No. 21-1218

In the Supreme Court of the United States

TYLER AYRES, ET AL.,
Petitioners,
v.
INDIRECT PURCHASER PLAINTIFFS, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION OF DEFENDANT-RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit correctly determined that petitioners' appeals from the denial of their motions to intervene were moot on the facts of this case.

2. Whether the district court correctly held that it lacked subject-matter jurisdiction over petitioners' motions to intervene.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

Other Materials

INTRODUCTION

The petition should be denied. Although petitioners claim there is a circuit split, that split is illusory, and for multiple, independent reasons this case would be an exceptionally poor vehicle for resolving the purported conflict in any event.

This appeal stems from the denial of petitioners' motions to intervene in a multidistrict litigation ("MDL"). Because petitioners sought intervention in the MDL directly—rather than filing separate actions and then seeking to have them transferred to the MDL—the MDL court found, among other things, that it lacked subject-matter jurisdiction over their claims. Petitioners appealed the denial of intervention to the Ninth Circuit. In an unpublished decision, the court found the appeals moot and thus did not reach either the underlying jurisdictional issue or the merits of intervention.

According to petitioners, the Ninth Circuit applied a "minority" rule holding that an intervention appeal is automatically mooted by a settlement and dismissal of the underlying case. This mischaracterizes both the state of the law and the decision below.

The Ninth Circuit did *not* apply an automatic mootness rule. In fact, no Ninth Circuit decision has applied such a rule since a 2017 decision clarified the circuit's law. Rather, applying the same case-by-case analysis that petitioners advocate and that all circuits actually apply, the Ninth Circuit determined that petitioners' appeals were moot on the facts. The court's unpublished decision—which is both fact-specific and non-precedential—is consistent with all post-2017 Ninth Circuit decisions on this subject. There is no

outlier authority in the Ninth Circuit for this Court to address, either in this case or otherwise.

Nor is an automatic mootness rule applied in other circuits. As in the Ninth Circuit, all recent D.C. Circuit cases apply the same fact-specific, case-by-case analysis that petitioners advocate. And notwithstanding some broad language, the Second Circuit has never adopted a categorical mootness rule in a published decision and has never dismissed an intervention appeal solely because the underlying litigation had been resolved. In each case that petitioners cite, the court dismissed the appeal only after considering whether, given the particular facts of the case, it was still possible for the intervenor to obtain effective relief.

Even if the supposed circuit split existed, moreover, this would be an exceptionally poor vehicle for resolving it.

To start, this case does not implicate the purported split. Because the Ninth Circuit applied the same case-by-case, fact-specific analysis that petitioners ask this Court to adopt, the result below would not change even if the Court were to grant certiorari and endorse petitioners' preferred rule.

Moreover, petitioners *invited* the Ninth Circuit's determination that their intervention appeals were moot. In the proceedings below, they argued that their attempt to intervene—and, by implication, their intervention appeals—would be mooted if the court affirmed the district court's approval of the settlements. Petitioners cannot object in this Court to a result that they advocated below.

These problems alone are sufficient grounds for denying certiorari. But there is yet another problem: the district court held that it lacked subject-matter

jurisdiction over the motions to intervene because the MDL statute (28 U.S.C. § 1407) does not allow direct intervention in an MDL. The very existence of this jurisdictional issue complicates this case and further demonstrates why it is not a good vehicle for resolving any question about the test for mootness.

Perhaps recognizing this problem, petitioners ask this Court to grant review on the MDL issue as well. But the Ninth Circuit did not address it below, and petitioners identify no lower-court conflict over the issue, which arises infrequently and was decided correctly by the district court. There is, in short, no reason for this Court to review the MDL question.

For all these reasons, the petition should be denied.

STATEMENT

This case involves a long-running but now largely settled dispute over cathode ray tubes ("CRTs"), an obsolete technology that was once used as the primary component in "big-box" televisions and computer monitors. Because of the procedural complexity, defendant-respondents provide both an overview of the history of this litigation and a more detailed account.

A. Overview

This sprawling class-action, multidistrict litigation began in 2007, when the defendant-respondents and others who manufactured or sold CRTs were sued for alleged antitrust violations. More than forty similar complaints were filed in district courts around the country. In early 2008, the cases were consolidated for pretrial proceedings by the Judicial Panel on Multidistrict Litigation. Over the course of fifteen years, lead plaintiffs representing indirect purchasers of CRTs incorporated in televisions and computer monitors filed

four successive consolidated complaints, ultimately asserting state-law damages claims on behalf of twenty-two state-wide classes and a federal claim for injunctive relief on behalf of a putative nationwide class. During this period, the district court made more than 6,000 docket entries, and the Ninth Circuit heard multiple rounds of appeals, the most recent of which gave rise to this petition.

Since the filing of the Third Amended Complaint in 2010, no complaint has asserted claims under the laws of any of petitioners' home states. And no complaint *ever* asserted the federal equitable-disgorgement or restitution claim that one petitioner seeks to assert. When plaintiffs later moved for class certification in 2012, they did not seek to certify—and the district court did not certify—either a state-wide class or a nationwide class that included petitioners.

In 2016, nine years after the litigation began, the district court approved settlements between the defendant-respondents and a settlement class comprising the twenty-two state-wide damages classes and the putative nationwide injunctive relief class alleged in the operative complaint. Although others objected to these settlements and appealed the district court's approval of the settlements, petitioners did not.

