No. 21-1218

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

REPLY BRIEF

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ARGUMENT

I. The courts of appeals are divided over whether a judgment moots a pending intervention appeal.

A. Two circuits have expressly recognized the circuit split that the Respondents deny exists.

The first question presented is whether a later-entered final judgment moots a pending intervention appeal. That legal question has long divided the circuits. (Pet. 21-31). The Respondents nonetheless tell the Court that "the petition posits a circuit split that does not exist." (Resp. 22). It is a surprising position, especially given that two circuits have expressly recognized the split the Respondents deny: *DeOtte v. State*, 20 F.4th 1055, 1066 (5th Cir.2021); *CVLR Performance Horses, Inc. v. Wynne*, 792 F.3d 469, 474 (4th Cir.2015).

The Respondents try to discredit those circuits' opinions by claiming they were based on "outdated cases." (Resp. 22). But the Fifth Circuit's *DeOtte* opinion was issued in December 2021. Unless a tectonic shift occurred in the past five months, the *DeOtte* panel had every relevant case at its disposal when it reaffirmed the circuit split at the heart of this petition. 20 F.4th at 1066.

B. The Respondents recast the issue to evade the circuit split.

The Respondents' substantive argument that the acknowledged circuit split "does not exist" depends on recasting the issue causing the split into something it is not. Specifically, the Respondents claim there is no split because all the circuits employ a "fact-specific, case-by-case" analysis to determine whether an intervention appeal is moot. (Resp. 16). But the split exists because the circuits disagree about whether a pending intervention appeal may continue after the dismissal of the underlying action.

The majority rule holds that a final judgment does not moot a pending intervention appeal. (Pet. 21-24). Under the minority rule, in contrast, if the underlying case is dismissed by a final judgment, the earlier-pending intervention appeal becomes moot. (Pet. 24-31). No other facts matter. Calling intervention-mootness a "fact-specific, case-by-case" analysis is thus no more than legerdemain—a hollow statement about mootness analysis in general that says nothing about the certworthiness of the legal issue in this case.

The Respondents' notion that the Petitioners are asking the Court to adopt an unspecified "case-by-case rule" to determine whether a final judgment moots a pending intervention appeal is an exemplar strawman. (Resp. 23). The Petitioners are asking the Court to disapprove the minority rule (employed by the Ninth Circuit below), under which a final judgment automatically moots a pending intervention appeal.

Under that minority paradigm, the mootness analysis is binary: if the underlying litigation is finally resolved, the pending appeal must be dismissed. The Petitioners are challenging the validity of that binary rule.

It is true that there is disagreement among the majority-rule circuits about the steps a putative intervenor must take to ensure its appeal remains viable after entry of a final judgment. Specifically, there is a sub-split about whether the later-entered final judgment must also be appealed to avoid mootness in the pending intervention appeal. (Pet. 24). But that nuance further proves what this appeal is about: determining the procedural effect of a final judgment on a pending intervention appeal and, if the minority rule is incorrect, the steps a putative intervenor must take to avoid mootness.

C. The circuit split is clear and persistent.

1. The Second Circuit has consistently applied the minority rule.

In the Second Circuit, the law is clear: "where the action in which a litigant seeks to intervene has been discontinued, the motion to intervene is rendered moot." *Kunz v. New York State Comm'n on Judicial Misconduct*, 155 Fed. App'x 21, 22 (2d Cir.2005). The Respondents' effort to complicate that precedent fails.

In *National Bulk Carriers v. Princess Management Co.*, 597 F.2d 819, 825 n.13 (2d Cir.1979), the Second Circuit was clear that it "need not reach the merits of

[an intervention] appeal . . . because [the court's] affirmance on the main appeal render[ed] the intervention issue moot." That determination was founded on one fact: "intervention in an action that is now terminated could not afford any [relief.]" *Id*. The Second Circuit's conclusion that intervention would not afford additional "protection" was no more than a restatement of the dispositive fact that a terminated case cannot provide relief. *Id.*

The Respondents urge the Court to ignore *Kunz* because it used "broad language." (Resp. 21). It is not entirely clear what that means. *Kunz* mechanically applied the minority rule and, if the panel's language leaves any doubt as to that intention, the panel's citation to *United States v. Ford*, 650 F.2d 1141, 1142–43 (9th Cir.1981)—a case employing the minority rule—leaves no doubt. 155 Fed. App'x at 22. The fact that the *Kunz* court affirmed the orders on appeal (as opposed to dismissing the appeal) made sense given that the trial court, itself, had denied intervention on the same mootness grounds. *Id*.

