

IRREGULARS: THE APPELLATE RIGHTS OF PERSONS WHO ARE NOT FULL-FLEDGED PARTIES

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I. INTRODUCTION

Irregulars is the second of a pair of articles on standing to appeal and the right to defend a judgment in the federal courts. The first article, *Shining a Light in a Dim Corner: Standing to Appeal and the Right to Defend a Judgment in the Federal Courts*, identified the conceptual similarities and differences between standing to sue and standing to appeal, and between the “right” to defend in the trial court and the right to defend a judicial order or judgment that has been appealed, considered the purposes of the doctrines governing these matters, and briefly described how Rule 19 parties and intervenors fit into our court system at the trial level.¹ The article distinguished standing to appeal and the right to defend against an appeal from related doctrines such as those addressing capacity to sue and be sued, mootness, appealability and reviewability, other procedural prerequisites to appeal, and acquiescence in a judgment.²

Shining a Light delved into the nature and degree of injury that warrants recognition of standing to appeal from an order or judgment in a civil suit, the requisite relation between that injury and the order or judgment sought to be appealed, and the relevance of the appellate court’s ability to redress the claimed injury.³ The article gave special attention to the bases for appeal available to a person who has substantially prevailed in the trial court, argued for abandonment of the collateral estoppel exception to the general rule that prevailing parties may not appeal, and advocated rethinking of other exceptions.⁴ *Shining a Light* also considered the doctrines that determine who may be an appellee in federal civil litigation.⁵

Irregulars explores the ways in which our law’s limitations on standing to appeal and defend apply to nonparty, would-be appellants and appellees and to the grievances they assert or seek to avert. Looking to both constitutional and common law, this

¹ Joan Steinman, *Shining a Light in a Dim Corner: Standing to Appeal and the Right to Defend a Judgment in the Federal Courts*, 38 GA. L. REV. 813, 816 (2004) [hereinafter *Shining a Light*].

² *Id.* at 816-17.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

Article revisits the importance of the capacity in which persons sued or were sued to their right to appeal or to defend a judgment on appeal, comments upon the appeal rights (or the lack thereof) of coparties and co-consolidatees (parties in litigation consolidated with that in which an appealable decision was rendered), and considers the appeal rights of various persons other than full-fledged formal parties to the suit in which an appealable decision was rendered. In particular, this Article focuses on would-be and successful intervenors, absent members of classes certified or sought to be certified under Rule 23 of the Federal Rules of Civil Procedure, shareholders in derivative suits, de facto and quasi-parties, and nonparties. The Article considers both the scope of the right of each of those categories of persons to appeal and their right to defend an order or judgment on appeal in the federal judicial system.⁶

Finally, *Irregulars* examines whether current doctrine governing “irregulars’ ”⁷ standing to appeal and to defend judgments makes good policy sense and is internally consistent with the doctrine governing full-fledged parties.

II. CAPACITY, COPARTIES, CONSOLIDATION

A. CAPACITY AS A FACTOR IN APPEAL RIGHTS

Ordinarily, parties aggrieved by a trial court decision may appeal it but, subject to exceptions discussed below, others may not. Similarly, parties prevailing in the trial court with respect to a particular decision ordinarily may defend that decision on appeal, while others may not. To apply these principles, one has to understand who the aggrieved and who the prevailing parties are. Under U.S. law, a person who was a trial court litigant by virtue of a particular capacity cannot serve as an appellant or appellee if he ceases to have that capacity or acts in a different capacity.⁸ He is a

⁶ The Article focuses primarily on case law created in the 1990s and thereafter, and assumes that issues arising in recent years are likely to be most important and relevant in the future. The Article will not examine standing to appeal or a right to defend an order or judgment that is granted by a particular statute and is not generally applicable and available.

⁷ The term “irregulars” will refer to persons who are not full-fledged parties.

⁸ *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 534-49 (1986) (holding that

stranger to the litigation in any capacity other than that in which he had standing to sue or be sued.⁹ Different capacities “are generally treated as . . . different legal personages.”¹⁰ Thus, in *Karcher v. May*, the Supreme Court dismissed an appeal for lack of jurisdiction under 28 U.S.C. § 1254(2)¹¹ where the appellants ceased to hold the official positions (speaker of a state general assembly and president of the state senate, respectively) that were the bases for their intervention as defendants into a lawsuit challenging a state statute’s constitutionality, and where they never participated nor sought to participate in the proceedings in the roles (as individual legislators and representatives of the majority of a now-expired legislature) they had acquired at the time of the appeal.¹² The district court and court of appeals held for plaintiffs, and the Supreme Court explained that the authority to pursue the lawsuit on appeal had passed to the successor-speaker and successor-president, both of whom chose not to appeal.¹³ Thus, the would-be appellants had no standing to appeal.¹⁴ In short, loss of the capacities in which they had litigated in the trial court caused these appellants to lack standing to appeal.¹⁵

member of school board against which declaratory relief was awarded lacked standing to appeal either in his individual capacity or as parent of student attending school at which events leading to suit had occurred, since he was sued in neither of those capacities and because he had no right to assert board’s right to appeal).

⁹ *Id.* at 543 n.6.

¹⁰ *Id.* (quoting FLEMING JAMES, JR. & GEOFFREY HAZARD, JR., CIVIL PROCEDURE § 11.6, at 594 (3d ed. 1985)).

¹¹ 28 U.S.C. § 1254(2) (2000). Under the statute, the Supreme Court at any time may review by certification by a court of appeals any question of law, in any civil or criminal case, as to which the court of appeals desires instructions. *Id.* The statute authorizes the Supreme Court to give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy. *Id.*

¹² 484 U.S. 72, 81 (1987).

¹³ *Id.* at 77-81.

¹⁴ *Id.*; see also *United States v. Van*, 931 F.2d 384, 387-89 (6th Cir. 1991) (holding that company’s president, subpoenaed to produce records, lacked standing to appeal order enforcing subpoena once corporate dissolution was reversed because he no longer could be liable in his individual capacity).

¹⁵ For similar reasons, the capacity in which one sued or was sued bears upon the availability of res judicata in a subsequent proceeding. See, e.g., *Mitchell v. Chapman*, 343 F.3d 811, 823 (6th Cir. 2003) (holding under “rule of differing capacities” that judgment for defendants in their official capacities did not preclude claims asserted against them in their individual capacities). The *Mitchell* court cited the RESTATEMENT (SECOND) OF JUDGMENTS § 36(2) (1982), stating that “[a] party appearing in an action in one capacity, individual or

The other side of the coin is that successors in interest to those who sued or were sued in a particular capacity are entitled to be substituted on official capacity claims and have standing to appeal or to serve as appellees.¹⁶

B. THE INABILITY TO APPEAL ON BEHALF OF NONPARTIES

Part II.A established that a trial court litigant who sued or was sued by virtue of a particular capacity cannot serve as an appellant or appellee if he ceases to have that capacity or acts in a different capacity. One may view as a corollary to that principle the notion that someone who sued or was sued individually, rather than in a representative capacity, has no standing to appeal or to act as an appellee on behalf of nonparties. *Chevron USA, Inc. v. School Board Vermilion Parish*¹⁷ illustrates the point. Royalty owners, lessors of mineral leases, had sent letters to various oil companies alleging underpayment and demanding an accounting and payment to themselves and to all similarly situated royalty owners.¹⁸ In an action brought against the letter-sending royalty owners, the oil companies sought a declaratory judgment that under a state statute

representative, is not thereby bound by or entitled to the benefits of the rules of res judicata in a subsequent action in which he appears in another capacity." *Id.*; see also *Magicsilk Corp. v. Vinson*, 924 F.2d 123, 124-25 (7th Cir. 1991) (holding that original plaintiff against which judgment was entered could not appeal judgment after district court granted motion to substitute purchaser of original plaintiff's assets as plaintiff).

¹⁶ See, e.g., *Top Entm't, Inc. v. Torrejon*, 351 F.3d 531, 534-35 (1st Cir. 2003) (awarding attorneys' fees and costs incurred in responding to motion to dismiss appeal for lack of standing based on absence of valid assignment, where appeals court and district court had granted assignee's motion to be substituted); *Negron Gaztambide v. Hernandez Torres*, 145 F.3d 410, 415 (1st Cir. 1998) (holding that successor public officials not involved in settlement negotiations to resolve plaintiff's lawsuit had standing to challenge settlement agreement allegedly entered into by predecessor officials); cf. *Wolff v. Cash 4 Titles*, 351 F.3d 1348, 1354-56 & n.19 (11th Cir. 2003) (holding receiver appointed for defendants in another case to be nonparty with no standing to appeal attorneys' fee award, despite receiver's proffer of objections to award, because receiver was not proxy for defendant and receiver's interest was not implicated by suit); *First Union Nat'l Bank v. Pictet Overseas Trust Corp.*, 351 F.3d 810, 813-16 (8th Cir. 2003) (instructing district court to litigate shareholder's individual capacity counterclaims against trustee because counter-defendant corporation submitted its alternate capacity to jurisdiction of court by defending counterclaims on merits and failing to proffer "different capacity" defense).

¹⁷ 294 F.3d 716 (5th Cir. 2002).

¹⁸ *Id.* at 718.

these demand letters were not effective to give notice on behalf of the unnamed similarly-situated royalty owners.¹⁹ Named defendants answered the declaratory judgment complaint and, individually and as representatives of a class of the similarly situated, filed a counterclaim against the plaintiff oil companies.²⁰ The court never certified any class.²¹ The district court ruled for the oil companies on their request for declaratory relief.²² The named defendants appealed, urging error by the district court in its grant of declaratory relief.²³ The Fifth Circuit held that the named defendants lacked standing to present this argument since the district court's ruling decided nothing as to appellants individually and was not binding on the similarly-situated owners because none of them had been before the district court.²⁴ Having failed to become judicially recognized representatives of a class of similarly situated royalty owners, defendant-appellants had no standing to assert any injury of the similarly situated.²⁵

The inability of a party to appeal on behalf of its attorney is another illustration of the principle that someone who has sued or been sued individually, rather than in a representative capacity, has no standing to appeal on behalf of a nonparty. An example is *Riggs v. Scrivner, Inc.*, where the Tenth Circuit held that the plaintiff had no standing to appeal from the imposition of sanctions on his attorney.²⁶

¹⁹ *Id.*

²⁰ *Id.* at 718-19.

²¹ *Id.* at 720.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 719-20. One might question whether the letter-sending royalty owners were the proper defendants in the declaratory judgment action, but none of the parties appears to have raised this question.

²⁶ 927 F.2d 1146, 1149 (10th Cir. 1991); *see also* Univ. Licensing Corp. v. Paola Del Lungo S.P.A., 293 F.3d 579, 583-84 (2d Cir. 2002) (holding that notice of appeal filed on behalf of party and that did not designate attorney as appellant did not confer jurisdiction to entertain challenge to sanction on attorney). Similarly, an attorney has no right to appeal on his own behalf a grievance to his client. *E.g.*, Hadd v. LSG-Sky Chefs, 272 F.3d 298, 299-300 (5th Cir. 2001) (holding that nonparty attorney had no right to appeal summary judgment in favor of adverse party entered after court stayed case, removed attorney as counsel, and allegedly denied party-client right of access to federal courts).