In 2019, after remand from the Ninth Circuit, the initial settlements were amended to narrow the settlement class to include only the twenty-two state-wide damages classes. As a result, the amended settlements do not release any claims of individuals (like petitioners) who had allegedly made their purchases in other states and would not receive monetary compensation under the allocation plan adopted by plaintiffs' lead counsel.

It was only then—twelve years after the litigation began—that petitioners tried to assert their claims, which either had not been previously asserted or had been long abandoned. But rather than initiate a separate action and seek transfer to the MDL (as the MDL statute requires), petitioners moved to intervene directly in the MDL itself.

The MDL court denied petitioners' motions to intervene. It held that it lacked subject-matter jurisdiction to consider their claims because petitioners had attempted to assert them in the MDL itself, rather than filing separate cases that would then be transferred to the MDL. The court advised petitioners to file such separate suits and seek a transfer to the MDL.

Petitioners declined to do so, instead appealing the denial of their motions to intervene. The stated reason for this procedural choice was petitioners' desire to invoke the relation-back doctrine, which they hoped would save their more-than-twelve-year-old claims from dismissal as untimely. In fact, the relation-back doctrine would *not* save their claims from dismissal even if petitioners were allowed to intervene directly in the MDL. But, in any event, the desire to try to invoke the relation-back doctrine to revive time-barred claims is not a cognizable basis for intervention.

During proceedings in the Ninth Circuit, petitioners argued that their motions to intervene would be "doomed" if the court affirmed the order approving the settlement agreements, as it ultimately did. Consistent with that concession, the Ninth Circuit, upon affirming the amended settlements, dismissed petitioners' intervention appeals as moot.

B. The parties

Petitioners are fourteen individuals who say they purchased a television or computer monitor containing a CRT made or sold by one or more of the defendant-respondents (or their alleged co-conspirators).

The fourteen petitioners come from a total of ten states: Arkansas, Massachusetts, Missouri, Montana, New Hampshire, Ohio, Oregon, Rhode Island, South Carolina, and Utah. Nine of these states have been referred to in this litigation as "omitted repealer states" ("ORS"). Petitioners call them "repealer states" because, according to petitioners, they have, "in one form or another," repealed this Court's ruling in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 746 (1977), and thus allow indirect purchasers to bring state-law antitrust damages suits for price fixing. *Stromberg* v. *Qualcomm Inc.*, 14 F.4th 1059, 1064 (9th Cir. 2021).[1] Petitioners call them "omitted" repealer states because the Indirect Purchaser Plaintiff-respondents ("IPP respondents") did not prosecute any damages claims under the laws of these states. The petitioner from the remaining state—Ohio, one of the "non-repealer states" ("NRS")—asserts only a claim for federal equitable relief, as she concedes that Ohio has not repealed the *Illinois Brick* rule.

The IPP respondents belong to twenty-two certified, state-specific classes that have throughout the litigation asserted state-law damages claims on behalf of

[1] In fact, as the district court held, at least three of these states—Arkansas, Rhode Island, and Montana—either do not provide a state-law cause of action for price fixing or have not repealed the *Illinois Brick* doctrine as a matter of state antitrust law. ECF Nos. 597 at 30–31, 768 at 3-5, 665 at 26 ¶ 14.

millions of individuals who purchased products containing CRTs in these twenty-two "repealer states."

Defendant-respondents are seven defendant corporate groups, some members of which at one time manufactured, distributed, or sold CRTs or televisions or computer monitors containing CRTs. They have long since exited the defunct CRT business.

C. Proceedings below

1. Since at least 2010, it has been clear that no class representative was pursuing state-law damages claims on behalf of petitioners.

Beginning in November 2007, indirect purchasers of CRTs filed at least forty-one complaints in district courts around the nation. (Petitioners were not among them.) In 2008, the Judicial Panel on Multidistrict Litigation transferred all related indirect-purchaser actions to the Northern District of California for pretrial coordination.

Over the next five years, indirect purchaser plaintiffs filed four consolidated amended complaints, each signed by counsel for petitioners, that successively dropped or revised various state-law damages claims in response to dismissal orders and other developments. As noted at the outset, no complaint has asserted claims under the laws of any of petitioners' home states since 2010.[2]

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[2] The March 2009 Consolidated Amended Complaint asserted state-law damages claims under the laws of twenty-two states, including Massachusetts and Rhode Island, but none of the other eight states associated with petitioners. ECF No. 437 ¶ 241. The May 2010 Second Consolidated Amended Complaint included

When the putative class representatives moved for certification of each of the twenty-two state-based damages classes in October 2012 (ECF No. 1388), they did not seek certification of any nationwide class or any state-law damages class that included indirect purchasers in any of the "omitted repealer" or "non-repealer" states.[3] Petitioners' counsel signed the class certification motion.

