

No. 21-1057

IN THE
Supreme Court of the United States

ORACLE CORPORATION,
Petitioner,

v.

HEWLETT-PACKARD CO.,
Respondent.

**On Petition For A Writ Of Certiorari To
The California Court Of Appeal**

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The petition's question presented is more properly stated as follows:

Whether the California Court of Appeal correctly determined that no damages were awarded to HP on the basis of any conduct allegedly protected by the Petition Clause.

RULE 29.6 STATEMENT

In November 2015, respondent Hewlett-Packard Company split into two separate, publicly traded companies: HP Inc. and Hewlett Packard Enterprise. Neither HP Inc. nor Hewlett Packard Enterprise has a parent corporation and no publicly traded corporation owns 10% or more of either company's stock.

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BRIEF IN OPPOSITION

Respondent HP respectfully submits this brief in opposition to the petition for a writ of certiorari.

INTRODUCTION

The Court should deny review because the constitutional question raised by petitioner is not at issue in this case. In reality, this state-law breach-of-contract action presents a fact-bound question decided by an intermediate state appellate court that does not have significance beyond the parties to this litigation.

Oracle proceeds from the false premise that HP was awarded damages based on Oracle's announcement, after the first phase of a multi-phase trial, that it intended to appeal the trial court's Phase 1 ruling—an announcement that Oracle believes is protected by the Petition Clause. But the California Court of Appeal concluded in a unanimous opinion that "Oracle has *not* shown that HP recovered damages based on Oracle's stated intention to appeal the phase 1 ruling." Pet. App. 95a (emphasis added). The court reached that conclusion after conducting an exhaustive review of the record, including the trial court's expert admissibility hearings, the parties' expert reports, trial testimony, jury instructions, and pre- and post-trial briefing. Oracle does not ask this Court to review the court of appeal's dispositive factual determination; instead, it altogether ignores that aspect of the court of appeal's analysis, mischaracterizes the opinion as having reached the exact *opposite* conclusion, and asks this Court to resolve a question that is not actually presented in this case. These tactics lay bare the absence of any legitimate basis for review.

There are also multiple other reasons to deny the petition. In particular, the question presented, even as framed by Oracle, is intensely factual. Determining whether HP’s “damages award[]” was “attributable to litigation-related activity,” Pet. i, would require the Court to undertake the same detailed review of the record conducted by the court of appeal to ascertain whether HP’s damages were based on Oracle’s breach of the parties’ contract (as both the court of appeal and the trial court found) or on Oracle’s statement of intent to appeal (as Oracle contends). There is no reason for the Court to grant review to conduct that fact-bound inquiry.

Nor does the purported circuit split on which Oracle principally relies—which turns on whether the Petition Clause protects litigants from damages attributable to litigation-related activity—provide a basis for review. This case is an exceedingly poor vehicle for addressing that question because Oracle failed adequately to develop its Petition Clause argument below, “improperly leav[ing] th[e] court [of appeal] to decode what amounts to little more than a bare assertion that the judgment, or part of it, is erroneous.” Pet. App. 89a (internal quotation marks omitted). Moreover, the court of appeal assumed that Oracle’s intent-to-appeal statement *was* protected by the Petition Clause but still rejected Oracle’s argument on the merits because HP’s damages expert “cannot reasonably be interpreted as having based his calculation of HP’s damages on Oracle’s statement of intent to appeal.” Pet. App. 93a–94a.

In any event, Oracle’s voluntary mid-trial statement declaring its intent to appeal an interlocutory ruling bears no resemblance to the cases cited in the petition, which almost exclusively address *pre-*

litigation conduct. Mid-litigation and pre-litigation conduct raise different constitutional considerations—especially because this Court has never even recognized a constitutional right to appeal or extended the Petition Clause to appeal-related conduct.

Oracle’s attempts to recast this state-law breach-of-contract dispute as a case of momentous constitutional significance also fall flat. Nothing in the court of appeal’s resolution of this procedurally unusual litigation—involving a voluntary mid-trial declaration of an intent to appeal an interlocutory ruling—will deter other litigants from pursuing an appeal. And Oracle’s speculation that the court of appeal’s ruling will generate forum-shopping between state and federal courts in California is nothing short of fanciful.