2. The Ninth Circuit remains in disarray.

The Respondents concede that the Ninth Circuit's precedent has been in disarray, admitting that there "may have been a period during which the Ninth Circuit 'rendered inconsistent decisions' on" the conflict issue. (Resp. 18). But then they contend a panel of the Ninth Circuit "resolved" the court's divergent precedent in *United States v. Sprint Communications, Inc.*,

855 F.3d 985, 990 (9th Cir.2017). There are two problems with this argument:

First, this case itself is vivid evidence that the Ninth Circuit has not abandoned the minority rule. The court of appeals dismissed the Petitioners' earlier-filed intervention appeal as moot on the explicit basis that the court was affirming the later-entered final judgment. (App. 9). Despite the Respondents' effort to suggest the Ninth Circuit's decision rested on other, "fact-specific" grounds, the decision's rationale is limited to the singular basis that the court was affirming the later-entered final judgment. *Id.*

Second, the Ninth Circuit's 2017 decision in *Sprint* did not reconcile or rewrite the Ninth Circuit's precedent, and the decision *could not* have done so—even if that were the panel's intent. *See Spinelli v. Gaughan*, 12 F.3d 853, 855 n.1 (9th Cir.1993) ("a panel of this court cannot overrule Ninth Circuit precedent"); *see also* Amy E. Sloan, *The Dog That Didn't Bark: Stealth Procedures and the Erosion of Stare Decisis in the Federal Courts of Appeals*, 78 FORDHAM L. REV. 713, 726 (2009) ("Not all circuits use informal en banc review. The U.S. Courts of Appeals for the Third, Ninth, Eleventh, and Federal Circuits do not authorize or use it.").

And while the *Sprint* panel may have applied the majority rule in that case, the decision was no watershed moment in which the Ninth Circuit "resolved" its prior divergent precedents. Indeed, panels within the Ninth Circuit had selectively applied the majority rule as far back as 2006—long before *Sprint*. *See*, *e.g.*,

DBSI/TRI IV Ltd. P'ship v. United States, 465 F.3d 1031, 1037 (9th Cir.2006) (intervention controversy survived final judgment 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)). Of course, other panels of the Ninth Circuit have since (as in this case) also continued to apply the minority rule. *See*, *e.g.*, *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.").

3. The D.C. Circuit remains in disarray.

The Respondents similarly contend that the D.C. Circuit has harmonized its divergent precedent. (Resp. 18-19). In contrast to their Ninth Circuit discussion, the Respondents do not even point to a case where the D.C. Circuit purportedly "shift[ed]" towards the majority rule. (Resp. 18). Instead, the Respondents hang their hat on the fact that *Energy Transportation Group, Inc. v. Maritime Administration*, 956 F.2d 1206 (D.C. Cir.1992)—a case that indisputably applied the minority rule—is "now nearly thirty years old." (Resp. 19). But precedent does not have a shelf life. And *Lopez v. NLRB*, 655 Fed. App'x 859 (D.C. Cir.2016)—cited by the Respondents—proves that *Energy Transportation Group* is still viable precedent. In *Lopez*, the D.C. Circuit dismissed an intervention appeal when the underlying case settled, explaining that the "parties'

voluntary settlement of their entire dispute renders a case moot, thereby depriving the court of jurisdiction to decide the appeal or petition for review." 655 Fed. App'x at 861. Citing *Energy Transportation Group*, the *Lopez* panel concluded that the intervention appeal was moot because "[t]here simply [was] no live case in which Lopez can intervene to litigate those settled issues." *Id*. at 862.