C. THE SMALL RELEVANCE OF COPARTY STATUS TO APPEAL RIGHTS

Being on the losing or winning side of litigation does not guarantee one a right to appeal or to defend a judgment on appeal. Just as one must take into account the capacity in which someone sued or was sued in determining appeal rights, so one must consider whether a party was sufficiently aggrieved by a trial court decision to have the right to participate as an appellant or was sufficiently successful to have the right to participate as an appellee.²⁷ In cases involving multiple plaintiffs on multiple defendants, a plaintiff or defendant does not have standing to appeal unless the party herself is adversely affected by the judgment, her claims or defenses are joint with those of a coparty who is directly injured, or she has standing to assert rights that nominally belong to her aggrieved coparty.²⁸ An insufficiently aggrieved coparty may be permitted to

²⁷ See, e.g., *Penda Corp. v. United States*, 44 F.3d 967, 971-72 (Fed. Cir. 1994) (holding that third-party defendant ("3pd") lacked standing to appeal judgment against defendant that latter chose not to appeal, despite 3pd's party status and financial interest as defendant's indemnitor). The *Penda* court concluded that the 3pd's pecuniary interest was "indirect and consequential, rather than direct and immediate," and hence that the 3pd was not aggrieved for purposes of determining Article III standing to appeal. *Id.* The court further rejected arguments predicated on issue preclusion, holding that a 3pd could not be collaterally estopped from relitigating the patent validity at issue between the plaintiff and defendant. *Id.* See also *McLaughlin v. Pernsley*, 876 F.2d 308, 313 (3d Cir. 1989) (holding that 3pd foster care placement agency lacked standing to appeal injunction ordering child returned to original foster parents where injunction did not restrain or impose liability on agency).

²⁸ *United States ex rel. Louisiana v. Jack*, 244 U.S. 397, 402 (1917) (stating that one not party to record and judgment is not entitled to appeal therefrom); *Dorsey v. Pinnacle Automation Co.*, 278 F.3d 830, 839 (8th Cir. 2001) (holding that, after grant of summary judgment to defendant employer, plaintiff employees whose claims were not found to be frivolous and who were not held liable for any of defendant's attorneys' fees lacked standing to challenge attorneys' fee award against coplaintiffs whose claims were found to be frivolous); *Courshon v. Berkett*, 16 Fed. Appx. 57, 61 (2d Cir. 2001) (holding that one defendant did not have standing to contest denial of another defendant's motion to quash subpoena, having suffered no injury as result and there being insufficient possibility of future injury); *Agretti v. ANR Freight Sys., Inc.*, 982 F.2d 242, 247-48 (7th Cir. 1992) (holding that settlement did not impair contract or due process rights of, or otherwise prejudice, nonsettling defendant who therefore lacked standing to object to settlement, and that nonsettling party lacked standing to appeal on grounds that settlement was illegal or against public policy); *United States v. 5.96 Acres of Land*, 593 F.2d 884, 887 (9th Cir. 1979) (holding state not proper party to appeal court decision made on ground in which state had no interest). See generally 15A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* 2d § 3902, at 63-73 & cases cited at nn.5, 11, 12, 14 (2d ed. 1992 & Supp. 2004) (noting that general rule against advancing rights of others denies standing to advance, on appeal, rights of coparty, even when disposition of claim between other parties

participate as an amicus, however.²⁹

The principle that an insufficiently aggrieved coparty does not have standing to appeal is illustrated by *United States Phillips Corp. v. Windmere Corp.*³⁰ The Federal Circuit held that Izumi, a manufacturer who had been a codefendant on a contributory patent infringement claim that had gone to final judgment in favor of the plaintiff, lacked standing to oppose a joint motion to vacate the judgments for the other defendant on the plaintiff's claim for unfair competition and the other defendant's antitrust counterclaim, where those parties sought the vacatur in connection with their settlement of those claims and a concomitant motion to dismiss the plaintiff's appeal of those judgments.³¹ The court held that Izumi had no appeal rights, concluding that the presence of Izumi's name in the caption did not render it a party to the appeal where Izumi was not a party to the particular claims in question and had affirmatively sought to avoid being characterized as a party to those claims in the context of discovery.³² Izumi contended that it was favorably affected by the judgment so as to give it standing to oppose vacatur, but the Federal Circuit rejected Izumi's positions that the financial and testimonial support it gave the defendant seller, or any commercial interest it had, conferred standing to appeal as a party.³³ The Federal Circuit further rejected Izumi's argument that its interest in having the judgments preserved for collateral estoppel purposes, in light of similar litigation in which it was involved although not as a party, gave it standing to intervene to preserve

may have significant effect on would-be appellant).

²⁹ *Atl. Mut. Ins. v. Northwest Airlines*, 24 F.3d 958, 961 (7th Cir. 1994) ("A litigant dissatisfied with the analysis of an opinion, but not aggrieved by the judgment, may not appeal Persons who care about the legal principles that apply to a dispute may appear as *amicus curiae*; they are not entitled to intervene."); *United States v. 5.96 Acres of Land*, 593 F.2d at 887 (stating that although state was not proper party to bring interlocutory appeal, state's briefs would be considered *amicus curiae* briefs); *cf. Nat'l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000) (noting court's policy to grant nonparties permission to file *amicus curiae* brief where petitioner has direct interest in case that, by *stare decisis* or *res judicata*, may be materially affected by case in which he seeks to file as *amicus*).

³⁰ 971 F.2d 728 (Fed. Cir. 1992).

³¹ *Id.* at 728-31.

³² *Id.* The court also noted that Izumi did not file an appearance or a certificate of interest on the appeal. *Id.* at 730.

³³ *Id.* at 728-31.

the judgment.³⁴

International Multifoods Corp. v. Commercial Union Insurance Co. discusses the lack of appellate standing to assert others' rights and also exemplifies the subtlety at times of distinguishing one's own rights from another's.³⁵ In this case, an insured (Multifoods) sued two insurers after one of the insurers ("CU," the all-risks insurer) denied a claim for loss of frozen food cargo seized by Russian police.³⁶ CU asserted a cross-claim for indemnification against the second insurer ("IINA").³⁷ The court granted summary judgment for the insured against CU, but also granted summary judgment in favor of IINA.³⁸ CU appealed, and the question was posed whether CU had standing to appeal the grant of summary judgment to IINA on the insured's claim, as well as the adverse judgment on CU's cross-claim. (The insured chose not to appeal.)³⁹ While conceding that CU's claim was effectively derivative of Multifoods's claim, the Second Circuit concluded that CU had a significant financial stake in whether IINA could be forced to cover any of Multifoods's loss and rejected IINA's challenge to CU's right to appeal.⁴⁰ If CU was deemed to have standing to appeal the grant of summary judgment to IINA as against Multifoods because of CU's own financial interest in that determination, the case illustrates the potential difficulty of distinguishing one's own interests from another's.⁴¹

³⁴ *Id.* at 730-31. Here, Izumi argued that depriving it of potential collateral estoppel benefits, through vacatur of the judgment, should be a grievance conferring standing to appeal. *Id.* Regarding the propriety of considering *adverse* collateral estoppel effects as a grievance, see *Shining a Light*, *supra* note 1, at 892-918.

³⁵ See generally 309 F.3d 76 (2d Cir. 2002) (discussing lack of standing).

³⁶ *Id.* at 76-77.

³⁷ *Id.* at 77.

³⁸ *Id.* at 82.

³⁹ *Id.* at 89.

⁴⁰ *Id.* at 89-90. The court's opinion is somewhat ambiguous. While it states that CU appealed both the grants of summary judgment to IINA, on Multifoods's claim and on CU's cross-claim, the court sometimes refers only to CU's cross-claim, noting that Multifoods's failure to appeal did not bar CU from appealing "its own cross-claim," and refers to "the" summary judgment, as if there were only one. *Id.* at 89 n.8, 91. The grounds of IINA's victory as against both Multifoods and CU was a particular clause of its policy. *Id.* at 82. This makes it difficult to tell whether the Second Circuit was upholding CU's standing to appeal both summary judgments or only that against CU. If only the latter was involved, the case did nothing interesting in this respect.

⁴¹ *Cf. Penda Corp. v. United States*, 44 F.3d 967, 968, 971-72 (Fed. Cir. 1994) (holding

D. THE SMALL RELEVANCE OF STATUS AS A PARTY TO A CONSOLIDATED CASE TO APPEAL RIGHTS

Cases can be consolidated at the trial level or for purposes of appeal and can be consolidated for limited purposes or for all purposes.⁴² Questions have arisen as to who has standing to appeal or to defend on appeal in consolidated cases and, in particular, as to whether a party to a case consolidated with another has standing to appeal or to defend the judgment or other decision on appeal in that other case. In these situations, answering the question whether the would-be appellant or appellee has standing to so participate encompasses considerations not only of grievance or success, of third-party standing rights, of causation of the grievance by the judgment or other decision sought to be appealed, and of the higher court's ability to redress the grievance, but also of whether the would-be appellant or appellee is to be considered a party to the case in which an appealable decision was rendered.

When consolidated cases simultaneously become ripe for appeal, the issue may not get the attention of either the parties or the court. Then, as a practical matter, an appellant or appellee in any of the cases may be heard on all the matters that affect his interest, whether he is technically an appellant or appellee only in a component or in all of the consolidated cases viewed as an entity. The issue attracts more attention when one component of a consolidation goes to judgment before other components. In those cases, for the most part, the courts have *not* found a party to one component of consolidated litigation to have standing to appeal, or to act as an

that contractor who agreed to indemnify government against liability under contract lacked standing to appeal judgment against government where no claim was asserted against contractor).

⁴² See Joan Steinman, *The Effects of Case Consolidation on the Procedural Rights of Litigants: What They Are, What They Might Be, Part I: Justiciability and Jurisdiction (Original and Appellate)*, 42 UCLA L. REV. 717, 724-25, 787-91 (1995) [hereinafter *Case Consolidation Part I*]; Joan Steinman, *The Effects of Case Consolidation on the Procedural Rights of Litigants: What They Are, What They Might Be, Part II: Non-Jurisdictional Matters*, 42 UCLA L. REV. 967, 967-70 (1995) [hereinafter *Case Consolidation Part II*] (noting that courts are consolidating increasing numbers of cases). See generally 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 2382 (2d ed. 1995 & Supp. 2004) (discussing consolidation).

appellee as to, a judgment rendered in a different component.⁴³ The courts sometimes have permitted such persons to participate as amici, however.⁴⁴

III. RULE 19 PARTIES AND WOULD-BE OR SUCCESSFUL INTERVENORS

A. BACKGROUND: WHERE RULE 19 PARTIES AND INTERVENORS FIT IN

1. *Rule 19- and Intervenor- Plaintiffs.* In addition to parties who take the initiative to sue and claim standing to do so, the Federal Rules of Civil Procedure make it possible for the parties or the trial

⁴³ *Stone v. United States*, 167 U.S. 178, 189 (1894) (holding that defendant in consolidated actions who exercised all his peremptory challenges in case in which he was sole defendant would not be heard to complain that court erred in limiting defendants' peremptory challenges in other consolidated case); *In re VMS Ltd. P'ship Sec. Litig.*, 976 F.2d 362, 367 (7th Cir. 1992) (disallowing named plaintiff in one suit to appeal from postjudgment orders in class action with which plaintiff's suit was consolidated); *United States v. Tippet*, 975 F.2d 713, 719 (10th Cir. 1992) (holding that, despite intermediate appellate court consolidation of two prisoners' appeals, one prisoner was not party to and was not entitled to benefit from Supreme Court decision awarding witness fees to other prisoner); *Hallowell v. Comm'r*, 744 F.2d 406, 407 n.1 (5th Cir. 1984) (concluding that notice of appeal filed as to one suit is not notice of appeal with respect to another suit dealing with different tax years with which first suit was consolidated for trial); *see also In re Brand Name Prescription Drugs Antitrust Litig.*, 115 F.3d 456, 457 (7th Cir. 1997) (holding that plaintiffs who opted out of class action in which summary judgment was entered for defendant had no right to appeal from that judgment because they were not parties to it, notwithstanding that these opt outs were permitted to participate in class action pretrial proceedings to facilitate coordination of their parallel suits). *But see Bergman v. Atl. City*, 860 F.2d 560, 565 n.6 (3d Cir. 1988) (holding that defendant in continuing case was proper appellee, entitled to be heard on issues presented by appeal in completely resolved consolidated case that directly affected his interests); *Hayes v. Prudential Ins. Co.*, 819 F.2d 921, 924 (9th Cir. 1987) (permitting appeal by plaintiff in one of two consolidated cases from decision in other case, where his request to be joined as defendant in second case had been treated as motion to consolidate, which was granted).