Because there is no reason for this Court to grant review of an intermediate state appellate court’s affirmance of a state-law breach-of-contract judgment, the Court should deny the petition.

STATEMENT

A. Oracle Breaches Its Contractual Commitment To Offer Its Software On HP’s Itanium Servers.

HP is a manufacturer of high-end servers that perform mission-critical computing processes for large customers like universities, hospitals, and government agencies. *See* Pet. App. 3a–4a. Beginning in 2002, HP began selling server systems built around the Itanium microprocessor, which was jointly developed by HP and Intel. Pet. App. 5a. These servers were very profitable for HP, “generating over \$2 billion in annual profits in 2010.” Pet. App. 6a.

Oracle is a major provider of database software for high-end servers. Pet. App. 4a. As part of Oracle and HP's decades-long partnership, Oracle ported its database, middleware, and key application software to HP's server platforms. Pet. App. 4a–5a. Porting is the process by which software that is designed to run on one operating system is made available on another system. Pet. App. 4a. Oracle's decision to port its software to Itanium benefitted Oracle and HP because Oracle generated significant profit by selling its software to Itanium customers. Pet. App. 5a–6a. HP encouraged Itanium customers to use Oracle software, and about 84 percent of Itanium customers ran Oracle's database software on their servers. Pet. App. 6a–7a.

In August 2010, HP's CEO, Mark Hurd, resigned at the request of HP's board. Pet. App. 9a. One month later, Oracle announced that Hurd would join Oracle as its Co-President, where he would oversee sales and marketing, including sales of Oracle's competing Sun servers. *Id.* Because Hurd had detailed knowledge of HP's trade secrets and confidential information that, if misused, would allow Oracle to compete unfairly, HP initiated a lawsuit in September 2010 to protect its interests. *Id.*

Executives at HP and Oracle quickly expressed a desire to resolve the lawsuit to preserve the parties' mutually beneficial and profitable relationship. As relevant here, executives at the companies negotiated an agreement to "continue to work together . . . with Oracle porting products to HP's platforms and HP supporting the ported products . . . for the mutual benefit of customers." Pet. App. 11a–12a. The key provision of the parties' final settlement provides: "Oracle and HP reaffirm their commitment to their

longstanding strategic relationship and their mutual desire to continue to support their mutual customers. Oracle will continue to offer its product suite on HP platforms, and HP will continue to support Oracle products” Pet. App. 13a.

Six months later, Oracle breached its commitment to continue offering its software on HP’s platforms. On March 22, 2011, the night before HP’s annual shareholders’ meeting and without warning to HP, Oracle issued a press release in which it stated that it “has decided to discontinue all software development” on HP’s Itanium servers. Pet. App. 17a. Larry Ellison, Oracle’s former CEO and chairman of the board who personally drafted the press release, claimed that he had been informed by Intel that Itanium was nearing the end of its life. *Id.*; see Pet. App. 9a; 9AA_2312 (Ellison Mar. 22, 2011 Email). Ellison’s statement was untrue. Intel issued a press release emphatically denying that Itanium was reaching end of life. Pet. App. 18a.

The March 2011 announcement “was unprecedented because it was the first time Oracle had decided to stop porting to any server based on a micro-processor architecture that was still being sold and marketed.” *Id.* Oracle’s executives recognized that the decision “would be big news” to HP. *Id.* As a result of the announcement, “[c]ustomers who were running Oracle’s software on Itanium would have to choose another hardware platform to receive future releases of Oracle’s software.” *Id.*

Oracle’s strategy to cripple HP’s Itanium server business worked, resulting in an immediate and devastating impact as customers were forced to abandon Itanium for new platforms that would be able to run

the latest versions of Oracle software on which they had built their IT infrastructures. Pet. App. 18a, 69a.

B. HP Files Suit And Prevails On Its Claim For Breach Of Contract.

1. HP filed suit in California Superior Court seeking a declaration that Oracle must continue to offer and support software products on HP's Itanium servers, as well as damages based on claims of breach of contract and breach of the implied covenant of good faith and fair dealing, which were premised on Oracle's repudiation of its commitment in the parties' settlement agreement to continue offering its software on Itanium. Pet. App. 19a–20a. The trial court bifurcated the trial into two phases: (1) a bench trial to interpret the agreement and decide declaratory-relief issues and (2) a jury trial to decide breach and damages. Pet. App. 20a.