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state-law damages claims under the laws of twenty-six states, including Massachusetts, Arkansas, and Montana, but dropped Rhode Island and again did not assert claims under the laws of the other six states associated with petitioners. ECF No. 716 ¶ 236. The December 2010 Third Consolidated Amended Complaint asserted no claims under the laws of any of petitioners' home states. ECF No. 827 ¶ 233. The January 2013 Fourth Consolidated Amended Complaint, like its predecessor, did not assert claims under the laws of any of petitioners' home states. ECF No. 1526 ¶ 244. In addition to the state-law claims, each of these consolidated amended complaints asserted a nationwide claim for injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. § 26. See ECF Nos. 437 ¶ 253; 716 ¶ 248; 827 ¶ 245; 1526 ¶ 256. The Fourth Consolidated Amended Complaint remained the operative complaint until 2019, when the Fifth Consolidated Amended Complaint was filed in conjunction with the amended settlements. ECF No. 5589.

[3] The IPP respondents did not seek certification of the nationwide class's claim for injunctive relief because "the CRT business has largely died and the people who effectuated" the purported "CRT conspiracy moved on when CRT technology became obsolete[]," making "'an injunction basically worthless, and probably impossible to obtain.'" ECF No. 4712 at 19 (citations omitted). Further, the IPP respondents never alleged a claim for equitable disgorgement under the Clayton Act—as one petitioner seeks to do—because "the Ninth Circuit disallows private use of Section 16 to pursue disgorgement." *Id.* at 20 (citing *In re Multidistrict Vehicle Air Pollution*, 538 F.2d 231, 234 (9th Cir. 1976) ("Recovery for past losses is properly covered under [Section] 4; it comes under the head of 'damages.' * * * [Section] 16 does not allow the claimed relief for past loss.")).

In sum, since at least December 2010, it has been evident to petitioners and their counsel that no one was pursuing state-law damages claims on their behalf. And the class certification motion in 2012 further confirmed that the plaintiffs were not pursuing *any* claim on behalf of petitioners. Despite this, petitioners never filed their own lawsuit and waited nearly nine years before seeking to intervene.

2. Initial settlements were reached and approved, and then the approval order was remanded.

While petitioners sat on their alleged rights to assert damages claims under the laws of their home states, the MDL continued, generating more than 6,000 docket entries. Docket, MDL No. 1917, No. 07-5944 (N.D. Cal.). The parties engaged in extensive discovery and motion practice, producing millions of documents (ECF Nos. 1933-1 at 4, 5416 at 4), taking more than one hundred depositions of fact witnesses and thirty-five depositions of seventeen expert witnesses, and filing more than twenty motions to compel and sixty motions *in limine* (see ECF No. 4071-1 at 14, 19, 22, 24–25, 34–35). Two federal district judges and four special masters entered more than six hundred IPP-specific orders, including rulings on twenty motions to dismiss, and a complex motion for class certification. Over twenty motions for summary judgment were briefed. Nearly all this activity occurred long after it was apparent that no claims were being pursued on behalf of petitioners.

After eight years of litigation, the IPP respondents reached settlement agreements with the seven sets of defendant-respondents. The settlements released the claims asserted on behalf of a nationwide indirect-

purchaser settlement class in exchange for payments from the defendant-respondents that collectively totaled $541.75 million. ECF Nos. 3862-1 to -5, 3875. Contrary to petitioners' assertion (Pet. 3), the terms of the settlement agreements did not dictate the distribution of the settlement funds. Instead, under the agreements, the distribution would be determined by a separate allocation plan to be developed solely by the IPP respondents. ECF Nos. 3862-1 at 11, 3862-2 at 11–12, 3862-3 at 12, 3862-4 at 11, 3862-5 at 12.

Under the allocation plan, the IPP respondents' lead counsel determined that only members of the twenty-two state-specific damages classes could make claims on the settlement fund because all other claims lacked legal foundation and were thus worthless. Pet. App. 37–38. Petitioners did not belong to any of those state-specific classes.

Petitioners did not object to these settlements.

Some others did object, and the district court overruled the objections and approved the settlements, certifying a nationwide settlement class of indirect purchasers. ECF Nos. 4712, 4717. Objectors from Massachusetts, Missouri, and New Hampshire appealed the settlement approval order, arguing that their claims were improperly released without monetary compensation from the settlement fund. See*, e.g.*, No. 16-16379, ECF No. 70 at 54–58 (9th Cir. Apr. 3, 2017); No. 16-16399, ECF No. 29 (9th Cir. Nov. 17, 2016).

While the objectors' appeal was pending, the district court concluded that it had "erred" in approving the original settlements. Specifically, the district court faulted the allocation plan's requirement that class members from Massachusetts, Missouri, and New Hampshire release their purported state-law

damages claims without monetary compensation from the settlement fund. ECF No. 5362 at 1.

The Ninth Circuit then remanded for reconsideration of the order approving the settlements. Pet. App. 162. On remand, the district court appointed counsel to represent indirect purchasers in the nine purported omitted repealer states (ORS) and twenty non-repealer states (NRS) who would not receive monetary compensation under the settlements. ECF No. 5518.

3. After remand, the IPP respondents and defendant-respondents reached new settlements that did not release petitioners' potential claims.

On remand, the district court appointed a magistrate judge to oversee renewed settlement discussions. ECF No. 5427. The magistrate mediated between defendant-respondents and representatives of the twenty-two state-law damages classes. ECF No. 5531. The mediation resulted in amended settlements that did *not* release petitioners' claims. A separate mediation that included ORS purchasers did not yield a settlement. ECF No. 5617.