II. The case presents an appropriate vehicle to address the split.

A. The Petitioners did not concede mootness.

The Petitioners' actions below were focused on one goal: ensuring the continued viability of their intervention-of-right appeal. In light of the Ninth Circuit's "divergent precedents" on whether a subsequently-entered final judgment moots an already-pending intervention appeal, the Petitioners filed a motion in the district court to stay final approval of the proposed settlement; objected to final approval on the basis that entry of a final judgment could moot their appeal; and filed a motion to stay final approval in the Ninth Circuit. (Pet. 13-16). The Respondents opposed such relief at every juncture, arguing there was no *possibility* that entry of a final judgment could moot the pending intervention appeal. *Id*.

The Respondents now argue—despite all of the Petitioners' efforts to avoid mootness—that the Petitioners conceded their appeal was moot and, thus, cannot

ask this Court for relief. (Resp. 24). The argument misrepresents the record.

In their briefing, the Petitioners were clear that they had standing to object to final settlement approval because "if the district court's final approval order and final judgment as to the Defendants become final, the [Petitioners'] appeal from the district court's order denying them leave to intervene to act as replacement class representatives . . . *could* be mooted." No. 20-16699, ECF No. 28 at 27 (emphasis added). In support of that possibility, the Petitioners cited the branch of the Ninth Circuit's divergent precedent that required dismissal under such circumstances while, also, acknowledging the other branch, which would allow their appeal to proceed. *Id*. Recognizing adverse precedent does not amount to a concession that such precedent is correct.

The Respondents' reliance on four words from a 30-minute oral argument is also misplaced. (Resp. 24). While the Respondents claim that an answer from one of the Petitioners' lawyers addressed a hypothetical involving what would happen "if the court affirmed the district court's approval of the amended settlement agreements" (Resp. 24), that is untrue. The hypothetical at issue was "if the Defendants are removed from the MDL through executing the amended settlements, will there be an original pleading to amend?" (9th Cir. Oral Arg. 13:50-14:00). This hypothetical addressed the viability of the Petitioners' relation-back arguments, which they intended to employ if

allowed to intervene—not the viability of their pending intervention-of-right appeal.

B. The Respondents' other arguments about why they think they should ultimately win are inapt.

The Respondents argue that review is inappropriate because the Petitioners would not be able to satisfy the substantive test for intervention if the case were remanded. (Resp. 25-26 n.8). The parties' likelihood of prevailing on as-yet-to-be-litigated issues is irrelevant, but the Respondents' argument also misconstrues intervention law and the record.

First, the Respondents argue that the Petitioners' motion to intervene was untimely because their motion was "filed twelve years after the MDL began and nine years after it became clear that petitioners' state-law damages claims would not be asserted in the MDL." *Id*.[1] That simplistic timeline ignores the reality of this litigation.

"Timeliness is a flexible concept; its determination is left to the district court's discretion." *United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir.2004). Where circumstances materially change during the litigation, that change can catalyze intervention and reset the timeliness clock. *See Smith v. Los Angeles*

[1] This argument is patently inapplicable to the NRS Plaintiff. Lead Counsel always asserted federal antitrust claims seeking equitable and injunctive relief on behalf of indirect purchasers in all 50 states. (DE 5584-1:60-62).

Unified Sch. Dist., 830 F.3d 843, 854 (9th Cir.2016) ("[T]he stage of proceedings factor should be analyzed by reference to the change in circumstances, and not the commencement of the litigation."); *United States v. State of Oregon*, 745 F.2d 550 (9th Cir.1984) ("the possibility of new and expanded negotiations" 15 years after the commencement of the case amounted to change of circumstances resetting timeliness clock).

On remand from the first appeal, intervention was necessary because the Petitioners—still members of a national certified class—lacked non-conflicted counsel. (Pet. 6-7). It was, after all, that very attorney-client conflict that had necessitated the remand proceedings. (App. 161-63). Without intervention on remand, those class-member Petitioners would have had no means to protect themselves from their own lawyers (Lead Counsel), who were seeking to cut the Petitioners free from any claims against the Defendants in order to get a settlement for the other class members those lawyers represented. (Pet. 6-7). The district court's reconsideration of the prior settlement on remand was thus precisely the type of "change of circumstances" that makes late stage intervention appropriate.[2]

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[2] The Respondents' reliance on the 2010 complaint as the touchstone for when the Petitioners should have known Lead Counsel was not pursuing state-law-damages claims on their behalf is particularly misleading. The claims raised in the 2010 amendment were based on a 2010 stipulation that Lead Counsel entered with the Defendants (in which counsel sought to horse-trade damages claims in some states for others). The district court vacated that deal on remand in 2019. (DE 5518).

