin I. Weiss, Michael C. Spencer, Janine L. Pollack, Lee A. Weiss, Brian C. Kerr, Uitz & Associates, Ronald A. Uitz, the Lustigman Firm, Sheldon S. Lustigman, Andrew B. Lustigman, Gabroy Rollman & Bosse, P.C., John Gabroy, and Ronald Lehman were named as defendants below. These individuals and entities are also respondents here.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Lance Laber respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit in No. 13-15812.

OPINIONS BELOW

The Ninth Circuit's order dismissing petitioner Laber's appeal from the denial of class certification (App. 1–2) is unpublished. The Ninth Circuit's order denying Laber's petition for panel rehearing and rehearing en banc (App. 51) is also unpublished. The opinion of the United States District Court for the District of Arizona denying class certification (App. 21–50) is reported at 285 F.R.D. 424.

JURISDICTION

The Ninth Circuit issued its order dismissing petitioner's appeal on February 1, 2018. App. 1–2. The Ninth Circuit issued its order denying petitioner's petition for panel rehearing and rehearing en banc on March 22, 2018. App. 51. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 1291 provides, in relevant part: "The courts of appeals (other than the United States Court

of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . ."

STATEMENT OF THE CASE

This case presents an important jurisdictional issue for class action appeals and the appellate rights of intervenors, resulting in a circuit split.

The factual and procedural background is straightforward. Philip Bobbitt and John Sampson brought a putative class action against Milberg in the District of Arizona for malpractice. *Bobbitt v. Milberg LLP*, 801 F.3d 1066, 1068 (9th Cir. 2015) (vacated). The district court denied certification on suspect grounds, and Bobbitt and Sampson voluntarily dismissed their claims with prejudice. They have repeatedly disclaimed any right to pursue their individual claims (on remand or otherwise) or to appeal the resulting judgment.

Bobbitt and Sampson petitioned for review under Rule 23(f), but the Ninth Circuit denied the petition. App. 20. When Bobbitt and Sampson decided not to pursue their individual claims or appeal further, Lance Laber, an unnamed class member not previously involved in the action, timely filed a motion asking to intervene in the district court for the purpose of appealing the district court's denial of class certification, as expressly permitted by *United Airlines*. App. 18–19. The district court granted the motion, and Laber filed a timely appeal. *Id.*

The panel held that it had jurisdiction over Laber's appeal and found the district court had committed legal error in refusing to certify a class. App. 5–17. Milberg filed a petition for certiorari to this Court, arguing, among other things, that the Court should either hear this case along with *Baker* or hold the certiorari petition pending resolution of *Baker*. Pet. in No. 15-734 (U.S. 2015). The Court declined to hear this case, but held the petition and, after deciding *Baker*, granted certiorari, vacated the panel's judgment, and remanded for further consideration in light of *Baker*. App. 3–4; *Milberg LLP v. Laber*, 137 S. Ct. 2262, 2263 (2017).

Following supplemental briefing by the parties, the Ninth Circuit issued an order dismissing the appeal. App. 1–2. Without addressing Laber's arguments with respect to *United Airlines*, the Ninth Circuit concluded that this case arose in the same procedural posture as *Baker* and dismissed the appeal for lack of jurisdiction. *Id.* The Ninth Circuit then denied Laber's petition for rehearing and rehearing en banc. App. 51–52. This petition follows.

REASONS FOR GRANTING THE WRIT

In *United Airlines*, this Court held that an unnamed class member could intervene for the purpose of appeal following dismissal of the named class representatives' class allegations and subsequent voluntary dismissal of their individual claim. The Court

concluded it was appropriate for the unnamed class members to wait to intervene until after dismissal of the named plaintiffs' claims, as requiring intervention sooner would have made the intervenors "superfluous spectators." *Id.* at 394 n.15. The Court has reaffirmed the validity of the *United Airlines* procedure in several leading cases on class action jurisdiction, and the procedure has been followed by the circuit courts of appeals.