⁴⁴ *See Trimble v. Gordon*, 430 U.S. 762, 765 (1977) (noting that Illinois Supreme Court allowed appellants in one case to file amicus brief in two other consolidated appeals presenting similar issues); *United States v. Johnson*, 383 U.S. 169, 172 n.3 (1966) (noting criminally convicted codefendant's filing of amicus brief in Supreme Court in cases whose appeals had been consolidated in Fourth Circuit); *Norfolk v. McGraw, S. Ry.* 71 Fed. Appx. 967, 969 (4th Cir. 2003) (noting that defendant railroads filed amicus briefs in state court challenge filed by another defendant in consolidated asbestos cases); *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (in chambers) (denying CFTC leave to file amicus brief, noting that amicus brief normally should be allowed when amicus has interest in some other case that may be affected by decision in present case, although not so affected as to entitle him to intervene).

court to join as a plaintiff a person who "claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest."⁴⁵ Rule 19 notes that "[i]f the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff."⁴⁶ Similarly, under Rule 24, upon timely application, persons have a right to intervene in an action when a federal statute confers an unconditional right to do so or when the applicant claims an interest relating to the property or transaction that is the subject of the action and is so situated that disposition of the action may, as a practical matter, impair or impede her ability to protect that interest, unless her interest is adequately represented by existing parties.⁴⁷ Such persons may intervene as plaintiffs.⁴⁸ In addition, upon timely application, a court may permit someone to intervene when a federal statute confers a conditional right to do so or "when an applicant's claim . . . and the main action have a question of law or fact in common."⁴⁹

It should be noted that persons who intervene as of right and are aligned as plaintiffs typically seek to protect themselves from impending court action; it is the prospective disposition of the action and its potential to impair their ability to protect their interests that provoke their intervention.⁵⁰ These intervenors resemble regular

⁴⁵ FED. R. CIV. P. 19(a). This Rule also permits the joinder, as a party, of a person in whose absence "complete relief cannot be accorded among those already parties." *Id.* A person joined for this reason would become someone against whom relief is sought and, therefore, would fall within categories of persons with a right to defend.

⁴⁶ *Id.*

⁴⁷ *Id.* 24(a). For example, 28 U.S.C. § 1369(d) provides that

In any action in a district court which is or could have been brought, in whole or in part, under this section, any person with a claim arising from the accident described in subsection (a) shall be permitted to intervene as a party plaintiff in the action, even if that person could not have brought an action in a district court as an original matter.

28 U.S.C. § 1369(d) (2000).

⁴⁸ 28 U.S.C. § 1369(d).

⁴⁹ FED. R. CIV. P. 24(b).

⁵⁰ *Id.* 24(a)(2).

plaintiffs in their concern with how the court will resolve the case, but they may differ from regular plaintiffs in that regular plaintiffs are in court to redress past out-of-court harms or to avoid imminent out-of-court harms, whereas, at least on one view of Rule 24, intervenors on the plaintiffs' side need not have any such grievances to redress or avoid.⁵¹ Persons joined under Rule 19 and aligned as plaintiffs also sometimes are joined because of the potential for the prospective disposition of the action to impair their ability to protect their interests, and they too are concerned with how the court will resolve the case.⁵²

2. *Rule 19- and Intervenor- Defendants.* A person who fits the descriptions provided in Rule 19(a)(1) and (2)(i) (that is, a person in whose absence complete relief cannot be accorded among those already parties or who "claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest") may be joined as a defendant.⁵³ A person joined pursuant to Rule 19(a)(2)(i) and aligned as a defendant may or may not be someone against whom the plaintiff seeks relief of a monetary or injunctive sort, however.⁵⁴

Similarly, under Rule 24, upon timely application, persons who seek to intervene as of right may intervene as defendants or on the defendants' side of the "v."⁵⁵ In addition, upon timely application, a court may permit someone to intervene when a federal statute confers a conditional right to do so or "when an applicant's . . . defense and the main action have a question of law or fact in common."⁵⁶ As with Rule 19 defendants, a defendant-intervenor, whether an intervenor of right or a permissive intervenor, may or may not be someone against whom the plaintiff seeks relief of a monetary or injunctive sort.⁵⁷ Particularly in the case of a permissive intervenor who has a defense that merely shares a question of

⁵¹ See *infra* notes 75-82 and accompanying text.

⁵² FED. R. CIV. P. 19(a)(2)(i).

⁵³ *Id.* 19(a).

⁵⁴ See *infra* notes 82-83 and accompanying text.

⁵⁵ FED. R. CIV. P. 24(a).

⁵⁶ *Id.* 24(b).

⁵⁷ See *infra* notes 87-88 and accompanying text.

law with the preexisting lawsuit, no plaintiff presently in the litigation may have standing to assert even a claim for declaratory relief against that intervening defendant.⁵⁸ Nonetheless, anyone who comes into a suit as a Rule 19 defendant or who intervenes as a defendant or in support of a defendant is provided some opportunity to protect his interests; that is, he has a right to defend.⁵⁹

Like persons who intervene on the plaintiffs' side, persons who intervene and are aligned on the defendants' side typically seek to protect themselves from impending court action; it is the prospective disposition of the action and its potential to impair their ability to protect their interests that provoke their intervention.⁶⁰ They also resemble plaintiff-joined defendants in their concern with how the court will resolve the case.

3. *The Controversial Relationship Between Rule 24 and Standing Requirements.* There currently is a split in the circuits as to whether a person properly may be permitted to intervene if he

⁵⁸ See, e.g., David L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 737-38 (1968) (listing several cases in which intervention was allowed under these circumstances).

⁵⁹ *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 376-78 (1987) (noting that intervenor could raise on appeal after trial its complaint that restrictions imposed on its participation by district court prevented it from protecting its interests, but rejecting argument that limits court placed on its right to participate were so onerous as to amount to complete denial of right to intervene, warranting immediate appeal); *Int'l Union v. Scofield*, 382 U.S. 205, 215 (1965) (noting that rights typically secured to intervenor in reviewing court include rights to participate in designating record and in prehearing conferences, to file brief, to engage in oral argument, and to petition for rehearing or to Supreme Court for certiorari); see also *Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 765-66 (1989) (holding that court may award attorney's fees against losing intervenors who entered lawsuits to defend their own constitutional or statutory rights and who had not been found to have violated any federal law, only where intervenors' action was frivolous, unreasonable, or without foundation).

Although federal courts may impose conditions and restrictions on intervenors, reviewable for abuse of discretion, those conditions and restrictions are limited. See FED. R. CIV. P. 24 advisory committee's note to 1966 amend. (stating that "An intervenor of right . . . may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings"); *Stringfellow*, 480 U.S. at 377-78 (concluding that district court-ordered restrictions on discovery and on right to assert claims and request relief additional to that sought by plaintiffs did not effectively deny permissive intervenors all right to participate, so as to make such orders immediately appealable). See generally 7C CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, *FEDERAL PRACTICE & PROCEDURE: CIVIL* § 1922 (2d ed. 1986 & Supp. 2004) (stating that those conditions and restrictions are limited).

⁶⁰ FED. R. CIV. P. 24(a)(2).

himself is not party to an Article III case or controversy with an adversary in the litigation.⁶¹ Although I will not exhaustively analyze or attempt to definitively resolve this question here, I venture into this terrain for two reasons. First, it is a part of the background of who can sue and be sued that serves as a prelude to my discussion of the right to appeal and to defend decisions on appeal. Second, this standing issue bears directly on the rights of intervenors to appeal and to defend decisions on appeal.

Although the opinions of the several circuit courts of appeals leave debatable where some of them stand, and commentators have disagreed about how the circuits line up, the split is roughly as follows: The D.C. and Eighth Circuits require that intervenors have standing; the Second, Fifth, Sixth, and Eleventh Circuits do not impose a standing requirement; the First and Ninth Circuits have equivocated, opining that the fulfillment of Rule 24(a)'s interest requirement typically will satisfy standing requirements as well; Seventh Circuit judges have taken a variety of positions but seem to lean toward a standing requirement or at least toward the equivocation described above; finally, while the Third, Fourth, and Tenth Circuits have not squarely addressed the issue, there are indications that the former leans toward a standing requirement and the latter two against.⁶²

⁶¹ Juliet Johnson Karastelev, Note, *On the Outside Seeking In: Must Intervenors Demonstrate Standing to Join a Lawsuit?*, 52 DUKE L.J. 455, 464-68 (2002). This split has engendered at least five pieces of student scholarship. Joshua C. Dickinson, Note, *Standing Requirements for Intervention and the Doctrine of Legislative Standing: Will the Eighth Circuit "Stand" by Its Mistakes in Planned Parenthood of Mid-Missouri & East Kansas, Inc. v. Ehlmann?*, 32 CREIGHTON L. REV. 983 (1999); Amy M. Gardner, Comment, *An Attempt to Intervene in the Confusion: Standing Requirements for Rule 24 Intervenors*, 69 U. CHI. L. REV. 681 (2002); Karastelev, *supra*, at 455; Tyler R. Stradling & Doyle S. Byers, Note, *Intervening in the Case (or Controversy): Article III Standing, Rule 24 Intervention, and the Conflict in the Federal Courts*, 2003 BYU L. REV. 419 (2003); Kerry C. White, Note, *Rule 24(a) Intervention of Right: Why the Federal Courts Should Require Standing to Intervene*, 36 LOY. L.A. L. REV. 527 (2002).

⁶² See Karastelev, *supra* note 61, at 464-68 (discussing various positions adopted by circuit courts). *But cf.* Gardner, *supra* note 61, at 693-97 (viewing D.C., Fifth, and Eleventh Circuits as allowing intervention without showing of Article III standing; Second and Seventh Circuits as holding that intervention requirements of Rule 24(b) set higher hurdle than Article III; and Eighth Circuit as holding that intervenors must meet Article III requirements; and also, in some contradiction of other conclusions, asserting that D.C. and Seventh Circuits have adopted some arguments for requiring Article III standing of intervenors); Stradling & Byers, *supra* note 61, at 425-38 (viewing Second, Fifth, Sixth, and Eleventh

On one view, so long as the civil action as framed prior to the intervention constitutes an Article III case or controversy and otherwise is within the subject-matter jurisdiction of the federal district courts, the intervenor need not have standing to sue but rather needs to satisfy only the requirements of Rule 24.⁶³ The Fifth

Circuits as allowing intervention without showing of Article III standing by intervenors; D.C., Seventh, and Eighth Circuits as requiring intervenors to have Article III standing; and First, Third, Fourth, Tenth, and Federal Circuits as having not yet ruled on question); White, *supra* note 61, at 545 (characterizing D.C., Seventh, and Eighth Circuits as requiring standing; Eleventh Circuit as "on the fence"; and Second, Sixth, and Ninth Circuits as allowing intervention when party lacks standing).

A recent decision by the First Circuit suggests it may have moved or be moving into the category of courts that do not require intervenors as a class to meet Article III requirements. See *United States v. One-Sixth Share of James J. Bulger*, 326 F.3d 36, 40 (1st Cir. 2003) (stating that, "[g]enerally, an intervenor must have independent standing if the intervenor would be the only party litigating a case") (emphasis added).