The bench trial included the testimony of 30 witnesses and the admission of over 500 exhibits. *Id.* The trial court issued a detailed statement of decision in August 2012, ruling in favor of HP on the declaratory-relief claim. *Id.* The court held that the plain language of the HP-Oracle settlement agreement, as confirmed by extrinsic evidence, “requires Oracle to continue to offer its product suite on HP's Itanium-based server platforms and does not confer on Oracle the discretion whether to do so or not.” Pet. App. 21a.

2. On the day the trial court issued its tentative statement of decision in Phase 1, Oracle issued a press release stating that “Oracle did not give up its fundamental right to make platform engineering decisions in the 27 words HP cites from the settlement of an unrelated employment agreement. . . . We plan to appeal the Court's ruling while fully litigating our cross

claims that HP misled both its partners and customers.” Pet. App. 22a.

A month later, Oracle stated it would comply with the Phase 1 decision and resume porting to Itanium. *Id.* Oracle believed that its decision to resume porting mitigated all of HP’s damages and told the trial court that HP would “need to substantially revise its damages case.” Pet. App. 23a.

Before the commencement of the second phase of the trial, the trial court held a hearing in which it evaluated the methodology of HP’s damages expert, Jonathan Orszag. Pet. App. 76a–77a. Orszag’s initial report estimated that HP’s damages were between \$3.8 billion and \$4 billion. Pet. App. 76a. His supplemental report addressed Oracle’s claim that its decision to resume porting mitigated all future damages. Pet. App. 79a. Although Orszag gave Oracle dollar-for-dollar mitigation credit for its decision to resume porting, he concluded that the “damage had been done” because many Itanium customers had already “decided to transition to other server platforms” between March 2011 and September 2012. Pet. App. 24a. The report explained that the “continued decline in Itanium revenue” reflected in the updated projections “shows that any favorable impact from the Phase 1 decision and the Oracle September 2012 announcement has been more than outweighed by the continuing negative impact . . . from the March 2011 Oracle Announcements” that it would no longer port software to Itanium servers and from “continuing uncertainty created by Oracle’s recent statements regarding its intention to appeal the Phase 1 decision.” Pet. App. 23a–24a.

After the hearing, the trial court rejected Oracle's claim that Orszag's damages opinion was impermissibly speculative. Pet. App. 80a.

3. On the last court day before the jury trial on breach and damages was to begin in April 2013, the court heard a motion filed by Oracle under California's anti-SLAPP law, which claimed that HP was improperly seeking damages based on Oracle's right to petition under the United States and California Constitutions. Pet. App. 25a, 81a. The trial court denied the motion as untimely. Pet. App. 25a–26a, 81a. Oracle then filed a notice of appeal, which required the trial court to vacate the jury trial pending appeal. Pet. App. 25a–26a.

In August 2015, the California Court of Appeal affirmed the denial of Oracle's anti-SLAPP motion, deeming it "utterly without merit" because it was "late under any reasonable construction of the facts" and explaining that "it was quite properly denied because it could not possibly achieve the purposes for which the anti-SLAPP statute was enacted." Pet. App. 26a; *Hewlett-Packard Co. v. Oracle Corp.*, 239 Cal. App. 4th 1174, 1178 (2015). The court declined to assess sanctions against Oracle only to avoid any further delay of the long-deferred Phase 2 jury trial on damages. Pet. App. 26a–27a; *Hewlett-Packard Co.*, 239 Cal. App. 4th at 1178.

4. On remand, the trial court conducted the second phase of the trial in May and June 2016, during which the jury heard testimony from 19 witnesses, including competing experts on damages. Pet. App. 27a. The jury found that Oracle breached the parties' agreement and awarded HP \$1.699 billion in past lost profits and \$1.315 billion in future lost profits. Pet. App. 29a.