This Court's opinion in *Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017), did not alter the viability of the procedure endorsed in *United Airlines*. *Baker* simply interpreted the word "final" in 28 U.S.C. § 1291, and held that when a named plaintiff voluntarily dismisses his individual claims purportedly "with prejudice," but also "reserve[s] the right to revive [his] claims should the Court of Appeals reverse," *id.* at 1707, that same plaintiff cannot then claim finality and appeal. To reach its conclusion, *Baker* relied heavily on principles stated in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), a case that expressly recognized the validity of the procedure endorsed in *United Airlines*.

United Airlines remains good law. This Court should grant the writ and confirm as much.

I. The Circuits Are Split On Whether An Unnamed Class Member May Intervene To Appeal From The Denial Of Class Certification.

The Ninth Circuit dismissed this appeal after determining that it lacked jurisdiction under *Baker*. Yet

the D.C. Circuit has exercised appellate jurisdiction under 28 U.S.C. § 1291 in remanding an appeal that arose in the same procedural posture as this case: an appeal from the denial of class certification by an intervenor who intervened precisely for that purpose. *See In re Brewer*, 863 F.3d 861 (D.C. Cir. 2017).

The *Brewer* case is procedurally complicated and requires some unpacking. Mr. Brewer was the named plaintiff in a class action alleging race discrimination. The district court denied certification, and Brewer sought interlocutory review under Fed. R. Civ. P. 23(f). Before his petition could be considered by the court of appeals, however, Brewer settled and voluntarily stipulated to dismissal with the defendant. 863 F.3d at 867. That same day, other previously absent class members sought to intervene. Importantly, their request was to do two things: (1) pick up pursuit of Brewer's Rule 23(f) petition, and (2) bring a *United Airlines* appeal with respect to the order denying class certification. *Id.* The district court did not resolve the motion to intervene before expiration of the notice of appeal deadline, leaving the putative intervenors in a difficult position. Accordingly, they filed a notice of appeal, appealing both the effective denial of their motion to intervene and from the order denying class certification. *Id.* The district court decided the notice of appeal stripped it of jurisdiction. *Id.*

The court of appeals determined that it had to decide two threshold jurisdiction questions. First was whether Brewer's stipulated dismissal blocked the motion to intervene. And second was the precise issue

here: "we must consider how the only named plaintiff's stipulated dismissal of his individual claims affects whether absent members of a putative class can appeal the denial of class certification." *Id.* at 868. On the first question, the court held that intervention is permitted after stipulated dismissal, and, on the second question, citing *United Airlines*, the court found that "intervention for the purpose of appealing a denial of class certification is certainly available." *Id.* at 868.

The court explicitly addressed *Baker*. 863 F.3d at 871. Importantly, the court did not even entertain the idea that *Baker* would prohibit the intervenors from challenging the class certification denial on appeal under *United Airlines*. The court only addressed whether *Baker* prohibited intervention to pursue the Rule 23(f) petition. *Id.* (explaining that the court did not need to address the "statutory issue" in *Baker* because it was considering only Rule 23(f) petition). It found that question easily resolved in favor of appellate jurisdiction. *Id.*

Notwithstanding its disclaimer about not reaching *Baker*'s "statutory issue," the court plainly, implicitly recognized it also had jurisdiction to hear the intervenor's appeal from the order denying class certification under *United Airlines*. While complicated by the procedural complexity of the case, the key point is this: After concluding it had jurisdiction to permit the intervenors to pursue Brewer's Rule 23(f) petition, the D.C. Circuit ultimately ***denied*** interlocutory Rule 23(f) review. *Id.* at 873–76.

Once it did so, the procedural posture in *Brewer* was effectively the same as it is here: the district court had denied class certification, the named plaintiff had voluntarily dismissed his case without litigating it to conclusion, the court of appeals had denied Rule 23(f) review, and the only parties left to challenge the allegedly erroneous denial of certification were the intervenors. The D.C. Circuit saw no jurisdictional impediment to remanding the case back to the district court with instructions to allow intervenors to seek to substitute a new class representative and re-file for certification. *Id.* at 876.