The difficulty of characterizing circuit positions was illustrated again recently by the D.C. Circuit's discussion in *Jones v. Prince George's County*, 348 F.3d 1014, 1014 (D.C. Cir. 2003). While acknowledging difficulties with the circuit stance, the court purported to follow circuit precedent that prospective intervenors must possess Article III standing. *Id.* at 1018-19. However, it stated that the question is not whether the prospective intervenor has a cause of action, but whether it has an interest in pending litigation. *Id.* On the facts, the court had no difficulty finding that, through the financial and emotional deprivation she suffered, the infant daughter of a motorist killed by police had a concrete, cognizable interest in the wrongful death action brought by the motorist's estate. *Id.* For a discussion of the relationship between standing and having a cause of action, see *Shining a Light*, *supra* note 1, at 819 n.9. In *Mangual v. Rotger-Sabat*, the Court of Appeals for the First Circuit noted the existence of the controversy over whether intervention of right requires Article III standing and commented that the requirement of standing for permissive intervenors is equally unsettled. 317 F.3d 45, 61 (1st Cir. 2003). "The traditional rule was that standing was required for permissive intervenors but not for intervenors of right. In part because of the 1990 amendments to the supplemental jurisdiction statute, the standing requirements for intervenors are now greatly confused." *Id.*

⁶³ See *Cal. Dep't of Soc. Servs. v. Thompson*, 321 F.3d 835, 845-47 (9th Cir. 2003) (opining that grandmother-foster parent of child ineligible for certain benefits from home of removal did not need to meet Article III standing requirements to intervene in suit by state seeking judicial determination that such benefits were available in certain situations, including grandmother's); *United States v. Tennessee*, 260 F.3d 587, 595 (6th Cir. 2001) (affirming denial of motion to intervene on plaintiffs' side, while observing that intervenor need not have standing necessary to commence lawsuit); *Loyd v. Ala. Dep't of Corr.*, 176 F.3d 1336, 1339 (11th Cir. 1999) (affirming grant of intervenor status to attorney general in prisoners' suit challenging two consent decrees and permanent injunction, and in which attorney general sought to terminate consent decrees and injunction, and declining to inquire into attorney general's standing based upon principle that " 'a party seeking to intervene need not demonstrate that he has standing in addition to meeting the requirements of Rule 24 as long as there exists a justiciable case and controversy between the parties already in the lawsuit' " (quoting *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989))); *Didrickson v. U.S. Dep't of Interior*, 982 F.2d 1332, 1340 (9th Cir. 1992) (noting that person is not required to establish standing in order to intervene); *Purnell v. City of Akron*, 925 F.2d 941, 948-51 (6th

Circuit case *Ruiz v. Estelle* most thoroughly set forth the reasoning in support of this position.⁶⁴ The *Ruiz* court reasoned that standing traditionally has been required only of parties *initiating* a lawsuit; that courts interpreting the Supreme Court's opinion in *Diamond v. Charles*⁶⁵ to suggest that Article III requires intervenors to possess standing misinterpret the case; and that there is little to justify interpreting Article III to require intervenors to have standing to sue: Merely asserting that Article III requires intervenors to have such standing (as some courts have done) does not make it so.⁶⁶ The *Ruiz* court did not directly answer the argument that because intervenors stand on equal footing with original litigants, standing should be required of them as well.⁶⁷ Instead, it asserted that the better reasoning is found in cases holding that Article III does not require intervenors to possess standing because Article III does not require each party in a case to have standing.⁶⁸ Rather, so long as an original plaintiff has standing, a case or controversy appropriate for judicial determination is guaranteed.⁶⁹ The court's jurisdiction vests and is not divested by the presence of additional parties who alone would not satisfy Article III's requirements.⁷⁰

Cir. 1991) (declaring that party seeking to intervene need not possess standing necessary to initiate suit); *Chiles*, 865 F.2d at 1213 (rejecting need for plaintiff-intervenors to have standing, while opining that standing cases are relevant in defining type of interest that intervenor must assert; reversing denial of detainees' motion to intervene in action alleging illegal operation of federal facility). See generally Shapiro, *supra* note 58, at 726 (opining that "[w]hen one seeks to intervene in an ongoing lawsuit, [justiciability] questions have presumably been resolved . . . [and] the case or controversy limitation should impose no barrier to his admission" as an intervenor).

⁶⁴ 161 F.3d 814 (5th Cir. 1998).

⁶⁵ 476 U.S. 54 (1986). *Diamond* is discussed further *infra* notes 123-39 and accompanying text. The *Ruiz* court noted that *Diamond* merely acknowledged that some lower federal courts have equated Rule 24's interest requirement with standing requirements and requires an intervenor who would appeal solo, unaccompanied by an original party to the Article III case or controversy, to establish that he himself is such a party, so that the case or controversy requirement continues to be satisfied.

⁶⁶ *Ruiz*, 161 F.3d at 829-33.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Cf. *Wichita R.R. & Light Co. v. Pub. Utils. Comm'n*, 260 U.S. 48, 54 (1922) ("Jurisdiction once acquired on [the ground of diversity of citizenship] is not . . . defeated by the intervention, by leave of the court, of a party whose presence is not essential to a decision of the controversy between the original parties."). See generally Carl Tobias, *Standing to Intervene*, 1991 WIS. L. REV. 415, 416-17 (arguing that standing to sue and intervention "have

Under the opposing view, someone who is not a party to an Article III case or controversy with an adversary in the litigation should not be permitted to intervene.⁷¹ Since the concept of standing ill fits defendants (we speak of standing to sue, not of standing to be sued),⁷² it is surprising that many of the cases, both those rejecting but especially those insisting upon standing as a prerequisite for intervention, involved potential defendant intervenors.⁷³ Be that as it may, the reasoning in support of this

different origins and serve dissimilar purposes," and that requirement that intervenors have standing to sue "has prevented affected interests from being heard, while the federal judiciary has lost helpful expertise, information and perspectives needed to make the best substantive decisions").

⁷¹ See, e.g., *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1023-24 (8th Cir. 2003) (reciting that party seeking to intervene must establish both standing to complain and satisfaction of Rule 24's requirements); *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731-32 (D.C. Cir. 2003) (requiring defendant intervenor to have Article III standing); *Planned Parenthood v. Ehlmann*, 137 F.3d 573, 577-78 (8th Cir. 1998) (refusing to permit legislators to intervene as defendant-appellants to appeal holding that legislation was unconstitutional, relying on would-be intervenors' lack of Article III standing where original defendant, state attorney general, had not appealed).

⁷² See, e.g., *Knight v. Alabama*, 14 F.3d 1534, 1555 (11th Cir. 1994) (noting that generally defendants are not required to have any particular standing in order to be sued). Indeed, the Court of Appeals for the D.C. Circuit recently noted that, although it has held that an intervenor must establish standing under Article III, "[r]equiring standing of someone who seeks to intervene as a defendant . . . runs into the doctrine that the standing inquiry is directed at those who invoke the court's jurisdiction." *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003) (citing *Virginia v. Hicks*, 539 U.S. 113, 118-23 (2003)).

⁷³ See *Ruiz*, 161 F.3d at 829-33 (rejecting argument that statute conferring upon state legislators statutory right to intervene was unconstitutional as applied because legislators lacked Article III standing). The *Ruiz* court concluded that "Article III does not require intervenors to independently possess standing where the intervention is into a subsisting and continuing Article III case or controversy and the ultimate relief sought by the intervenors is also being sought by at least one subsisting party with standing to do so." *Id.* at 830; *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997) (noting that Sixth Circuit has held that intervenors need not have standing necessary to initiate suit); *United States Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978) (declaring that case or controversy having been established between plaintiff and defendant, there was no need to impose standing requirements on proposed intervenor; affirming denial of intervention to letter carriers' association on other grounds).

But see *Fund for Animals, Inc.*, 322 F.3d at 731-32 (requiring defendant intervenor to have standing); *Curry v. Regents of the Univ.*, 167 F.3d 420, 422-23 (8th Cir. 1999) (denying motion to intervene where defendants lacked standing); *Mausolf v. Babbitt*, 85 F.3d 1295, 1304 (8th Cir. 1996) (reversing denial of conservation groups' motion to intervene in suit seeking to enjoin enforcement of snowmobiling restrictions in national park, in part on ground that groups had Article III standing).

The *Mausolf* court's view was that every party in a federal lawsuit, including intervenors, must have standing, or the Article III case or controversy framed by the original parties is lost. 85 F.3d at 1301. In support of this conclusion, it invoked the Supreme Court's

position is essentially: (a) that each litigant in federal court must be party to an Article III case or controversy; therefore, to permit the intervention of someone who does not have standing to sue or who is not sued by someone with standing to sue him destroys the Article III case or controversy before the court; and (b) that because intervenors want to participate on equal footing with the original parties, intervenors should be required to meet the same standards as original parties must meet.⁷⁴

My own sense is that the Supreme Court has *not* acted as if it believed that intervenors or Rule 19 parties must have standing to sue the joined defendants or be persons whom present plaintiffs have standing to sue. Evidence for this proposition is found, among other places, in the Court's Rule 19 and Rule 24 cases,⁷⁵ including in its *Diamond v. Charles* dicta,⁷⁶ and in other cases in which the Court has demonstrated concern with only a single plaintiff's

pronouncements that "Those who do not possess Art. III standing may not litigate as suitors in the courts of the United States." *Id.* (citing *Valley Forge Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 475-76 (1982)). The *Mausolf* court also embraced the pronouncement that "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Id.* (citing *Allen v. Wright*, 468 U.S. 737, 750-51 (1984) (quoting *Warth v. Selden*, 422 U.S. 490 (1975))). The *Mausolf* court also cited the notion that, because an intervenor participates on an equal footing with original parties, an applicant seeking to intervene must satisfy the same standing requirements as original parties must satisfy. *Id.* at 1300-01. In the *Mausolf* court's view, imposition of the standing requirement is necessary to prevent federal courts from becoming fora for the "airing of interested onlookers' concerns [or] arena[s] for public-policy debates." *Id.* at 1301. It should be noted that the Supreme Court cases quoted by *Mausolf* used the quoted language *supra* when addressing original parties' standing to sue and not in relation to any issue concerning intervenors.

⁷⁴ See generally *supra* notes 71-73 and accompanying text.

⁷⁵ See, e.g., *Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 761-62 (1989) (holding, in suit involving union's intervention on side of defendant airline in suit by flight attendants alleging sex discrimination, that although union was blameless on merits, union's intervention was not frivolous or unreasonable); *Martin v. Wilks*, 490 U.S. 755, 766-69 (1989) (concluding that white employees had no duty to intervene in suit by black co-employees against their employer, seeking remedies for race discrimination, but rather that under Federal Rules existing parties ought to have joined white employees under Rule 19 in order to bind them by judgment; at no point indicating that black employees or defendant employer had claim against white employees or that latter had claim against either of former); *Trbovich v. United Mine Workers*, 404 U.S. 528, 531, 536 (1972) (seeming to imply that intervenors need not have standing to sue in case upholding statutory intervention).

⁷⁶ 476 U.S. 54, 59 (1986) (acknowledging that, under Court's Rules, defendant-intervenor *Diamond* could have piggybacked on appeal by defendant state, although *Diamond* did not have standing to appeal by himself).

standing to sue.⁷⁷ I also believe that both the reasons underlying the Rules' authorization of intervention and Rule 19 joinder⁷⁸ and the Supreme Court's historical precedents governing ancillary jurisdiction support the view that Rule 19 and Rule 24 parties need not either have Article III standing to sue or have been sued by plaintiffs with Article III standing to sue them. These cases suggest that the Constitution does *not* mandate that all parties to litigation have standing or the defense equivalent thereof. How?

Article III has been interpreted *not* to require an independent basis of subject-matter jurisdiction over each claim in a case, but to be satisfied if there is an independent basis of subject-matter jurisdiction over *one* claim between a plaintiff and a defendant (envision a federal question claim under 28 U.S.C. § 1331, for example), so long as each other claim in the action shares a common nucleus of operative fact with the anchor claim so that they are part

⁷⁷ *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (concluding that where union members clearly had standing, Court did not need to consider whether union itself or Members of Congress also had standing even where only Members of Congress were plaintiffs in one of consolidated cases); *Sec'y of Interior v. California*, 464 U.S. 312, 319 (1984) (stating that where California clearly had standing, Court need not address standing of other plaintiff environmental groups and local governmental agencies); *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 402 n.22 (1982) (declaring that where standing of other plaintiffs was not challenged, Court did not need to reach standing of Pennsylvania, because even if state lacked standing, "the District Court possessed Art. III jurisdiction to entertain those common issues presented by all plaintiffs"). There also are Supreme Court decisions concerning standing to appeal. *See, e.g., Dir., Office of Worker's Comp. Program v. Perini N. River Assoc.*, 459 U.S. 297, 302-05 (1983) (holding that where individual whose claim for statutory benefits had been administratively denied was party under Supreme Court's Rules, justiciable controversy was before Court, and accordingly, it was unnecessary to decide whether official responsible for administration and enforcement of pertinent Act had Article III standing to seek review); *Worldcom, Inc. v. F.C.C.*, 246 F.3d 690, 696 (D.C. Cir. 2001) (concluding that where one appellant had standing, court did not need to decide whether prevailing party did so as well by virtue of harm that tribunal's reasoning might do to its rights).