The court preliminarily approved the amended settlements between the IPP respondents and defendant-respondents in March 2020. Pet. App. 98.

Some petitioners objected to the amended settlements. ECF Nos. 5732, 5756. Among other things, the objectors demanded to be included in a *global* settlement of all indirect purchasers in which they would share in the recovery. See*, e.g.*, ECF Nos. 5607 at 11–13, 5732 at 13. The objectors made this claim even though the ORS and NRS purchasers failed to agree to a settlement despite negotiations in which, at their request, they were separately represented.

The district court struck the objections and granted final approval of the amended settlements. Pet. App. 34. It ruled that the objectors lacked standing to object because they were not members of the settlement classes and because the amended settlements would not release any of their potential claims. Pet. App. 46–49. Indeed, the district court's order afforded exactly the relief that the objectors had repeatedly demanded: vacatur of the original settlements and the related nationwide settlement release, so the objectors would be free to pursue whatever claims they had. Pet. App. 76.

The objectors then moved to intervene for the purpose of appealing the denial of their objections to the amended settlements. ECF No. 5792. The court denied the motion, holding that the objectors lacked a "significantly protectable interest" in the amended settlements because they were not members of the settlement classes and the amended settlements did not release the objectors' potential claims. Pet. App. 18–21.[4]

In August 2020, the objectors, including the petitioners, appealed from the final judgment of dismissal following approval of the amended settlements and from denial of their motions to intervene for purposes of appealing the denial of their objections to the amended settlements. But the present petition does not involve those appeals. In this Court, petitioners challenge neither the final judgment nor approval of the amended settlements between the defendant-respondents and IPP respondents.

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[4] The district court also denied permissive intervention because allowing petitioners to intervene and object to the amended settlements, to which they were not parties, would prejudice the parties to the amended settlement agreements. Pet App. 21–23.

4. The district court denied petitioners' motions to intervene in the MDL.

Wholly apart from their failed objections to the amended settlements, petitioners also attempted to intervene in the MDL to assert claims against defendant-respondents. Specifically, in August 2019, petitioners moved to intervene in the MDL as class representatives and to amend the IPP respondents' operative consolidated amended complaint to assert new or previously abandoned claims on behalf of indirect purchasers from ORS and NRS states. ECF Nos. 5565, 5567.

The district court denied the motions to intervene without prejudice, rejecting the would-be intervenors' attempt to "amend someone else's complaint" as "not allowed." Pet. App. 142–43, 148.

In response, petitioners filed renewed motions to intervene, accompanied by complaints that they sought to file directly in the MDL proceeding, instead of initiating new federal cases that could then be transferred to the MDL. ECF Nos. 5645, 5645-1, 5643, 5643-1.

The district court denied the renewed motions to intervene, holding that it lacked subject-matter jurisdiction because the MDL statute, 28 U.S.C. § 1407, "does not permit * * * direct intervention into * * * MDL proceedings, whether by filing separate complaints or amending [the] operative complaint." Pet. App. 133. The court advised petitioners that if they wished to assert claims in the MDL, they should "file their claims in the appropriate forum(s) and seek transfer from the JPML or, if properly filed in the Northern District of California, 'request assignment of [their] actions to the Section 1407 transferee judge in

accordance with applicable local rules.'" Pet. App. 138 (quoting JPML R. 7.2(a)).[5]

Ignoring the court's ruling, petitioners declined to file new actions. Instead, they appealed the orders denying their motions to intervene directly in the MDL. Pet. App. 81-82.[6] These are the appeals that led to this petition.

5. The Ninth Circuit affirmed the order approving the amended settlements and dismissed the intervention appeals as moot.

Petitioners' intervention and final-judgment appeals were briefed separately, but the Ninth Circuit consolidated them for oral argument. Pet. App. 5–6. In their briefing, petitioners argued that "final approval" of the settlement agreements "would moot their * * * appeal from the district court's order denying their motions to intervene." No. 20-16699, ECF No. 28 at 25. And during argument, petitioners again stated that the approval of the amended settlements "doomed" their efforts to intervene, and further argued that approval of the settlements would mean that there would be "nothing to relate back to." 9th Cir.

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[5] The court also denied the motions because, "as discussed in its previous orders," would-be intervenors "may not add new plaintiffs to an MDL by amending IPP Plaintiffs' complaint." Pet. App. 135.

[6] Petitioners also appealed the district court's order preliminarily approving the amended settlements. "The Ninth Circuit concluded that it lacked jurisdiction over the order preliminarily approving the settlement and dismissed that portion of the appeal." Pet. App. 87 (citing No. 20-15697, ECF No. 20 (9th Cir. June 9, 2020)).

Oral Arg. Rec. 13:47–14:21, https://www.ca9.uscourts.gov/media/video/?20210728/20-15697/.

In an unpublished decision, the Ninth Circuit first affirmed the amended settlements' final approval. Applying Ninth Circuit law—which petitioners do not challenge—the Ninth Circuit held that petitioners "lack[ed] standing to object to the settlement agreements" because the settlements "do not release [their] claims." Pet. App. 6–7. The Ninth Circuit further held that the prejudice that petitioners claimed they would suffer if the settlements were approved—*i.e.*, a weakening of their relation-back argument and difficulty in completing service of process—did not constitute "formal legal prejudice" that would allow non-parties to appeal the settlements. Pet. App. 7–8.