C. The Court Of Appeal Rejects Oracle's Claim That HP's Damages Were Based On Oracle's Statement Of Intent To Appeal.

The California Court of Appeal affirmed the trial court's judgment across the board. As relevant here, the court of appeal first determined that Oracle had "fail[ed] to develop a reasoned argument supported by legal authority for its First Amendment claim," "improperly leav[ing] th[e] court to decode what amounts to little more than a bare assertion that the judgment, or part of it, is erroneous." Pet. App. 89a (internal quotation marks omitted). "For this reason alone," the court declared, "Oracle's First Amendment argument cannot prevail." *Id.*

The court nonetheless went on to assume that "Oracle's stated intent to appeal [falls] within its First Amendment right to petition" and that "damages arising from the protected conduct are prohibited." *Id.* That assumption made no difference to the outcome, however, because "based on [its] review of the record," the court determined that "Oracle has not shown that HP recovered damages based on Oracle's stated intention to appeal the phase 1 ruling." Pet. App. 95a.

In particular, the court found that the testimony of HP's damages expert, Jonathan Orszag, "falls far short of attributing damages to the stated intent to appeal, rather than to market uncertainty about the availability of Oracle's software on HP's Itanium platform after Oracle's March 2011 announcement." Pet. App. 92a. The court "conclude[d] from the testimony at trial that Orszag explained HP's damages in terms of real-world data that showed what consumers were buying, or not buying, starting in March 2011 . . . through the time of trial in 2016," which showed that

“Oracle’s vow to appeal failed to reverse the market’s uncertainty about the future of Oracle’s product suite on Itanium.” Pet. App. 93a. In other words, “Oracle’s appeal was a factor in the calculation of damages only insofar as it reduced any *mitigation*” claimed by Oracle from the “resumption of porting in September 2012, not because the exercise of the right to appeal was a source of harm in and of itself.” *Id.* (emphasis added).

The court of appeal reached this conclusion based on an independent examination of the trial record. *See* Pet. App. 92a–93a. Those “observations,” the court explained, “are reinforced by the trial court’s ruling on Oracle’s motion for new trial,” which found that “HP did not claim that th[e] [intent-to-appeal] statement caused its damages, merely that this and other circumstances created uncertainty surrounding Oracle’s commitment to Itanium, explaining why the September 2012 announcement did not cause HP’s market share to recover.” Pet. App. 94a.

The court of appeal further emphasized that the jury was instructed to award reasonable compensation “for the harm caused by the breach,” which was defined “only in terms of Oracle (1) making its March 2011 decision and announcement [to stop porting to Itanium], and (2) repeatedly telling customers that it would no longer offer its product suite on Itanium.” *Id.* No instruction “directed the jury to consider Oracle’s September 2012 [intent-to-appeal] announcement in ascertaining damages.” *Id.*

Oracle then petitioned the California Supreme Court for review, which summarily denied Oracle’s petition. Pet. App. 118a.

REASONS FOR DENYING THE PETITION

The California Court of Appeal’s unanimous decision rests on the straightforward application of state law to HP’s breach-of-contract claims and presents nothing remotely worthy of this Court’s review. Indeed, the question that Oracle identifies—whether “the Petition Clause protects litigants from damages awards attributable to litigation-related activity,” Pet. i—is not even presented in this case because, as the court of appeal found, “Oracle has not shown that HP recovered damages based on Oracle’s stated intention to appeal the phase 1 ruling.” Pet. App. 95a. Oracle’s petition is premised on misstatements regarding the trial and appellate record, which are reason enough to deny review.

Moreover, even if this Court were inclined to overlook that glaring vehicle problem, it could not do so without undertaking its own fact-intensive review of the voluminous record to determine whether “Oracle’s appeal was a factor in the calculation of damages only insofar as it reduced any mitigation”—as the trial court and court of appeal found—or whether “the exercise of the right to appeal was a source of harm in and of itself”—as Oracle contends. Pet. App. 93a. There is no reason for the Court to wade into those factual issues because, even accepting Oracle’s insupportable characterization of the record, the case still would not be worthy of review. It does not implicate a circuit split because no other court has ever addressed whether the Petition Clause protects voluntary mid-trial declarations of an intent to appeal, Pet. App. 95a; the issue is unlikely to recur and has negligible significance to anyone other than the parties to this case; and the decision of an intermediate state

appellate court is unlikely to be given significant weight by courts in other jurisdictions.

For all of these reasons, review should be denied.

I. The Petition Is Based On A False Premise Because, As The Court Of Appeal Found, HP's Damages Were Not Based On Any Alleged Petitioning Activity.

The court of appeal found that “Oracle has not shown HP recovered damages based on Oracle’s stated intention to appeal the phase 1 ruling.” Pet. App. 95a. Oracle’s petition does not even mention this unambiguous finding, which represents a fatal vehicle problem that is sufficient reason, standing alone, for this Court to deny review.