⁷⁸ *Mayer Paving & Asphalt Co. v. Gen. Dynamics Corp.*, 486 F.2d 763, 771 (7th Cir. 1973) (quoting statement of *United Mine Workers v. Gibbs*, 383 U.S. 715, 724 (1966), that "[t]he general policy of Rule 19 . . . is 'the impulse . . . toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged'"); *see Tobias, supra* note 70, at 428-32 (tracing history of intervention rule, including intention of advisory committee for 1966 revisions to "promote more flexible, practical[,] judicial application generally and rectify specific difficulties," including fostering more flexible and pragmatic treatment of interest, impairment, and inadequate representation requirements); 7 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, *FEDERAL PRACTICE AND PROCEDURE: CIVIL*, § 1602, at 20 (stating that Rule "should be employed to promote the full adjudication of disputes with a minimum of litigation effort").

of the same Article III case or controversy.⁷⁹ So too Article III can

⁷⁹ *Gibbs*, 383 U.S. at 725. The supplemental jurisdiction statute, 28 U.S.C. § 1367, provides for supplemental jurisdiction over all claims so related to the civil action of which the district courts have jurisdiction that they form part of the same case or controversy under Article III, and “all claims” includes claims that involve the joinder or intervention of additional parties. 28 U.S.C. § 1367(a) (2000). Claims of intervenors of right have long been regarded as falling within supplemental, or what previously was called ancillary, jurisdiction. 7C WRIGHT, MILLER, & KANE, *supra* note 59, § 1917, at 464, 472, 482. Claims of merely permissive intervenors may or may not derive from a common nucleus of operative fact with a claim in the case over which there is an independent basis of federal subject-matter jurisdiction. If they do so derive and thereby “form part of the same case or controversy under Article III,” federal courts can assert supplemental jurisdiction over those claims; if not, a federal court can hear the claims only if there is an independent basis of jurisdiction over them. *Id.*

If a civil action is in federal court solely by virtue of jurisdiction under 28 U.S.C. § 1332 diversity jurisdiction, additional questions arise as to whether the exercise of supplemental jurisdiction over the claims or defenses of intervening parties or of parties joined under Rule 19 is permissible under § 1367(b). Section 1367(b) provides in pertinent part that,

[i]n any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule . . . 19, . . . or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

18 U.S.C. § 1367(b) (2000). Pre-§ 1367 case law indicated that the exercise of supplemental jurisdiction over claims by or against intervenors may be permissible, except in the circumstance of an indispensable party. *See Wichita R.R. & Light Co. v. Pub. Util. Comm’n*, 260 U.S. 48, 54 (1922) (holding diversity jurisdiction not defeated by permissive intervention of entity not diverse from opponent, where intervenor was not essential to decision of controversy between original parties); 7C WRIGHT, MILLER, & KANE, *supra* note 59, § 1917, at 477 (noting as long-established general principle that “[a] person who should have been joined . . . because he is so related to the action that he is regarded as ‘indispensable’ cannot intervene if his joinder will deprive the court of jurisdiction over the subject matter of the action” (citations omitted)). The drafters of § 1367 sought to eliminate the arguably anomalous juxtaposition that existed prior to § 1367 and allowed a federal court to assert supplemental jurisdiction over some persons who came into a case through Rule 24 but disallowed the court from asserting such jurisdiction over similarly situated persons who came into a case through Rule 19. *See* 7C WRIGHT, MILLER, & KANE, *supra* note 59, § 1917, at 479-80 (noting that statute eliminated the anomaly by contracting supplemental jurisdiction as to Rule 24 intervenors).

It should be noted that there is some question as to whether “common nucleus of operative fact” sets the outer limits of an Article III case or controversy and that some commentators have argued for a more encompassing test. *See, e.g.,* William A. Fletcher, “Common Nucleus of Operative Fact” and Defensive Set-Off Beyond the *Gibbs* Test, 74 IND. L.J. 171, 178 (1998) (discussing various constitutional tests for supplemental jurisdiction); Richard A. Matasar, *Rediscovering “One Constitutional Case”: Procedural Rules and the Rejection of the Gibbs Test for Supplemental Jurisdiction*, 71 CAL. L. REV. 1399, 1478-79

(and, I would argue, should) be interpreted *not* to require that each plaintiff have standing to sue a defendant in an action and that each defendant be sued by a plaintiff with standing to sue him, but instead to be satisfied so long as *one* plaintiff has standing to sue one defendant and each other claim in the litigation (for which there is not an independent basis of subject-matter jurisdiction, including standing) shares a common nucleus of operative fact with the anchor claim so that they are part of the same Article III case or controversy.

This approach makes sense from a multitude of viewpoints.⁸⁰

It serves judicial economy by allowing courts to avoid deciding potentially difficult issues of standing. More fundamentally, it comports with a number of the basic values that are served by standing doctrine. That is, so long as some plaintiff has standing, the courts can be assured that, by hearing the case, they are fulfilling the role of the federal judiciary in our governmental system, . . . [rather than] exceeding their proper sphere as a matter of separation of powers. Similarly, so long as some plaintiff has standing, the courts are conforming to the policy to prevent lawsuits by persons who have only an ideological stake in the outcome. So long as some plaintiff has standing, a specific controversy is being presented to the court by an advocate with "sufficient personal concern to effectively litigate the matter."⁸¹

(1983) (arguing against *Gibbs's* assumption that case or controversy must be defined by reference to substantial federal question plus particular factual relationship among claims). The Second Circuit recently noted these more encompassing tests with seeming approval in the context of holding that the federal district court had supplemental jurisdiction over counterclaims that the court concluded were permissive, rather than compulsory. *Jones v. Ford Motor Credit Co.*, 358 F.3d 205, 213-14 (2d Cir. 2004) (using broader test than common nucleus of operative fact); *see also* *Channell v. Citicorp Nat'l Servs.*, 89 F.3d 379, 385 (7th Cir. 1996) (viewing § 1367's reach to constitutional limits as requiring only "a loose factual connection" between claims).

⁸⁰ *See supra* note 77 and accompanying text.

⁸¹ *Case Consolidation, Part I, supra* note 42, at 729 (footnotes omitted).

It is true that, according to this view, "the federal courts are being asked to protect interests and remedy grievances that would otherwise not be permitted in federal court."

Under this view, intervenors of right could intervene on plaintiffs' side without standing to sue, or on defendants' side without being sued by one with standing, given that Rule 24(a)(2) intervenors, by definition, claim an interest relating to the property or transaction that is the subject of the suit; hence their positions would share the necessary common nucleus of operative fact.⁸² Permissive intervenors could intervene on plaintiffs' or defendants' side without standing (or the defense equivalent) if, but only if, they too presented a position that shared a common nucleus of operative fact with an anchor claim so that the intervenor's position and a party's claim were part of the same Article III case or controversy. If the permissive intervenors merely had claims or defenses that had a question of law or fact in common with the suit, as required by Rule 24(b), or had a statutorily-conferred conditional right to intervene, on this view, such permissive intervenors would have to establish an independent basis of subject-matter jurisdiction, including standing to sue a party to the suit or vulnerability to suit by an Article III plaintiff in the case.⁸³ Thus, the question whether intervenors must have Article III standing or the defense equivalent can be asked regarding both intervenors of right and permissive intervenors, but federal courts' ability to permit the involvement of permissive intervenors is more limited by Article III than is their ability to entertain the arguments of intervenors of right.

The second argument supporting the need for intervenor standing—that is, if intervenors participate on equal footing with parties, the same requirements should be imposed on them⁸⁴—seems unpersuasive. First, even if intervenors do partici-

White, *supra* note 61, at 552. However, that can be viewed as a virtue, rather than a vice, so long as Article III does not prohibit it. Even the student author who purported to regard intervention without standing as illegitimate argued for an exception for “necessary defendants.” *Id.* at 559-60.

⁸² See *supra* note 47 and accompanying text. Whether intervenors of right pursuant to Rule 24(a)(1) always have claims or defenses arising from a common nucleus of operative fact with the anchor claim is not clear.

⁸³ Permissive intervenors would not have to establish an independent basis of subject-matter jurisdiction if their claims or defenses and those of the existing parties comprised a single Article III case or controversy under a test requiring a looser affiliation than “common nucleus of operative fact.” See *supra* note 79 and accompanying text.

⁸⁴ See *Mausolf v. Babbitt*, 85 F.3d 1295, 1300-01 (8th Cir. 1996) (arguing that because intervenor asks court to decide merits of dispute, including his own issues, he is no different

pate on an equal footing, that is not in itself a sufficient reason to conclude that they must have standing. Second, the predicate of the argument is subject to challenge. Intervenor may not, in fact, participate on an equal footing because courts can impose limitations on intervenors' participation rights,⁸⁵ and when the court is deciding whether to allow intervention, no one may know whether or how the court may restrict a would-be intervenor's participation in the future. This response is not altogether satisfactory because parties too are vulnerable to judicial restriction of their participation rights, particularly in cases involving multiple parties with similar interests.⁸⁶ That is, parties and intervenors may be said to be on an equal footing in that both are subject to possible limits on their participation rights. Still, inequality in the participation rights actually afforded sometimes will undermine the argument that equal footing demands equal standing requirements.

The equal footing argument also is weakened by the fact that, unlike initial parties, intervenors sometimes are not asserting claims or having claims asserted against them.⁸⁷ In some cases plaintiff intervenors do not have standing to assert a claim for either money damages or equitable relief that would survive a motion to dismiss for failure to state a claim, and defendant intervenors may not be vulnerable to suit by the original plaintiffs.⁸⁸ Years ago,

from party); *City of Cleveland v. Nuclear Regulatory Comm'n*, 17 F.3d 1515, 1517 (D.C. Cir. 1994) (grounding conclusion that intervenors must satisfy standing requirements on intervenors' equal footing with parties).

⁸⁵ See, e.g., *The Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 738 n.11 (D.C. Cir. 2003) (noting that in granting motions of certain intervenors "the [trial] court limited their intervention 'to the claims raised by the original parties' and barred them from raising collateral issues"). See generally Karastelev, *supra* note 61, at 475-76 & n.126, 481-82 & nn.163-66 (citing examples of cases in which appellate courts imposed or upheld conditions on intervenors and in which district courts imposed such conditions).

⁸⁶ See, e.g., *MCI Communications Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1171 (7th Cir. 1983) (upholding imposition of time limit on presentation of each side's case-in-chief); *In re Fine Paper Antitrust Litig.*, 685 F.2d 810, 817-18 (3d Cir. 1982) (upholding district court's imposition of time limit on plaintiffs' discovery and trial preparation); *SCM Corp. v. Xerox Corp.*, 77 F.R.D. 10, 13 (D. Conn. 1977) (imposing six-month limit on plaintiff's presentation when plaintiff failed to make prima facie showing of liability after fourteen weeks of trial).

⁸⁷ See Shapiro, *supra* note 58, at 726, 737-38, 740, 759 (offering examples of courts permitting intervention by persons with interest in final judgment, but no claim to assert against any party, and where no party could assert claim against intervenor).