The court found its power to do so derived from its consolidation of the intervenor's *United Airlines* appeal with the interlocutory Rule 23(f) appeal. *Id.* Obviously, if the D.C. Circuit had believed that, under *Baker*, it lacked jurisdiction to consider the intervenor's *United Airlines* appeal from the final judgment (which, as here, resulted from the named plaintiff's voluntary dismissal), then it would have been obligated to end the case as soon as it rejected Rule 23(f) relief. It did not do so. Indeed, one of the ***very reasons*** the court denied the Rule 23(f) petition was its conclusion that the intervenors had, in fact, appealed the denial of certification under *United Airlines*. *Id.* at 874 (intervenors do not "face a death-knell situation if we decline [Rule 23(f)] review," because "[t]hey have appealed class certification from final judgment, thereby demonstrating their intent to continue the litigation regardless whether we grant the Rule 23(f) petition").

Thus, although the procedural history is cleaner here, *Brewer* is directly on point: Voluntary dismissal by a named plaintiff does not preclude other class members from stepping forward, within the appeal period, to pursue a *United Airlines* appeal of class denial. *See also Love v. Wal-Mart Stores*, *Inc.*, 865 F.3d 1322, 1326 (11th Cir. 2017) (Anderson, J., concurring) (recognizing, in a case decided after *Baker*, that "putative class members who move to intervene *and* file a notice of appeal within the thirty-day time to appeal from the final judgment effected by a Federal Rule of Civil Procedure 41(a)(1)(A)(ii) joint stipulation are not foreclosed from exercising their conditional right to intervene after final judgment for the purpose of appealing the district court's previous denial of class certification, as contemplated by the Supreme Court in *United Airlines*").

The result reached by the D.C. Circuit in *Brewer* is thus directly in conflict with that reached by the Ninth Circuit here. In both cases, an intervenor sought appellate review of an order denying class certification following dismissal by the named plaintiff of his individual claims. The D.C. Circuit correctly exercised appellate jurisdiction over that appeal by remanding to the district court – an order it could not have entered without jurisdiction under 28 U.S.C. § 1291. This Court should endorse the D.C. Circuit's approach.

II. *United Airlines* Is A Bedrock Of This Court's Class Action Jurisprudence.

While the issue presented in *United Airlines* was technically whether the motion to intervene was timely for purposes of Rule 24, it has served as a foundational case in a series of decisions in which this Court has defined the contours of its appellate jurisdiction for class certification denials.

The Term following *United Airlines*, the Court decided *Livesay*, 437 U.S. 463 (1978). There, the Court addressed whether a named class plaintiff could appeal an interlocutory order denying class certification as a matter of right under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The Court held that orders denying class certification do not come within the "small class" of decisions excepted from the final judgment requirement in *Cohen*, because such orders are not "effectively unreviewable on appeal from a final judgment." *Livesay*, 437 U.S. at 468–69. This was in part due to the fact that "an order denying class certification is subject to effective review after final judgment at the behest of the named plaintiff *or intervening class members*." *Id.* at 469 (emphasis added) (citing *United Airlines*, 432 U.S. 385). In other words, the option for absent class members to appeal by intervening under *United Airlines* was a key reason why the Court in *Livesay* decided against permitting interlocutory appeals.