In the same unpublished, non-precedential decision, the Ninth Circuit also dismissed petitioners' intervention appeals as moot. Quoting *United States* v. *Sprint Communications Inc.*, 855 F.3d 985, 990 (9th Cir. 2017), the court began its analysis by stating that it first had "[t]o determine" whether petitioners' "appeal[s] of the denial of intervention [are] moot" by examining the circumstances and "ask[ing] if 'any effectual relief whatever' is possible even 'if we were to determine that the district court erred in denying [] intervention." Pet. App. 9. Acknowledging that petitioners sought "to intervene into the pending action against Defendants to strengthen their relation back arguments," the Ninth Circuit found, consistent with petitioners' position in briefing and at oral argument, that approval of the settlements meant that "[t]here is no longer an action against Defendants into which the ORS and NRS appellants can intervene." Pet. App. 9. Accordingly, the Ninth Circuit concluded that, under the fact-specific analysis of *Sprint Communications*,

the intervention appeals were moot because the court could "grant no 'effectual relief' to [the ORS and NRS] appellants even if [it] were to reach the merits of the appeals and determine the district court erred." Pet. App. 9.

Petitioners requested rehearing en banc, but no member of the Ninth Circuit called for a poll. Pet. App. 164-75.

REASONS FOR DENYING THE PETITION

Petitioners ask that this Court grant certiorari to resolve a purported circuit split over "whether a final judgment moots a pending appeal from an order denying intervention." Pet. 21; accord *id.* at i. The question does not warrant this Court's attention, as the claimed circuit split is illusory and, regardless, this case does not implicate it. In its unpublished decision, the Ninth Circuit applied the very same fact-specific, case-by-case "majority" rule for which petitioners advocate. For this reason—as well as several others discussed below—this case would be an exceptionally poor vehicle in which to resolve any circuit split, even if one existed.

The second question presented—regarding the jurisdiction of the MDL court—is plainly not certworthy. As petitioners acknowledge, the decision below is unpublished and "did not reach the district court's jurisdictional determination." Pet. 35 n.8. They also do not allege any circuit conflict and, instead, recognize that this issue has never been decided by *any* circuit court and has arisen only a handful of times in the last half-century. Certiorari is unwarranted.

I. There is no reason to grant review on the mootness question.

The Ninth Circuit's unpublished decision does not warrant this Court's review because its fact-bound, case-specific mootness determination does not implicate any circuit split.

A. There is no live circuit split.

The alleged circuit split is illusory. According to petitioners, "[t]he 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," while "[t]he minority rule," supposedly "followed by the Second Circuit, and a subset of the precedent from the District of Columbia and Ninth Circuits (including the order on review)," provides that entry of final judgment in the underlying litigation automatically moots a pending intervention appeal. Pet. 30 (emphasis added). In fact, *all* circuits currently apply the same case-by-case, fact-based analysis to resolve any mootness question. There simply is no circuit split to resolve.

1. The Ninth and D.C. Circuits analyze mootness on a fact-specific, case-by-case basis.

Petitioners do not contend that the Ninth and D.C. Circuits consistently depart from what they call the "majority rule." Rather, they say these courts "have divergent precedents" regarding the mootness of an intervention appeal after the underlying litigation has been resolved. Pet. 21 (quoting *DeOtte* v. *Nevada*, 20 F.4th 1055, 1066 (5th Cir. 2021), *reh'g pet. pending*). That contention rests on outdated cases, as both circuits currently and consistently apply the same fact-specific analysis for which petitioners advocate.

Although there may have been a period during which the Ninth Circuit "rendered inconsistent decisions" on this issue (*CVLR Performance Horses, Inc.* v. *Wynne*, 792 F.3d 469, 474 (4th Cir. 2015)), that ended with the court's 2017 opinion in *Sprint Communications*, which expressly "agree[d] with the Fourth Circuit * * * that 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." *United States* v. *Sprint Commc'ns, Inc.*, 855 F.3d 985, 990 (9th Cir. 2017) (citing *CVLR Performance Horses*, 792 F.3d at 475) (emphasis added). Unsurprisingly, every Ninth Circuit decision petitioners identify as following what they characterize as "[t]he minority rule" predates *Sprint Communications*. Pet. 26–27 (citing *W. Coast Seafood Processors Ass'n* v. *Nat. Res. Def. Council, Inc.*, 643 F.3d 701, 704 (9th Cir. 2011); *Hamilton* v. *Cnty. of Los Angeles*, 46 F.3d 1141 (9th Cir. 1995); *United States* v. *Ford*, 650 F.2d 1141, 1143 (9th Cir. 1981)). All subsequent cases—including this one—follow *Sprint Communications* and what petitioners call the "majority rule." *Id.* 26–27 (citing *Stadnicki ex rel. LendingClub Corp.* v. *Laplanche*, 804 Fed. Appx. 519, 520 (9th Cir. 2020); *Allied Concrete & Supply Co.* v. *Baker*, 904 F.3d 1053, 1066 (9th Cir. 2018)).[7]

The D.C. Circuit has made a similar shift. The only D.C. Circuit decision identified by petitioners as applying "[t]he minority rule"—its 1993 decision in *Energy*

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[7] Other recent Ninth Circuit decisions, not cited by petitioners, also employ the case-by-case approach. See *Cooper* v. *Newsom*, 13 F.4th 857, 863–64 (9th Cir. 2021) (reversing denial of intervention, citing *Sprint Comm'ns*); *Idaho Conservation League* v. *U.S. Forest Ser*v., 2021 WL 3758320, at *1 (9th Cir. 2021) (following *Sprint Comm'ns* and finding that "appeal from denial of intervention as of right was not moot").