⁸⁸ See, e.g., *id.* (citing case examples); see also *Miami Tribe v. Walden*, 206 F.R.D. 238, 241 (S.D. Ill. 2001) (permitting intervention by state of Illinois into suit against landowners

Professor Shapiro advocated that, rather than “stretch the language of the rule [in regard to having a “claim or defense”], and . . . give the words a meaning quite different from that given them in other contexts[, a] better approach . . . would be to free the question of intervention from this conceptual limitation and to recognize that even one lacking a claim or defense may have a good case for intervention.”⁸⁹

Seeking a different rationalization for the presence of such persons in federal litigation, some commentators have suggested that certain intervenors be regarded as asserting, or as having asserted against them, claims for declaratory relief that the court explicitly or implicitly decides when it enters judgment.⁹⁰ If one

by tribe claiming ownership and control over millions of acres of land, where state had interest in exercising sovereignty over land, and in taxing and regulating entities on land). See generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1290 (1976) (noting that right to participate in case has ceased to depend on having right to relief or liability to satisfy claim asserted); Joan Steinman, *Section 1367—Another Party Heard From*, 41 EMORY L.J. 85, 107-11 (1992) (defending position that one who seeks to intervene on side of defendant in civil litigation may have sufficient interest in action and in judgment that he has right to intervene, even though he has no claim to assert against present parties and they have none to assert against him).

⁸⁹ Shapiro, *supra* note 58, at 759.

⁹⁰ See AMERICAN LAW INSTITUTE FEDERAL JUDICIAL CODE REVISION PROJECT 62-65 (2004) (noting that “the conceptual status of the ‘answer in intervention’ of a defendant-intervenor who intervenes not to resolve a potential liability owed to the plaintiff, but because some interest of the intervenor may be adversely affected if the plaintiff wins the relief sought against the original defendants” is somewhat puzzling; urging that “[a]lthough a plaintiff may have no right to coercive relief against the [above described] type of defendant-intervenor, the effect of the joinder of the intervenor . . . is to resolve conclusively the right of the intervenor to attack collaterally any adverse judgment that results from the litigation . . .”); Thomas C. Arthur & Richard D. Freer, *Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 963, 966-72 (1991) (insisting that there cannot be any defendant against whom no plaintiff asserts claim for relief, and finding contrary view to take “antiquated, narrow, nonfunctional view of ‘claim’ ”); Thomas D. Rowe et al., *A Coda on Supplemental Jurisdiction*, 40 EMORY L.J. 993, 1000-03 (1991) (arguing that “[a] plaintiff can be said to have a ‘claim’ only against . . . someone who allegedly owes a duty to the plaintiff and who has breached that duty . . . [not] . . . against a blameless or innocent defendant, someone who owes no duty to the plaintiff but is present in a suit only to protect its interests”). For an expression of Supreme Court members’ discomfort with the approach that does not require a claim or defense, see *Diamond v. Charles*, O’Connor, J., joined by the Chief Justice and Rehnquist, J., concurring in part and concurring in the judgment, arguing that, in Rule 24(b), “the words ‘claim or defense’ manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit Thus, . . . permissive intervention . . . plainly *does* require an interest sufficient to support a legal claim or defense.” 476 U.S. 54, 76-77 (1986). These Justices did not address whether a traditional claim or defense is required of intervenors of right under Rule 24(a). *Id.*

conceptualizes the situation as this declaratory judgment theory does and *rejects* the idea that some intervenors are neither asserting claims nor having claims asserted against them, it may seem appropriate to require standing since standing to sue is required of plaintiffs asserting declaratory claims, as well as of those asserting coercive claims.⁹¹ Yet that requirement remains inconsistent with the basis of Rule 19 joinder or Rule 24 intervention, where the focus is on potential future harm to be caused by the court, rather than on past or future harm threatened by the defendant.⁹² One might posit that the required standing should be comparable to that demanded of those asserting a claim for an injunction, where the complainant must allege a threat of imminent harm to a concrete interest that the court can avoid by how it rules and frames relief.⁹³ Such a notion of standing remains inapt, however, because an intervenor or Rule 19 party does not immediately fear his litigation adversary, but fears the court, and he is asking the court to avoid harm that the court itself might do. One has so altered the nature of the required standing elements that saying intervenors or Rule 19 parties must have standing would mean something quite different than is meant when we require plaintiffs to have standing to sue defendants. This analysis suggests that the questions asked by courts looking for traditional standing are of little relevance.

As an aside with possible implications for the controversy over whether Rule 24 intervenors must have standing to sue (or the defense equivalent), one might expect the courts to wrestle with similar questions concerning the propriety of Rule 19 joinder of persons who lack an Article III case or controversy with an adversary in federal litigation. However, these issues have not been

⁹¹ See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2308, 2312 (holding that noncustodial father of school child lacked prudential standing to seek declaration that addition of words "under God" to Pledge of Allegiance violated First Amendment to Constitution, observing that "In every federal case, the party bringing the suit must establish standing to prosecute the action"); *Gratz v. Bollinger*, 539 U.S. 244, 245-46 (2003) (holding that persons who alleged that university denied them opportunity to compete for admission on nondiscriminatory basis when those persons were able and ready to apply had standing to seek declaratory and injunctive relief).

⁹² See *supra* notes 50-52 and accompanying text.

⁹³ See *infra* note 115.

raised.⁹⁴ When Rule 19 joinder is proposed, courts determine whether they would have either an independent basis of jurisdiction or supplemental jurisdiction over the claims or defenses thus proposed to be added to the litigation.⁹⁵ When personal or subject-matter jurisdiction cannot be exercised, courts decide whether the proposed additional parties are indispensable so that, rather than proceed without them, the action has to be dismissed.⁹⁶ But courts are not wrestling with standing issues when they consider their jurisdiction over matters that would come into a case through Rule 19 joinder. If Rule 19 parties need not have an Article III case or controversy, why should such be required of similarly situated intervenors?

This discussion is relevant to the project of this Article because the question whether an intervenor is a party to an Article III case or controversy recurs and has particular importance in the context of an appeal if no other party seeks to appeal or to defend the judgment below. Thus, the question whether one may prosecute or defend an appeal without independently being party to the case or controversy is raised most acutely in circuits that do *not* require independent standing as a prerequisite to intervention or to Rule 19 joinder in the trial court. This issue, which the Supreme Court has answered in part, is addressed below in the context of discussing intervenors' rights to appeal and to defend appeals, generally.⁹⁷

⁹⁴ The one reference I found in Supreme Court opinions to the relationship between Rule 19 and standing was in *Lujan v. Defenders of Wildlife*, where the Court observed that, "[t]he redressability element of the Article III standing requirement and the 'complete relief' referred to by Rule 19 are not identical." 504 U.S. 555, 570 n.4 (1992). See generally Karastelev, *supra* note 61, at 470, 472 (noting that "if allowing a party without standing to intervene . . . destroys the case, then, logically, necessary parties joined under the identically phrased Rule 19 must also prove standing . . . , a consequence so far ignored by both the courts and legal commentators"; further noting that no court has held that parties joined under Rule 19 should demonstrate standing).

⁹⁵ FED. R. CIV. P. 19(a).

⁹⁶ *Id.* 19(b).

⁹⁷ One student commentator has argued that allowing intervention by parties who lack standing to sue has the effect of "permit[ting] intervening parties into an action without an opportunity to appeal the decision to which they are bound according to the dictates of res judicata unless the original party . . . pursue[s] appeals related to his own interest." White, *supra* note 61, at 543-44. However, as discussed *infra* note 284 and accompanying text, a decision that cannot be appealed may be denied res judicata effect.

B. THE APPEAL RIGHTS OF WOULD-BE AND SUCCESSFUL INTERVENORS

1. *Would-be Intervenor*s. A federal trial court's denial of a motion to intervene is regarded as an immediately appealable decision *if* the motion was to intervene as of right and the movant was not permitted to intervene permissively; the rejected intervenor—although a nonparty—is recognized to have standing to appeal the denial.⁹⁸ There is some difference of opinion among the federal circuits as to whether the denial of a motion to intervene permissively is immediately appealable,⁹⁹ and on rare occasions an

⁹⁸ See, e.g., *Jones v. Prince George's County*, 348 F.3d 1014, 1020 (D.C. Cir. 2003) (asserting appellate jurisdiction over denial of motion to intervene as of right); *South Dakota ex rel. Barnett v. U.S. Dep't of Interior*, 317 F.3d 783, 785 (8th Cir. 2003) (affirming denials of intervention of right and permissive intervention); *Heaton v. Monogram Credit Card Bank of Ga.*, 297 F.3d 416, 420-21 (5th Cir. 2002) (enforcing FDIC's right to appeal denial of motion to intervene, holding such denial appealable under collateral order doctrine where it preceded remand to state court); *Cotter v. Mass. Ass'n of Minority Law Enforcement Officers*, 219 F.3d 31, 37 (1st Cir. 2000) (reversing denial of promoted black officers' motion to intervene in action alleging that white officers' rights were violated by promotions).

⁹⁹ See *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 376 (1987) (stating that after trial defendant who was permitted to intervene permissively could challenge denial of motion to intervene as of right or challenge restrictions placed on it by court). Some courts take the position that an appeal from the denial of intervention must be taken within thirty days of the entry of the order, or not at all; they hold an appeal within thirty days of final judgment (and more than thirty days from the entry of the intervention denial order) to be untimely. Compare *Hutchinson v. Pfeil*, 211 F.3d 515, 524 (10th Cir. 2000) (dismissing as untimely postjudgment appeal from denial of motion to intervene, stating that would-be intervenor must appeal within thirty days of order denying intervention), and *S.E.C. v. Wozniak*, 33 F.3d 13, 15 (7th Cir. 1994) (dismissing appeal by one who waited until after final judgment to appeal denial of his motion to intervene, court not specifying whether motion was to intervene of right or permissively), and *Retired Chi. Police Ass'n v. City of Chicago*, 7 F.3d 584, 594-95 (7th Cir. 1993) (explaining that order denying intervention is final and appealable and by necessity subject to immediate review because denial precludes proposed intervenor from appealing later judgment and denial of intervention, but upholding appellate jurisdiction where district court immediately addressed merits of motions for class certification filed by putative intervenors in anticipation of their filing procedurally correct motions), and *Arney v. Finney*, 967 F.2d 418, 421 (10th Cir. 1992) (holding absolute denial of motion to intervene permissively to be immediately appealable collateral order), with *Davis v. Butts*, 290 F.3d 1297, 1299 (11th Cir. 2002) (dismissing for lack of jurisdiction appeal from denial of motion to intervene permissively, concluding that "anomalous rule" pursuant to which appeals court dismisses for lack of appellate jurisdiction if it decides that district court was correct to deny motion to intervene applies only to efforts to intervene of right, and that order denying permissive intervention is neither final decision nor immediately appealable interlocutory appeal). I presume that the circuits disallowing immediate appeal do so on the ground that the interests of the would-be permissive intervenor are sufficiently unimportant to be adequately vindicable after final judgment under the collateral order doctrine.

appeals court may issue a writ of mandamus to reverse the refusal of permissive intervention.¹⁰⁰ Whether the party denied permissive intervention is permitted to appeal the denial immediately or only after final judgment, the decision is reviewed as an exercise of discretion.¹⁰¹ If the appeals court concludes that the decision below was an abuse of discretion (something that rarely occurs), it will reverse, but traditionally, if the trial court properly denied the motion to intervene permissively, the appeals court would dismiss the appeal as outside its jurisdiction.¹⁰² Some courts will dismiss even appeals from denials of motions to intervene as of right for lack of jurisdiction, rather than affirm, if the appeals court agrees with the decision below, and despite the appealability of those orders under the collateral order doctrine.¹⁰³ Critics of this approach propose that every denial of intervention (both of right and permissive) “should be regarded as an appealable final order,” with the appellate court affirming, rather than dismissing, unless the trial court erred in denying intervention of right or “seriously abused its discretion in refusing to allow permissive intervention.”¹⁰⁴ An

¹⁰⁰ For an example issuing a writ of mandamus to command allowance of permissive intervention, see *San Jose Mercury News, Inc. v. U.S. District Court, Northern District (San Jose)*, 187 F.3d 1096, 1103 (9th Cir. 1999) (holding that district court erred in denying newspaper’s motion to intervene in sexual harassment suit against city and police department in order to get access to investigatory report, where district court erroneously believed that public had no prejudgment right to judicial records in civil cases, and appeals court believed that newsworthiness of case made mandamus appropriate).