The question presented asks whether “the Petition Clause protects litigants from damages awards *attributable to litigation-related activity*.” Pet. i (emphasis added). But that question is not presented here because, as the court of appeal found, the testimony of HP’s damages expert “falls far short of attributing damages to the stated intent to appeal, rather than to market uncertainty about the availability of Oracle’s software on HP’s Itanium platform after Oracle’s March 2011 announcement.” Pet. App. 92a. The court of appeal’s finding makes clear that there is no “damages award[]” in this case that is “attributable to litigation-related activity.” Pet. i.

In an effort to generate a federal issue in this state-law breach-of-contract action, Oracle mischaracterizes the holding and reasoning of the court of appeal’s decision by selectively quoting from the opinion, while ignoring key findings that foreclose its position. For example, Oracle repeatedly quotes the court of appeal’s statement that “Oracle’s appeal was a factor in

the calculation of damages,” Pet. App. 93a, but *omits* the essential qualification in the remainder of the sentence: “only insofar as it *reduced any mitigation* from the resumption of porting in September 2012, *not because* the exercise of the right to appeal was a source of harm in and of itself,” *id.* (emphases added). Oracle also ignores other statements in the opinion, such as the court of appeal’s declaration that “[a]t no point . . . did Orszag ascribe damages to Oracle’s statement of its intent to appeal standing alone or suggest the uncertainty reflected in the market data was solely, or even predominantly, the result of Oracle’s announcement about its appeal.” *Id.* These tactics underscore the absence of any legitimate basis for review.

If this Court were nevertheless inclined to overlook these deficiencies and determine for itself whether the question framed by Oracle is *actually* presented in this case, the Court would be required to undertake an intensely factual analysis to assess the correctness of the court of appeal’s finding that “Orszag’s testimony cannot reasonably be interpreted as having based his calculation of HP’s damages on Oracle’s statement of intent to appeal.” Pet. App. 93a–94a. There is no reason for this Court to grant review to conduct that fact-bound inquiry. In any event, the extensive factual record fully substantiates the court of appeal’s finding that HP did not recover damages based on Oracle’s stated intention to appeal and that HP’s causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing had nothing to do with Oracle’s intent-to-appeal statement.

After the trial court issued its tentative and then final Phase 1 decision concerning the meaning of the parties’ agreement—and 18 months after Oracle’s

original March 2011 announcement that it would stop porting to Itanium—Oracle announced in a series of press releases in August and September 2012 that it would comply with the Phase 1 decision and resume porting to Itanium; at the same time, Oracle made clear that it believed the decision was wrong and would seek its reversal on appeal. *See* Pet. App. 22a. Oracle asserted in the trial court that its announcement about the resumption of porting *mitigated* all of HP’s future damages from that point forward. *See* Pet. App. 91a, 109a; 43AA_10735 (Oracle Opp. to Motion for Leave to Serve Supplemental Expert Report).

At Oracle’s insistence, HP’s damages expert updated his damages calculation to determine the impact, if any, of Oracle’s announcements following the Phase 1 trial. Pet. App. 23a–24a, 79a. Orszag concluded that Oracle’s announcement that it would resume porting to Itanium “under protest” did not mitigate HP’s future damages. 56-A_RT_16555 (June 20, 2016 a.m. Trial Tr.); 34RT_9938–39, 9946–47 (Mar. 18, 2013 Hearing Tr.). He fully considered the market implications of Oracle’s announcement but concluded that the damage to HP’s Itanium platform caused by Oracle’s breach almost 18 months earlier had already been done. 56-A_RT_16554–56 (June 20, 2016 a.m. Trial Tr.); 34RT_9946–47 (Mar. 18, 2013 Hearing Tr.) (“[Y]ou can’t put Humpty Dumpty back together, given the 17-month period.”).