The Court next decided two important class action appellate jurisdiction cases in 1980, both on the same

day: *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980), and *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326 (1980). In *Geraghty*, the Court held that a proposed class representative retains Article III standing to appeal the denial of class certification even after his personal claim has become moot, as his interest in obtaining class certification constitutes a separate "personal stake" for purposes of Article III. 445 U.S. at 404. In reaching its holding, the Court observed that it had previously, in "two different contexts," discussed the importance of the appealability of class certification denials. *Id.* at 399. First, the Court noted, this dynamic had been important to *Livesay*'s rejection of class certification denials as immediately appealable collateral orders. *Id.* at 399–400. Second, the Court observed:

> [I]n *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 393–95 (1977), the Court held that *a putative class member may intervene, for the purpose of appealing the denial of a class certification motion, after the named plaintiffs' claims have been satisfied and judgment entered in their favor*. Underlying that decision was the view that "refusal to certify was subject to appellate review after final judgment at the behest of the named plaintiffs."

Id. at 400 (emphasis added) (quoting *United Airlines*, 432 U.S. at 393).

And, in *Roper*, the Court held the ordinary rule, that only a party aggrieved by a judgment may appeal from that judgment, does not apply with respect to orders denying class certification. A class representative

may, the Court held, appeal the denial of certification even if judgment has been entered in the class representative's favor. The Court reasoned that class representatives have an interest in representing the rights of absent class members, which is a separate interest from their stake in their individual claims. 445 U.S. at 331. The Court found this interest to rest not just with named class representatives, but also with "putative class members as potential intervenors," *id.* – an obvious reference back to the Court's then very-recent decision in *United Airlines*. Indeed, elsewhere in its opinion, the *Roper* Court characterized *United Airlines* as holding "that a member of the putative class could appeal the denial of class certification by intervention, after entry of judgment in favor of the named plaintiff, but before the statutory time for appeal had run." *Id.* at 330. And, as in *Geraghty*, the Court in *Roper* observed that the appealability of the denial of class certification was "an important ingredient" to *Livesay*. *Id.* at 338.[1]

Geraghty, Roper and these other cases, accordingly, stand for two important principles that are crucial here. First, they reaffirm what *Livesay* itself had

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[1] Various circuit courts of appeals have recognized the validity of *United Airlines*'s appellate procedure. *See, e.g.*, *Alaska v. Suburban Propane Gas Corp.*, 123 F.3d 1317, 1320 (9th Cir. 1997). The Seventh Circuit, in observing that *United Airlines* means courts of appeals have jurisdiction over appeals from denials of class certification by unnamed class representatives who intervene following settlement by named plaintiffs, aptly stated that "[o]n this we can be brief." *Champ v. Siegel Trading Co.*, 55 F.3d 269, 274 (7th Cir. 1995).

said – that the availability of appeals of class denials by intervenors under *United Airlines* was a significant underpinning of the *Livesay* Court's decision not to extend *Cohen* collateral-order finality to class denials. To kick out one of the legs on which *Livesay* rests (*United Airlines*) would, given *Baker*'s reliance on *Livesay*, likewise remove crucial support for *Baker* itself. The more sensible way to harmonize the Court's line of cases is to interpret *Baker* as leaving *United Airlines* undisturbed.

Second, although *Geraghty* and *Roper* are Article III cases, not § 1291 cases, their standing analyses depend heavily on – and relied heavily on – *United Airlines* for the principle that absent class members (or named class members whose claims are moot) have a separate, independent interest in protecting the class's interest in appealing class certification denials. These cases have stood for nearly 40 years. Given the choice between holding that *Baker* meant silently to undermine all this law and to undermine the important independent rights of absent class members, or holding that *Baker* simply means a judgment is not "final" as to a named class member when he tries to reserve for himself the right to appeal and later pursue his claims, the Court should opt for the latter.

Milberg argued below that an appeal by the named plaintiff and by an intervening class member are functionally the same. That is hardly so for a number of reasons. First, and most significantly, *United Airlines* authorizes the latter. Second, *United Airlines* putative intervenors have an entirely distinct interest

from named plaintiffs who elect to no longer pursue their claims. That is the very point of *Geraghty, Roper* and the other cases cited above, which recognize that the right to seek review of a certification denial stands on its own as a cognizable Article III interest. There is not a single word in *Baker* on which to pin an intent by the Court to overrule 40 years of precedent *sub silentio* in a factually distinct context. Third, intervention is different because it requires a suitable intervenor willing to take on the class's cause within the short time for appeal – no more than 30 days in a case not involving the government. *E.g.*, *Love*, 865 F.3d at 1322.