Second, the Respondents contend that intervention would be inappropriate because the Petitioners would not be able to show that denial of intervention would "impair or impede [their] ability to protect [their] interest[s.]" (Resp. 26 n.8) (quoting Fed. R. Civ. P. 24(a)(2)). They claim this is so because "desire to invoke the relation-back doctrine is not a valid basis for intervention." *Id.*

But that misconstrues the legal standard for intervention: "Members 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) (quoting NEWBERG ON CLASS ACTIONS § 16:7, p. 154 (4th ed. 2002) (alteration removed)). On remand, the Petitioners—still class members—undisputedly lacked adequate representation. (Pet. 6-7). They thus had the right to intervene so they could pursue their claims with adequate representation, including the right to assert the relation-back doctrine or any other theory that adequate representatives would present.

C. Non-publication does not impede this Court's review.

The Respondents do not explicitly argue that the Court should deny review because the Ninth Circuit's opinion is unpublished. Yet they repeatedly and pointedly invoke the opinion's unpublished status. The Respondents' *sotto voce* argument for denial should be ignored.

Nonpublication has never been a bar to this Court's review. *See A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199, 228 (2001) (collecting dozens of cases reviewing unpublished decisions).[3] Indeed, "the fact that [a] Court of Appeals' order under challenge . . . is unpublished carries no weight in [the Court's] decision to review the case." *C.I.R. v. McCoy*, 484 U.S. 3, 7 (1987).

III. The jurisdictional MDL issue supports granting certiorari.

A. The Ninth Circuit's failure to reach the issue does not preclude review.

The Respondents argue that it would be "inappropriate" for the Court to review the jurisdictional MDL issue because the Ninth Circuit did not reach that issue. (Resp. 26-27). But 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)); *see also New York City Transit Auth. v. Beazer*, 440 U.S. 568, 583 n.24 (1979) (same).

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[3] The Court has, of course, continued to grant certiorari to review unpublished decisions. *See*, *e.g.*, *Dunn v. Reeves*, 141 S.Ct. 2405 (2021); *Andrus v. Texas*, 140 S.Ct. 1875 (2020).

B. The issue is important.

The Respondents make two arguments that the MDL issue is not important: *First*, they argue that the district court's jurisdictional determination is correct. (Resp. 28). But their analysis—merely invoking the language of the MDL statute—is *ipse dixit*: they fail to address this Court's precedent prohibiting courts from ascribing jurisdictional significance to statutes (like the MDL statute) that do not clearly speak in jurisdictional terms. (Pet. 36).

Second, the Respondents argue the issue cannot be important because there are only three decisions from MDL courts on point. (Resp. 27). But that is because it has been almost universally accepted that parties may file directly in an MDL proceeding. (Pet. 37 n.9).[4] The three cited decisions from MDL courts create a body of law that not only conflicts with established practice, but would strip members of class actions of their due process protections. (Pet. 35).

C. The MDL jurisdictional issue does not hinder review.

If the Court were to grant review on the mootness issue, there is no *requirement* that the Court also address the MDL jurisdictional issue. "[J]urisdiction is vital only if the court proposes to issue a judgment on the merits." *Sinochem Intern. Co. Ltd. v. Malaysia Intern. Shipping Corp.*, 549 U.S. 422, 431 (2007)

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[4] The IPPs in this very case undertook such "direct filing." (DE 5584-1:5-9).

(alteration in original) (quoting *Intec USA, LLC v. Engle*, 467 F.3d 1038, 1041 (7th Cir.2006)). So, while the Petitioners believe review on the MDL jurisdictional issue is necessary given the clarity and gravity of the error presented (Pet. 34-39), the Court is obviously free to limit its review to only the mootness issue that has split the circuits and leave the jurisdictional issue to be decided in the first instance on remand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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