Transportation Group, Inc. v. *Maritime Administration*, 956 F.2d 1206 (D.C. Cir. 1992)—is now nearly thirty years old. Cf. Pet. 25. As petitioners tacitly concede, all *recent* D.C. Circuit decisions addressing the mootness issue hold that "a motion to intervene [can] survive a stipulated dismissal." *Id.* at 26 (quoting *In re Brewer*, 863 F.3d 861, 870 (D.C. Cir. 2017); citing *Alt. Research & Dev. Found.* v. *Veneman*, 262 F.3d 406, 410 (D.C. Cir. 2001)); see also *In re Endangered Species Act Section 4 Deadline Litig.*, 704 F.3d 972, 976 (D.C. Cir. 2013) (despite dismissal of the underlying litigation, the "court has jurisdiction over the appeal of the denial of intervention as of right").

The only D.C. Circuit case to cite *Energy Transportation*'s statement regarding mootness is *Lopez* v. *NLRB*, 655 Fed. App'x 859 (D.C. Cir. 2016), an unpublished per curiam decision that ultimately employs the same case-specific analysis that petitioners advocate. In *Lopez*, the would-be intervenors wanted to intervene in NLRB proceedings to defend their employer against charges that rested in part on the employer's decision to withdraw recognition of a union. *Id.* at 860. In particular, the intervenors wanted to present evidence that the employer's action was justified because they had submitted a decertification petition with a sufficient number of valid signatures. *Id.* The D.C. Circuit dismissed the appeal as moot, not only because the litigation against the employer had settled, but also because the court found that nothing "could * * * come from an after-the-fact validation of those signatures," given that the NLRB's determination that the employer had committed unfair labor practices "rested on alternative and independent grounds." *Id.* at 862. Thus, in *Lopez*, too, the D.C. Circuit followed what

petitioners call the "majority" rule and engaged in a case-specific analysis.

2. The Second Circuit too analyzes mootness on a case-by-case, fact-specific basis.

Petitioners contend that the settled rule in the Second Circuit (and only the Second Circuit) is that an appeal from the denial of a motion to intervene is automatically moot once the underlying litigation has concluded. But broad language aside, the Second Circuit has not adopted such a broad, categorical rule.

Petitioners misread *National Bulk Carriers, Inc.* v. *Princess Management Co.*, 597 F.2d 819 (2d Cir. 1979), the only published Second Circuit decision they cite. In that case, a creditor moved to intervene in a pending lawsuit, hoping to garnish the plaintiff's anticipated judgment. *Id.* at 825 n.13. The district court denied intervention, and the would-be intervenor appealed. *Id.* After affirming the underlying judgment, the Second Circuit found the intervention appeal moot. *Id.*

But the Second Circuit did not apply what petitioners describe as "[t]he minority rule" of automatic mootness to reach that result. Pet. 30. Indeed, the Second Circuit did not adopt any generally applicable rule, let alone one holding that intervention appeals are automatically mooted by entry of final judgment in the underlying litigation. Instead, applying a fact-specific analysis, the court found the intervention appeal moot because the district court's final judgment "provide[d] complete protection for the proposed intervenors." *Nat'l Bulk Carriers,* 597 F.2d at 825 n.13. The district court had ordered the defendant to deposit the judgment with the clerk, rather than pay it to the

prevailing plaintiff, so that the funds would be available to the would-be intervenor. *Id.* On those facts, the Second Circuit concluded that the intervenor, who had already obtained a state garnishment order, required no "greater protection than this, and intervention in an action that is now terminated could not afford any." *Id.* Thus, the Second Circuit found the intervention appeal moot because, on the facts of the case, intervention could not afford the would-be intervenor any relief beyond what had already been provided—not because of any rule of automatic mootness.

That analysis is entirely consistent with the case-specific approach providing that the conclusion "of the underlying action does not *automatically* moot a preexisting appeal of the denial of a motion to intervene." *CVLR Performance Horses*, 792 F.3d at 475 (emphasis added); see also *id.* (noting that a "settlement [can moot] the appeal [if] it provide[s] all of the relief that the plaintiffs sought").

Nor does *Kunz* v. *New York State Commission on Judicial Misconduct*, 155 Fed. App'x 21 (2d Cir. 2005)—the only other Second Circuit case petitioners cite—apply a categorical mootness rule. In a single-page, unpublished summary order, *Kunz* affirmed an order denying intervention. Although the court used broad language stating that "where the action in which a litigant seeks to intervene has been discontinued, the motion to intervene is rendered moot," the court went on to examine the facts and affirmed the denial of intervention because of the would-be intervenors' "fail[ure]" to satisfy Federal Rule of Civil Procedure 24(a)(2), which requires a prospective intervenor to establish "'a direct, substantial, and legally protectable' interest in the litigation." *Id.* (quoting *United States* v. *Peoples Benefit Life Ins. Co.*, 271 F.3d 411, 415 (2d

Cir. 2001)). In other words, the Second Circuit held that the motion to intervene was futile and had been properly denied on the facts of the case. Mootness was not the basis of the Second Circuit's decision; indeed, if it had been, the court would have dismissed the appeal rather than affirming the order below.