¹⁰¹ *Bhd. of R.R. Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 524 (1947) (holding that absent abuse of discretion, no appeal lies from order denying leave to intervene permissively); *In re Holocaust Victim Assets Litig.*, 225 F.3d 191, 197 (2d Cir. 2000) (noting that court reviews district court denial of motion to intervene, whether of right or by permission, for abuse of discretion); *Trans Chem. Ltd. v. China Nat’l Mach. Imp. & Exp. Corp.*, 332 F.3d 815, 822 (5th Cir. 2003) (stating that court reviews orders denying permissive intervention for “clear abuse of discretion”).

¹⁰² See *Trans Chem.*, 332 F.3d at 821-22, 825 (noting that court operated under “anomalous rule” that provides appellate jurisdiction to consider only whether district court abused its discretion in denying motion to intervene permissively, and affirming where district court did not abuse its discretion and correctly denied intervention of right); *United States v. City of Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002) (stating that if district court abused its discretion in denying permissive intervention, there is appellate jurisdiction to review denial).

¹⁰³ 7C WRIGHT, MILLER, & KANE, *supra* note 59, § 1923, at 508.

¹⁰⁴ *Id.* at 508-09. The treatise criticizes the traditional approach as illogical and as encouraging appeals by disappointed would-be permissive intervenors. *Id.* at 515-16. I believe dismissals for want of jurisdiction of unsuccessful appeals by proposed intervenors of right makes no sense at all, whether taken immediately or after final judgment. Dismissals

increasing number of appellate courts are handling appeals from denials of intervention in just that way, although the more archaic “anomalous rule” has the imprimatur of Supreme Court decisions.¹⁰⁵ Regardless of the outcome, federal appeals courts do not doubt rejected suitors’ standing to appeal the denial of their motions to intervene, including motions to intervene for purposes of appeal.¹⁰⁶ If an appeals court reverses a denial of intervention, it often will permit immediate intervention and entertain the new intervenors’ arguments on the merits of other issues before the court.¹⁰⁷

2. *Those Who Have Intervened.* When the appeal rights of those who successfully intervened in the trial court (whether of right or permissively) are the question, the courts generally treat intervenors like full-fledged parties to the litigation, whose rights to appeal or to defend on appeal turn on their interest in the decision below and in the appeal.¹⁰⁸ In *Stringfellow v. Concerned Neighbors*

for want of jurisdiction of unsuccessful appeals by proposed permissive intervenors, taken after final judgment, are similarly unprincipled, however futile the appeals may be.

¹⁰⁵ See *id.* at 509-15 (citing cases that follow emerging method and Supreme Court cases that follow old rule).

¹⁰⁶ *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (noting that denials of motions to intervene for purposes of appeal are appealable); *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395-96 (1977) (holding that motion to intervene was timely and should have been granted to allow class member intervenor to appeal denial of class certification, and citing several Supreme Court decisions permitting postjudgment intervention for purposes of appeal); *S.E.C. v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 460 (1940) (holding that Commission intervenor was party aggrieved by court’s refusal to dismiss proceeding, and was entitled to appeal that refusal, as well as holding of intermediate court of appeals that its intervention had been unauthorized). These cases explicitly or implicitly recognize the standing to appeal of those whose motions to intervene for various purposes were denied.

¹⁰⁷ See, e.g., *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.*, 510 U.S. 27, 34 (1993) (dismissing writ of certiorari as improvidently granted, but indicating that if Supreme Court reversed lower court’s denial of petitioner’s motion to intervene, Court could address merits of question on which it granted certiorari); *United Airlines, Inc.*, 432 U.S. at 390 (1977) (affirming court of appeals’ reversal of denial of putative class member’s motion to intervene to appeal denial of class certification, and affirming decision that district court erred in refusing to certify plaintiff class); *Crawford v. Equifax Payment Servs., Inc.*, 201 F.3d 877, 882 (7th Cir. 2000) (reversing denial of motion to intervene, entertaining intervenors’ challenge to approval of settlement of class action, and reversing order approving settlement); *Shults v. Champion Int’l Corp.*, 35 F.3d 1056, 1061 (6th Cir. 1994) (stating in dicta that class member not permitted to intervene may have standing to bring direct appeal if appeals court holds that he should have been permitted to intervene).

¹⁰⁸ See, e.g., *Ass’n of Banks in Ins., Inc. v. Duryee*, 270 F.3d 397, 402-03 (6th Cir. 2001) (finding appellate standing for intervening insurance trade organizations where judgment they sought to appeal would have caused economic injury to intervenors were it not reversed); *S.E.C. v. Black*, 163 F.3d 188, 195-96 (3d Cir. 1998) (holding that intervenors of right had

in Action ("CNA"),¹⁰⁹ the Supreme Court rejected CNA's argument that the order denying CNA the right to intervene and imposing restrictions on its participation was immediately appealable under the collateral order doctrine, reasoning that, as a permissive intervenor, CNA could obtain effective review of its contentions on appeal after final judgment.¹¹⁰ The Supreme Court stated flatly that "[a]n intervenor, whether by right or by permission, normally has the right to appeal an adverse final judgment by a trial court,"¹¹¹ and that "a permissive intervenor . . . ha[s] the same rights of appeal from a final judgment as all other parties."¹¹² There is, however, considerable precedent to the effect that, except in extraordinary circumstances, courts of appeals will not entertain

standing to appeal orders lifting freeze of investor funds and procedural orders entered in connection therewith); *Sierra Club v. Babbitt*, 995 F.2d 571, 574-75 (5th Cir. 1993) (dismissing appeal in which defendant-intervenors lacked Article III standing due to lack of injury from judgment below, as it ordered nothing of appellants and none of court's findings or declarations would have preclusive effect on appellants in later litigation).

¹⁰⁹ 480 U.S. 370, 370 (1987).

¹¹⁰ *Id.* at 375-76; see also *Heaton v. Monogram Credit Card Bank of Ga.*, 297 F.3d 416, 420 (5th Cir. 2002) (reversing denial of FDIC's motion to intervene, and holding that FDIC had statutory right to appeal remand of case to state court); *Transamerica Ins. Co. v. South*, 125 F.3d 392, 396-97 (7th Cir. 1997) (upholding standing to appeal of defendant-intervenor/counterclaimant that satisfied Article III requirements and that was bound by adverse judgment rendered on claims in which it had interest); *Carlough v. Amchem Prods., Inc.*, 5 F.3d 707, 710-14 (3d Cir. 1993) (dismissing appeal by class members of denials of their motions to intervene of right or permissively, where district court assured them of active participation as objectors, and they therefore would be able to appeal final order); *Didrickson v. U.S. Dep't of Interior*, 982 F.2d 1332, 1338 (9th Cir. 1992) (concluding that intervenor's standing to appeal is tested by whether its interests were adversely affected by judgment, and observing that generally "an intervenor may appeal from any order adversely affecting the interests that served as the basis for intervention, provided that the requirements of Article III are satisfied").

¹¹¹ *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375-76 (1987); see also *County of Santa Fe v. Public Serv. Co.*, 311 F.3d 1031, 1047 (10th Cir. 2002) (entertaining intervenors' appeal of dismissal of their complaint in intervention and of their challenge to grant of other parties' FED. R. CIV. P. 41(a)(2) motion to dismiss suit in connection with proposed settlement); *Ruthardt v. United States*, 303 F.3d 375, 386 (1st Cir. 2002) (sustaining denials of motions to intervene but permitting intervention going forward where rehearing en banc and Supreme Court review might be sought).

¹¹² *Stringfellow*, 480 U.S. at 377; see also *Davis v. E. Baton Rouge Parish Sch. Bd.*, 78 F.3d 920, 926-27 (5th Cir. 1996) (upholding standing of news agency intervenors to appeal orders prohibiting school board and others from commenting upon draft desegregation plans and requiring school board to meet privately and confidentially); *In re Subpoena to Testify*, 864 F.2d 1559, 1561 (11th Cir. 1989) (upholding standing of newspaper intervenors to appeal closure order instructing parties, counsel, and others not to reveal any information relating to grand jury investigation).

issues raised by an intervenor that were not raised by a principal party. For example, as early as 1944 the Supreme Court noted that “one of the most usual procedural rules is that an intervenor is admitted to the proceedings as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues or compel an alteration of the nature of the proceeding.”¹¹³ Federal courts typically take this approach in the courts of appeals as well as at the trial level.¹¹⁴

Some cases turn on whether the grievance asserted by the would-be intervenor appellant suffices for standing to appeal. When that is the critical question, the discussion in *Shining a Light* of what does and does not constitute such a grievance is relevant.¹¹⁵ However, because intervenors may not have sought coercive relief nor defended against efforts to have coercive relief awarded against them,¹¹⁶ the analysis of whether intervenors have been aggrieved by the judgment below or would be aggrieved by losing the judgment on appeal may differ slightly from the analysis of the grievance already suffered or the injury feared from reversal that is alleged by primary party appellants and appellees. The general rule is that “[t]he intervenor may appeal . . . only if the . . . order [he seeks to appeal] affect[s] him and only to the extent of the interest that made

¹¹³ *Vinson v. Wash. Gas Light Co.*, 321 U.S. 489, 498 (1944).

¹¹⁴ *See Ga. Power Co. v. Teleport Communications Atlanta, Inc.*, 346 F.3d 1047, 1049 (11th Cir. 2003) (granting motion to strike argument made by intervenors but never made by principal party); *Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533, 539 (D.C. Cir. 1999) (concluding that nonparty with interest arising from possible precedential impact on its own case should be accorded amicus curiae status rather than being permitted to intervene where it sought only to contribute its views on issues already raised by parties, and opining that parties with Article III standing can petition for review directly and then be free to add issues); *Conn. Dep’t of Pub. Util. Control v. FCC*, 78 F.3d 842, 851 (2d Cir. 1996) (rejecting intervenor’s argument on merits after noting questionable propriety of issue raised only by intervenor); *Nat’l Ass’n of Regulatory Util. Comm’rs v. ICC*, 41 F.3d 721, 729-30 (D.C. Cir. 1994) (invoking principle against intervenors who sought to expand case beyond matters addressed in petitioners’ request for review); *Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27, 37 n.4 (D.C. Cir. 1992) (refusing to address arguments made only by intervenors); *cf. Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234, 1269 (11th Cir. 2001) (affirming district court’s refusal to allow intervenor additional time to develop support for argument not advanced by defendant university).

¹¹⁵ *See Shining a Light*, *supra* note 1, at 840-41 (stating that appellant must allege that he suffered or imminently will suffer injury by reason of decision or judgment).

¹¹⁶ *See supra* note 90 and accompanying text.

it possible for him to intervene.”¹¹⁷ For example, *Cotter v. Massachusetts Ass’n of Minority Law Enforcement Officers* reversed the denial of promoted black officers’ motion to intervene in an action alleging that white officers’ rights were violated by the promotions and asking injunctive relief and damages to come from the City of Boston.¹¹⁸ Once the black officers were permitted to intervene, what should they have the right to appeal? Although plaintiffs did not ask that the black officers’ promotions be voided, if plaintiffs succeeded on the merits and established a violation of the white officers’ rights, it was possible that the court would undo the black officers’ promotions.¹¹⁹ If the court took that action, it seems clear that the black officers should have standing to appeal that ruling even if they would not have a right to appeal (because they arguably would not suffer any injury) if plaintiffs merely were awarded money damages, were promoted, or both.¹²⁰ When a judgment would deprive the black officers of their promotions, they should have standing to appeal that ruling notwithstanding that the harm would flow from an order against the City of Boston to retract the promotions rather than from relief ordered directly against the black officers.¹²¹

C. ARTICLE III STANDING ISSUES RISE AGAIN

So long as appellants and appellees respectively include persons who were original parties to the litigation and whose adversary posture created an Article III case or controversy, many federal appellate courts have thought it unnecessary to look beyond intervenors’ status in the trial court proceedings. As intervenors, they were accorded standing to appeal as co-appellants or standing to defend the judgment as co-appellees. However, when intervenors have sought to appeal solo, or have sought to defend a judgment

¹¹⁷ 7C WRIGHT, MILLER, & KANE, *supra* note 59, § 1923, at 517.