Among other factors supporting his conclusion, Orszag pointed to evidence that many customers had already left the Itanium platform by the time of Oracle’s September 2012 announcement. 56-A_RT_16556–57 (June 20, 2016 a.m. Trial Tr.). He further reasoned that customer uncertainty about future availability of new versions of Oracle software on

HP's Itanium platform was not alleviated by the resumption-of-porting announcement because Oracle had simultaneously signaled that it would once again stop porting to Itanium if it were successful in overturning the decision on appeal. *See* 34RT_9946–48, 9971–72 (Mar. 18, 2013 Hearing Tr.); 56-A_RT_16678 (June 20, 2016 a.m. Trial Tr.). As Orszag explained, customers in the mission-critical server market need to have certainty that the most up-to-date versions of the applications they run on their servers will be available. 34RT_9947–48 (Mar. 18, 2013 Hearing Tr.); 56-B_RT_16677–78 (June 20, 2016 p.m. Trial Tr.). Absent such assurances, customers will switch to other platforms, which Orszag found to be the case here. *See* 56-B_RT_16678 (June 20, 2016 p.m. Trial Tr.); 56-A_RT_16557 (June 20, 2016 a.m. Trial Tr.); Pet. App. 92a. Thus, as the court of appeal found, Orszag “attribut[ed] damages . . . to market uncertainty about the availability of Oracle’s software on HP’s Itanium platform after Oracle’s March 2011 announcement,” not “to the stated intent to appeal.” Pet. App. 92a.

This conclusion is also borne out by the trial court’s findings. When Oracle challenged the jury’s damages award in its motion for a new trial on the ground that the award was impermissibly based on its statement announcing an intent to appeal, the trial court rejected the factual premise of Oracle’s argument, finding that “HP did not claim that this statement caused its damages, merely that this and other circumstances created uncertainty surrounding Oracle’s commitment to Itanium, explaining why the September 2012 announcement did not cause HP’s market share to recover.” Pet. App. 94a.

Accordingly, both the trial court and the court of appeal found that the damages award was *not* “based on Oracle’s stated intention to appeal the phase 1 ruling.” Pet. App. 95a. There is no reason for this Court to grant review to examine that fact-bound determination by two lower courts. Indeed, it is this Court’s longstanding rule that, as “[a] court of law, . . . rather than a court for correction of errors in fact finding, [it] cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.” *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 841 (1996) (quoting *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949)). Far from “obvious and exceptional” error, the lower courts’ findings are fully supported by the record.

II. The Court Of Appeal’s Opinion Does Not Conflict With Any Lower Court Decision Or Decision Of This Court.

Although there is no need for this Court to examine Oracle’s purported conflicts in authority—given the insurmountable vehicle problems plaguing the petition—Oracle’s effort to manufacture a conflict with the decisions of other lower courts and this Court fails in all respects.

At the outset, this case is not a suitable vehicle for addressing the scope of the right to petition because the court of appeal did not announce a broad ruling that intent-to-appeal statements lack protection under the Petition Clause. Rather, it simply concluded that Oracle failed to carry its burden of presenting a fully developed legal argument on this issue. Specifically, the court found that Oracle’s reliance on a “single line from a single case”—this Court’s decision in *Borough of Duryea v. Guarnieri*, 564 U.S. 379 (2011)—

to “support the premise that its [intent-to-appeal] announcement was an exercise of its constitutionally protected right to petition” was manifestly insufficient. Pet. App. 85a–86a. Other than that, Oracle cited only a hodgepodge of authority for the “unremarkable generalization that the First Amendment prohibits penalizing protected speech,” including picketing near a soldier’s funeral service and speech by a public employee on “matters of public concern.” Pet. App. 87a–88a (citing *Snyder v. Phelps*, 562 U.S. 443 (2011); *Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006)). Oracle’s inapposite authority was “accompanied by neither argument nor application to the facts presented.” Pet. App. 87a. The court of appeal therefore determined that Oracle had “fail[ed] to develop a reasoned argument supported by legal authority for its First Amendment claim,” “improperly leav[ing] th[e] court to decode what amounts to little more than a bare assertion that the judgment, or part of it, is erroneous.” Pet. App. 89a (internal quotation marks omitted). This was not a sweeping declaration regarding the scope of the constitutional right to petition, but a case-specific ruling on Oracle’s failure to present a fully developed legal argument. Oracle is wholly silent about this aspect of the court of appeal’s opinion.