National Bulk Carriers and *Kunz* are the only cases petitioners cite in support of their assertion that the Second Circuit has "long held" that an intervenor automatically "loses the right to appellate review" if the case concludes while the appeal is pending. Pet. 24. But each case rests on its particular facts, not a categorical "minority" rule.

Thus, *no* circuit has binding precedent adopting a categorical rule that a motion to intervene is *always* moot following dismissal of the underlying case. Rather, in all circuits that have binding precedent on point, courts approach mootness on a case-specific basis by asking whether effectual relief could still be had notwithstanding the dismissal.

In short, the petition posits a circuit split that does not exist. To the extent there was once any conflict among or within the circuits (*e.g.*, before *Sprint Communications* in the Ninth Circuit), it has been resolved. Although panels in the Fourth and Fifth Circuits have perceived "divergent precedents," that perception rests on outdated cases. *DeOtte*, 20 F.4th at 1066 (citing *CVLR Performance Horses,* 792 F.3d at 474, in turn citing, inter alia, *Energy Transp. Grp.*, 956 F.2d at 1210, *Kunz*, 155 Fed.App'x at 22, and *W. Coast Seafood Processors*, 643 F.3d at 704). Because all the circuits are now aligned, there is no need for this Court's review.

B. If there were a circuit split, this case does not present it.

Even if there were still conflict among the circuits, this case would not implicate it and thus would not be the vehicle for addressing it. Indeed, adopting the case-by-case rule petitioners advocate would make no difference in this case; the Ninth Circuit already applied the rule and simply found petitioners' appeals moot on the facts.

The Ninth Circuit did *not* assume that settlement of the underlying litigation automatically mooted petitioners' intervention appeals. Pet. App. 9. To the contrary, the court began its analysis by quoting *Sprint Communications* for the proposition that "[t]o determine *if* an appeal of the denial of intervention is moot, we ask if 'any effectual relief whatever' is possible even 'if we were to determine that the district court erred in denying [] intervention.'" *Id.* (quoting *Sprint Commc'ns*, 855 F.3d at 990) (brackets in original; emphasis added). Applying that test—the case-specific rule for which petitioners advocate (cf. Pet. 26–27)—the Ninth Circuit concluded that petitioners' intervention appeals were moot because it determined, on the facts of the case, that it could "grant no 'effectual relief' to [petitioners] even if we were to * * * determine the district court erred." *Id.* (quoting *Sprint Commc'ns*, 855 F.3d at 990). Petitioners do not challenge that fact-bound, case-specific determination, which in any event is correct.

In short, even if there were a reason to weigh in on the mootness issue, this is not the case in which to do so.

C. This case is also an unsuitable vehicle for at least two other reasons.

1. Petitioners conceded mootness below.

Review of the first question presented is also inappropriate in this case because of petitioners' concessions below. When asked at oral argument whether petitioners would be able to assert their claims in the MDL if the court affirmed the district court's approval of the amended settlement agreements, petitioners' counsel asserted, "No, it's over." 9th Cir. Oral Arg. Rec. 14:10–14:13. This was the same position that petitioners had advanced in their briefs. No. 20-16699, ECF No. 28 at 25.

The Ninth Circuit has now affirmed approval of the amended settlement agreements, holding that petitioners "lack[ed] standing to appeal the district court's approval of the * * * settlement agreements." Pet. App. 8; see also Pet. 18. Petitioners do not challenge that holding. Cf. Pet. i. Having told the Ninth Circuit that their intervention was "doomed" if the court affirmed the approval of the amended settlement agreements (9th Cir. Oral Arg. Rec. 14:00–14:02), petitioners cannot now ask this Court to reverse that decision.

2. The district court's determination that it lacked subject-matter jurisdiction would complicate this Court's review.

There is yet another problem that makes this case an unsuitable vehicle for addressing the mootness question: the district court held that petitioners' attempts to intervene must be rejected for lack of subject-matter jurisdiction. Pet. App. 134. At a minimum, this jurisdictional holding would complicate the Court's review.

One petitioner moved to intervene by filing a new federal antitrust complaint in the MDL itself, while the others sought to add new state-law claims to the operative complaint filed by the settling IPP respondents. Pet. App. 133. But as the district court held, the MDL statute does not provide subject-matter jurisdiction for courts to consider either of these actions. See, *e.g.*, Pet. App. 134 (following cases from other MDL courts dismissing intervening complaints for lack of subject-matter jurisdiction). The Ninth Circuit did not reach this jurisdictional issue because it found the appeals moot.

This jurisdictional problem complicates the Court's ability to resolve the first question presented. The MDL issue would, at minimum, force the Court to evaluate whether it must decide both jurisdictional issues if it is to reach either and, if not, how to sequence them. Cf. *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 549 U.S. 422 (2007) (federal courts may choose among threshold grounds on which to dismiss a case); cf. *Camreta* v. *Greene*, 563 U.S. 692 (2011) (reaching first, threshold question presented despite ultimately holding case moot). Petitioners obviously realize this, which explains why they included the MDL issue as a second question presented, even though (as discussed below) that question does not satisfy this Court's criteria for review.