Moreover, Milberg's functional-equivalent argument ignores that even where one path to appeal is blocked by lack of finality, this Court has had no trouble recognizing alternative procedural paths to finality, so long as a party is willing to live with the consequences the alternative procedural path entails. For example, just as the Court in *Livesay* was comforted by the existence of an appeal-by-intervention under *United Airlines*, the Court in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), recently was comforted in holding that orders compelling production of arguably privileged information are not final under *Cohen* in part precisely because of the existence of an alternative "safety valve" means of obtaining an appeal to vindicate error (such as provoking contempt by failing to produce the privileged information and then appealing the contempt order). *Id.* at 110–11. There is, accordingly, no anomaly in recognizing an appeal-by-intervention under *United Airlines* while blocking

appeals under *Baker* by named representatives who claim to be dismissing "with prejudice" but reserve a right to reappear later.

Bobbitt and Sampson forever relinquished their claims and denounced their right to appeal; Laber subjected himself to the possibility his request for intervention would be denied by the district court or that he would face other obstacles; and the class's viability now depends on the emergence of a suitable class representative other than Bobbitt or Sampson. The path forged by Laber is not, in any sense, a functional equivalent to the "we-pretend-to-dismiss-with-prejudice-but-do-not-really-mean-it" path pursued by Mr. Baker and his co-plaintiffs.

III. Requiring Early Intervention To Preserve Appellate Rights Would Result In Unduly Protracted Proceedings.

The purpose of intervention is to preserve one's rights when the named parties to the action will not do so. Fed. R. Civ. P. 24. The same is true in putative class actions: until the class is certified, all unnamed members of the putative class must rely on the named plaintiff to purse the rights of the class. If the named plaintiff fails to do so – as is the case when he settles and voluntarily dismisses his individual claims following the denial of class certification – unnamed class members must be able to enter the appeal to preserve their rights.

This Court recognized as much in *United Airlines*, holding that intervention for the purpose of appealing the denial of class certification was authorized once it became clear "that the interests of the unnamed class members would no longer be protected by the named class representatives." *Id.* at 394. The Court also endorsed the unnamed class member's decision to wait to intervene until after judgment had been entered in the would-be class action – noting that earlier intervention would force absent class members to enter the action solely to preserve their appellate rights, creating unnecessary proceedings only to sit idly by in the litigation in case the named plaintiff ceased pursuing the claims:

> A rule requiring putative class members who seek only to appeal from an order denying class certification to move to intervene shortly after entry of that order would serve no purpose. Intervention at that time would only have made the respondent a superfluous spectator in the litigation for nearly three years, for the denial of class certification was not appealable until after final judgment. Moreover, such a rule would induce putative class members to file protective motions to intervene to guard against the possibility that the named representatives might not appeal from the adverse class determination. The result would be the very multiplicity of activity which Rule 23 was designed to avoid.

Id. at 394 n.15 (internal quotation marks and citations omitted).

And in *Baker*, this Court specifically sought to avoid "protracted litigation and piecemeal appeals." 137 S. Ct. at 1713. Yet disavowing the *United Airlines* procedure would, apart from disrupting decades of this Court's precedent, create the very type of protracted litigation the Court sought to avoid in *Baker*. As recognized in *United Airlines*, requiring unnamed putative class members to intervene early in the case so as to preserve their appellate rights would invite multiplicity of proceedings. And denying them the ability to appeal from the denial of class certification following intervention for that purpose would disrupt the rightful reliance on the named plaintiff invited by *United Airlines*.

The more efficient procedure is that used here. Intervenors should have the right to enter a case to appeal their class action rights in the event the named plaintiff abandons his. There is no need to require that they do this at the outset of the litigation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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