Oracle also ignores that the court of appeal then went on to assume, *arguendo*, that Oracle had engaged in protected conduct and still rejected Oracle’s challenge to the damages award because, even if “Oracle’s stated intention to appeal” were constitutionally protected conduct, Oracle failed to demonstrate that “HP recovered damages based on Oracle’s stated intention to appeal the phase 1 ruling.” Pet. App. 95a. As discussed in Part I, that fact-bound conclusion is well supported by the record and does not present a legal issue worthy of this Court’s review.

In any event, the question whether the Petition Clause protects Oracle’s intent-to-appeal statement cannot possibly implicate a circuit split or a conflict with this Court’s precedent because no other court has ever addressed the application of the Petition Clause to a voluntary, mid-trial declaration of an intent to appeal. This *sui generis* case presents a unique set of circumstances that have not arisen in the past and are unlikely to be repeated with any frequency in the future. The court of appeal could not “identif[y] a case directly on point—or even one that is analogous,” Pet. App. 95a, and none of the cases cited by Oracle involves a mid-trial statement in which a litigant declares, between two phases of a bifurcated proceeding, that it intends to file an appeal from the decision in the first phase.

The federal appellate decisions that Oracle cites address claims premised on pre-litigation threats and cease-and-desist letters. Pet. 17. Nearly all of those rulings focus on “litigation-related activities *preliminary* to the formal filing of the litigation.” *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 937 (9th Cir. 2006) (emphasis added). In *Primetime 24 Joint Venture v. National Broadcasting Co.*, 219 F.3d 92 (2d Cir. 2000), for example, the Second Circuit considered whether pre-suit challenges to signal-strength determinations by satellite broadcasters fall within the protection of the *Noerr–Pennington* doctrine. *Id.* at 100. And in *Glass Equipment Development, Inc. v. Besten, Inc.*, 174 F.3d 1337 (Fed. Cir. 1999), the Federal Circuit held that the threat of patent-enforcement litigation could not subject a patent holder to antitrust liability. *Id.* at 1343–44. The other circuit court decisions that Oracle identifies as allegedly conflicting with the decision below are equally distinguishable. *See Sosa*, 437 F.3d at 937 (holding that pre-suit settlement

demands are protected under the Petition Clause); *McGuire Oil Co. v. Mapco, Inc.*, 958 F.2d 1552, 1560 (11th Cir. 1992) (holding that concerted threats of litigation are protected under *Noerr–Pennington*); *CVD, Inc. v. Raytheon Co.*, 769 F.2d 842, 850–51 (1st Cir. 1985) (holding that a threat of trade-secret litigation must be a sham to expose the maker to antitrust liability); *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1367–68 (5th Cir. 1983) (extending petitioning immunity to generalized threats to litigate to protect claims to oil assets).

This case bears no resemblance to any of Oracle’s authorities. Oracle’s gratuitous mid-trial press release implicates distinct constitutional considerations from a pre-suit demand letter issued as a precursor to a plaintiff’s invocation of its constitutional right of access to the courts. Unlike a pre-litigation threat, Oracle’s mid-trial declaration of its intent to appeal did not create the possibility of *averting* litigation or further other litigation-related purposes, which were relevant considerations identified by several courts holding that the Petition Clause extends to pre-litigation threats. *E.g.*, *Sosa*, 437 F.3d at 936 (recognizing the importance of pre-litigation conduct in “streamlining any subsequent litigation” and avoiding a “more onerous” litigation process); *Primetime 24*, 219 F.3d at 100 (emphasizing that pre-litigation challenges are “a preliminary step [before] resort[ing] to litigation if necessary”). Indeed, the court of appeal did not address any pre-suit conduct in its Petition Clause analysis. Rather, the court considered a singular circumstance unlikely to recur in future cases: a litigant’s voluntary decision to declare in the middle of a multi-phase trial that it intends to appeal the outcome of the first phase and the opinion of the opposing party’s expert that the declared intention to appeal forecloses the possibility

that damages will be mitigated. Oracle does not identify a single case that presents a remotely similar set of facts.