For this reason as well, this case presents an exceptionally poor vehicle for resolving any purported circuit conflict on the issue of mootness.[8] To the extent

[8] The intervention appeals will inevitably fail for several other independent reasons as well. For example, the motions were untimely, filed twelve years after the MDL began and nine years after it became clear that petitioners' state-law damages claims

the mootness question merits review at all, the Court should await a case that cleanly presents that issue without the added complication of a second, threshold jurisdictional issue that plainly does not warrant this Court's attention.

II. The MDL question was not reached by the Ninth Circuit, does not involve any circuit split, and is not certworthy.

The second question presented—which involves subject-matter jurisdiction and MDL procedure—does not independently satisfy *any* of this Court's criteria for certiorari. To the contrary, as petitioners acknowledge, the Ninth Circuit's unpublished decision "did not reach the district court's jurisdictional determination." Pet. 35 n.8. This by itself makes review inappropriate. See, *e.g., Omnicare, Inc.* v. *Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S.

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would not be asserted in the MDL. And even if the motions had been timely filed, petitioners cannot establish that denying intervention would "impair or impede [their] ability to protect [their] interest[s]," as they remain free to file a new complaint and pursue whatever claims they may have in their own action. Fed. R. Civ. P. 24(a)(2); see also Pet. App. 18–21. A desire to invoke the relation-back doctrine is not a valid basis for intervention. See *Hawaii-Pac. Venture Capital Corp.* v. *Rothbard*, 564 F.2d 1343, 1345 (9th Cir. 1977) (affirming denial of intervention even though the statute of limitations could bar a separate action, because that "harm [is] not * * * attributable to the disposition of the class action suit" but is instead the result of "the appellants' own negligence and failure to raise the * * * claims for over seven years that bars them"); *United States* v. *City of New York*, 198 F.3d 360, 366 (2d Cir. 1999) ("[A]ny failure on [appellants'] part to act within the applicable statutes of limitations does not sufficiently impair their interests to warrant intervention under Rule 24(a)(2); rather, the harm to their interests must be attributable to the court's disposition of the suit in which intervention is sought.").

175, 204 (2015) (Thomas, J., concurring in the judgment) (identifying the "lower court's failure to address an issue below as a reason for declining to address it here").

Further, petitioners do not identify—and defendant-respondents are not aware of—any conflict among the circuits on the MDL question. Indeed, petitioners do not identify even a single circuit that has ever decided the question. The petition cites only three cases that have ever addressed it, and all are from district courts. See Pet. 38. And all those decisions are in accord, concluding that an MDL court "does not have subject-matter jurisdiction over" claims that were not asserted in a case transferred to it by the Judicial Panel on Multidistrict Litigation. *In re Mortgage Elec. Registration Sys. (MERS) Litig.*, 2016 WL 3931820, at *5 (D. Ariz. 2016); accord *In re Farmers Ins. Exch. Claims Representatives Overtime Pay Litig.*, 2008 WL 4763029, at *3–5 (D. Or. 2008); Pet. App. 134.

Nor is the MDL question sufficiently important to warrant review. Again, petitioners identify only three district-court cases reaching the issue in "nearly 50 years of MDL proceedings." Pet. 36, 38. It is no surprise that this issue arises only rarely, as there is no need for a would-be plaintiff to intervene directly in an MDL. Instead, the would-be plaintiff can either bring a separate action in another forum and ask that it be transferred to the MDL court, or file an action in the district hosting the MDL and then seek reassignment to the MDL judge for coordination. Although petitioners did not follow the court's guidance, this is exactly what the district court advised petitioners to do here. Pet. App. 138.

Given these readily accessible procedural mechanisms for asserting claims in an MDL, there are no "drastic ramifications" (Pet. 37) to the district courts' unanimous view that MDL courts lack subject-matter jurisdiction over claims that are filed directly in an MDL. The simple solution is for the would-be plaintiff to file a separate action and then have it transferred to the MDL.

In any event, each district court that has reached the issue has decided it correctly. As the court in this case explained, "[c]ases must already be pending in a federal court before they can be added to an existing MDL." Pet. App. 134. That conclusion follows directly from the MDL statute. As a matter of statute, only cases that "*are pending* in different districts * * * may be transferred to" an MDL, and only the JPML can make the transfer. 28 U.S.C. § 1407(a) (emphasis added). The only exception is when a tag-along case is filed in the district where the MDL is pending. In that instance, transfer by the JPML is unnecessary; the plaintiff need only "request assignment of such action[] to the Section 1407 transferee judge in accordance with applicable local rules." J.P.M.L. R. 7.2(a); accord Pet App. 138.

In sum, there is no conflict among the circuits on the MDL question, which arises infrequently because direct intervention in an MDL is never necessary. Neither the Ninth Circuit nor any other circuit has even reached the issue, and the three district courts that have done so are unanimous (and correct) in their analysis. Under these circumstances, there is no basis for this Court to grant certiorari on the second question presented.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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[9] Samsung SDI Mexico S.A. de C.V., Samsung SDI Brasil Ltda., Shenzhen Samsung SDI Co., Ltd., and Samsung SDI (Malaysia) Sdn. Bhd, have been dissolved.