Nor has this Court ever held that the Petition Clause extends to statements declaring an intent to appeal. In fact, the Court has declined even to hold that there is a constitutional right to appeal. See *Halbert v. Michigan*, 545 U.S. 605, 610 (2005). While Oracle cites to *Borough of Duryea v. Guarnieri* to suggest the existence of a broad “right of individuals to appeal to courts,” Pet. 12 (citing *Borough of Duryea*, 564 U.S. at 387), that language speaks to the general right to seek redress from courts; the case has nothing to do with the application of the Petition Clause in the appellate context. See *Borough of Duryea*, 564 U.S. at 387 (holding that a government employer’s retaliation for a “public employee’s exercise of the right of access to the courts may implicate the protections of the Petition Clause”). Thus, even if the court of appeal’s decision could be read as declaring that the Petition Clause was inapplicable to Oracle’s intent-to-appeal statement—rather than as rejecting a legal argument that Oracle failed to develop adequately on appeal, see Pet. App. 89a—it still would not implicate a conflict with any other court, including this Court.

Similarly, the second alleged circuit split on which Oracle relies—which relates to the disaggregation of First Amendment-protected conduct in the calculation of damages, see Pet. 19–20—is not presented here in light of the court of appeal’s finding that “Orszag’s testimony cannot reasonably be interpreted as having based his calculation of HP’s damages on Oracle’s statement of intent to appeal.” Pet. App. 93a–94a. There is no need to disaggregate damages where *no portion* of the damages award was based on protected

petitioning conduct. In fact, the court of appeal deemed it “unremarkable” that “the First Amendment prohibits penalizing protected speech,” but concluded that this prohibition was not implicated here because Oracle simply “ha[d] not shown that HP recovered damages based on Oracle’s stated intention to appeal the phase 1 ruling.” Pet. App. 88a, 95a. That finding is fatal to Oracle’s claims of a conflict and an insurmountable barrier to this Court’s review.

III. This Case Is Jurisprudentially Insignificant.

Oracle’s efforts to transform this state-law breach-of-contract dispute into a case with profound constitutional significance are entirely overblown and unfounded.

First, the highly unusual fact pattern presented here is extraordinarily unlikely to recur with any frequency in the future. It is exceedingly rare for a party to declare in the middle of trial that it intends to appeal and for that declaration to have any potential relevance to the other side’s damages model. Thus, the fact that “thousands of appeals are filed—and announced—each year in California” is entirely irrelevant. Pet. 12. Those appeals are almost universally announced at the end of the case, after damages have already been calculated, and in proceedings where the possibility of appeal has no conceivable bearing on damages. Oracle’s failure to identify even a single remotely similar case is telling and underscores the legal insignificance of this case.

Second, there is no reason to believe that the court of appeal’s decision will “promote forum shopping.” Pet. 30. To credit Oracle’s far-fetched assertion, the Court would have to conclude that plaintiffs would

elect to file suit in state court in California, rather than in federal court, on the off-chance that (1) the defendant makes a voluntary mid-trial public statement regarding an intention to appeal and (2) the plaintiff is then able to incorporate that statement into its damages theory. It strains credulity to suggest that litigants would select a forum based on such an infinitesimal possibility.

Third, Oracle's speculation that the court of appeal's opinion would "deter" parties from the "act of appealing" so that they can avoid "subject[ing] [themselves] to the risk of damages" is also detached from reality. Pet. 23, 29. The court of appeal correctly concluded that HP's damages were not based in any way on Oracle's intent-to-appeal announcement. *See* Pet. App. 93a–95a. The announcement was relevant to the damages issue only insofar as it undercut Oracle's argument that its decision to resume porting would *mitigate* damages. *See* Pet. App. 93a–94a. Accordingly, the decision below does not endorse the imposition of damages based on decisions to appeal and will have no effect on whether litigants decide to appeal in future cases. Moreover, Oracle's decision to announce its intent to appeal between the two phases of the trial was entirely voluntary and did not serve any litigation-related purpose. Any party that has concerns that a similar declaration could be used against it at trial can simply defer its public announcement of its intent to appeal until the end of the case.

Finally, the jurisprudential insignificance of this case is compounded by the fact that this is a petition from a state intermediate appellate court. The Court ordinarily reviews decisions of federal appellate courts or state courts of last resort, not those of a state intermediate appellate court. *See Huber v. N.J. Dep't*

of Envtl. Prot., 562 U.S. 1302, 1302 (2011) (Alito, J., respecting denial of certiorari) (“[B]ecause this case comes to us on review of a decision by a state intermediate appellate court, I agree that today’s denial of certiorari is appropriate.”). There is no reason for this Court to depart from that settled practice in this fact-bound state-law breach-of-contract action.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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