¹¹⁸ 219 F.3d 31, 31 (1st Cir. 2000).

¹¹⁹ *Id.* at 35.

¹²⁰ By the same token, the black officer intervenors should be entitled to be appellees if defendants prevail below but there is a risk that reversal would endanger the interests that the black officers asserted in the litigation.

¹²¹ See *infra* note 242 and accompanying text (concerning injunctions affecting nonparties).

solo, without any of the original Article III parties, the question whether an Article III case or controversy exists, so that the appeals court can hear the case, becomes critical. As discussed above, the issue is particularly acute for those circuits that do not require standing to sue, or an Article III claim against an intervenor, as a prerequisite to the intervention itself.¹²²

Although there is earlier precedent, *Diamond v. Charles* typically is cited as the seminal case and is perhaps the clearest Supreme Court decision holding that “an intervenor’s right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art[icle] III.”¹²³ In *Diamond*, a pediatrician intervened as a defendant in a class action brought against the state of Illinois, challenging the constitutionality of a state law governing abortions.¹²⁴ Dr. Diamond cited his professional status, his status as the parent of a minor daughter, and his conscientious objections to abortion in support of his motion to intervene, which the district court granted without indicating whether the intervention was of

¹²² See *Transamerica Ins. Co. v. South*, 125 F.3d 392, 396 (7th Cir. 1997) (noting that “[i]t is . . . conceivable that a person lacking standing to bring suit . . . , yet properly permitted to intervene, might have standing to appeal a judgment which adversely affected him or her”).

¹²³ 467 U.S. 54, 68 (1986) (citing *Int’l Union of Mine Workers v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 338-39 (1945), which upheld intervenor-unions’ standing to appeal denial of NLRB’s petition to vacate portion of decree dealing with back pay where NLRB had not sought Supreme Court review). Several cases follow *Diamond*. *E.g.*, *Kootenai Tribe v. Veneman*, 313 F.3d 1094, 1109-11 (9th Cir. 2002) (holding that defendant-intervenor environmental groups had standing to appeal preliminary injunction against implementation of regulation where government defendants had decided not to appeal and intervenors were injured by denial of environmental protection that challenged regulation would provide and showed necessary causation and redressability). The *Kootenai* court stated that “[f]or standing on appeal, intervenors need not show that they independently could have sued the party who prevailed in district court. ‘Intervenor can allege a threat of injury from the order they seek to reverse, an injury which would be redressed if they win on appeal.’” *Id.* at 1110 (quoting *Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1399 (9th Cir. 1995)). See also *Chadwick v. Janecka*, 302 F.3d 107, 112-15 (3d Cir. 2002) (permitting intervenor wife standing to appeal ruling freeing husband from incarceration for civil contempt of order requiring him to pay into escrow account for wife’s benefit, where wife had Article III standing by virtue of her financial injury and her injury could be redressed by reversal that would require husband to remain incarcerated until he paid funds into escrow account); *Sierra Club v. Babbitt*, 995 F.2d 571, 574-75 (5th Cir. 1993) (dismissing appeal in which defendant-intervenor sought to continue appeal that federal government agency brought but then dismissed, upon concluding that intervenors lacked Article III standing for lack of injury from judgment below).

¹²⁴ *Diamond*, 476 U.S. at 57-58.

right or permissive and without explaining how Diamond's interests satisfied Rule 24.¹²⁵ Ultimately, the district court permanently enjoined the enforcement of provisions of the law that imposed criminal liability on physicians for violation of particular statutory prescriptions.¹²⁶ The Court of Appeals for the Seventh Circuit affirmed and permanently enjoined the enforcement of an additional, related provision.¹²⁷ Diamond alone appealed to the Supreme Court, although the state filed a letter of interest with the Court indicating that its interest was "co-terminous with the position . . . set forth by the appellants [sic]."¹²⁸ While acknowledging that, under its Rules, Diamond could have piggybacked on an appeal by the state, the Supreme Court held that Diamond did not have standing to appeal by himself.¹²⁹ Only the state had the direct stake necessary to entitle it to defend its statutes; Diamond, as a private individual, had no standing to defend the constitutionality of this state law.¹³⁰ He suffered no injury in fact from the decision below: His contention that, if the law were upheld and enforced, he would gain patients was speculative; his conscientious objection to abortion was not a judicially cognizable interest; he failed to show that he was entitled to assert his daughter's interests; he was not entitled to assert the constitutional rights of unborn fetuses; and other interests he claimed were irrelevant because they were unrelated to the state law provisions at issue.¹³¹

¹²⁵ *Id.* Some Justices opined that Diamond was not a proper intervenor. *Id.* at 73-78 (O'Connor, J., joined by Burger, C.J., and Rehnquist, J., concurring in part and concurring in judgment).

¹²⁶ *Id.* at 61.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 64.

¹³⁰ *Cf. Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994) (permitting political opponents to intervene for purposes of appealing preliminary injunction preventing enforcement of determination that political party's nominating petitions were invalid, after state decided not to appeal to defend constitutionality of its statutes); *Didrickson v. U.S. Dep't of Interior*, 982 F.2d 1332, 1339 (9th Cir. 1992) (allowing defendant-intervenor industry groups to appeal to defend federal regulation where government abandoned its appeal and court held that defendant-intervenor had independent Article III standing and could benefit from reversal of lower court decision).

¹³¹ *Diamond*, 476 U.S. at 64-67; *see also Maine v. Taylor*, 477 U.S. 131, 148 (1986) (upholding Maine's standing to appeal reversal of federal criminal conviction where reversal was predicated on unconstitutionality of state statute that Maine had intervened to defend; and holding that live case or controversy existed with criminally accused and that Maine had

The Court also rejected Diamond's contention that the assessment of attorneys' fees jointly and severally against him and the state gave him a stake sufficient to allow him to appeal the decision on the merits and to argue for reinstatement of the law and consequent elimination of the attorneys' fee award.¹³² The Court responded that "standing requires an injury with a nexus to the substantive character of the statute . . . at issue[.] . . . [T]he mere fact that continued adjudication would provide a remedy for an injury that is only a byproduct of the suit itself does not mean that the injury is cognizable under Art. III."¹³³

If the Court prevented Diamond from appealing the imposition upon him of the prevailing parties' attorneys' fees, that would seem to be *incorrect*. He clearly was aggrieved by that aspect of the judgment. The Court did not say otherwise; its rationale seemed to be that the only way to determine whether that award was improper was to review the constitutionality of the statute, which the Court had decided Diamond lacked standing to do. Thus, the Court refused to allow Diamond to circumvent his lack of judicially cognizable interest in the abortion law.¹³⁴ However, there was a final, appealable judgment. Diamond was aggrieved by the aspect of the judgment that held him liable for plaintiffs' attorneys' fees, and such decisions routinely are held sufficient to confer standing to appeal. The fact that the attorneys' fee award could not be

standing to appeal in light of its substantial interest in continued enforceability of its statute, despite federal government's abandonment of its own appeal); *Don't Bankrupt Wash. Comm. v. Cont'l Ill. Nat'l Bank & Trust Co.*, 460 U.S. 1077, 1077 (1983) (dismissing appeal for want of jurisdiction where appellant, intervenor-proponent of enacted ballot initiative whose constitutionality was successfully challenged, lacked standing to appeal); *Didrickson*, 982 F.2d at 1338-41 (following *Diamond* in holding that permissive defendant-intervenor needed independent jurisdictional grounds on which to pursue appeal where original defendant abandoned its appeal); *United States v. AVX Corp.*, 962 F.2d 108, 120 (1st Cir. 1992) (dismissing plaintiff-intervenor's appeal of consent decree on grounds that intervenor lacked Article III standing where original parties, although participants in appeal, were no longer adverse to one another).

¹³² *Diamond*, 476 U.S. at 70-71.

¹³³ *Id.*; see also *Didrickson*, 982 F.2d at 1339 (holding that intervenors' liability to prevailing party for costs and attorneys' fees did not provide basis for holding that case or controversy existed that would allow intervenors to appeal invalidation of regulation they had sought to uphold).

¹³⁴ *Diamond*, 476 U.S. at 70-71; see also *Didrickson*, 982 F.2d at 1339 n.2 (following *Diamond* in concluding that intervenor's liability for fees and costs was insufficient basis for continuing case or controversy).

reviewed without reviewing the underlying decision on the merits should not have caused the Court to refuse to review the award, if that is what it did. The Court could have upheld the award upon concluding that the district court correctly held aspects of the abortion law to be unconstitutional, or it could have reversed the award on the grounds that the district court erred in holding the law unconstitutional and that the plaintiffs were not entitled to fees as prevailing parties. *In neither event would the Court have been required to reverse the holding of unconstitutionality*, thus keeping teeth in the holding that Diamond lacked standing to appeal that aspect of the judgment. This approach would be analogous to appellate consideration of awards of attorneys' fees and costs concomitant with remands to state courts for lack of original subject-matter jurisdiction or for defects in removal procedure. The remands themselves are statutorily unreviewable,¹³⁵ but federal appeals courts do review the propriety of the remands in the context of hearing appeals from awards of fees and costs.¹³⁶ A decision that the remand was erroneous results in reversal or vacation only of the award, however; it does not touch the remand decision itself.¹³⁷ All of the foregoing discussion may be based on a misinterpretation of the majority opinion, however. It appears from the concurring opinion that Diamond did *not* seek to appeal the award of attorneys' fees per se, but merely sought to use that award as the basis for an argument that he was aggrieved by the judgment striking the Illinois abortion law and, hence, as a source of standing to appeal

¹³⁵ See 28 U.S.C. § 1447(d) (2000) ("An order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise.").

¹³⁶ See, e.g., *Gibson v. Chrysler Corp.*, 261 F.3d 927, 932-33 (9th Cir. 2001) (examining de novo whether remand was correct in context of reviewing attorneys' fees award); *Mints v. Educ. Testing Serv.*, 99 F.3d 1253, 1260-61 (3d Cir. 1996) (approving evaluation of merits of remand as part of review of attorneys' fees award).

¹³⁷ *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857 (9th Cir. 2001) (noting that court could not reverse or affirm remand order itself in conjunction with review of award because of prohibition on appellate review of remand orders); *Stuart v. Unum Life Ins. Co. of Am.*, 217 F.3d 1145, 1148, 1155 (9th Cir. 2000) (reversing award of costs and expenses of removal upon concluding that remand was erroneous, but not reversing remand); *Mints*, 99 F.3d at 1260-61 (noting that even though appeals court could not reverse remand to state court, it might be reluctant to uphold award of attorneys' fees and costs under § 1447(e) if district court erred in remanding).

that holding of unconstitutionality.¹³⁸ If that was the posture of the case, I have no quarrel with the Court's reasoning.¹³⁹

As a general rule, only parties to a lawsuit may appeal an adverse judgment, but at times nonparties with an interest adversely affected by the trial court's judgment are permitted to seek intervention for purposes of appeal.¹⁴⁰ When they do so, Article III issues may arise, especially if those intervenors are the sole appellants or appellees.¹⁴¹ In *Arizonans for Official English v. Arizona*, the Court did not resolve whether the intervenor appellants (allowed into the case by the court of appeals) had Article III standing to seek appellate review from the Supreme Court, but instead decided the case on mootness grounds.¹⁴² The Court did, however, express grave doubts about whether the petitioners for certiorari had Article III standing to pursue appellate review and reiterated several basic standing principles: that "the standing Article III requires must be [independently] met by persons seeking

¹³⁸ See *Diamond*, 476 U.S. at 77-78 (O'Connor, J., joined by Burger, C.J., and Rehnquist, J., concurring in part and concurring in judgment) (noting that "the proceedings in the District Court concerning attorneys' fees are neither contained in the record before us nor the subject of questions presented in Diamond's jurisdictional statement").

¹³⁹ Other cases following *Diamond* include *California Department of Social Services v. Thompson*, 321 F.3d 835, 845-46 (9th Cir. 2003) (holding that because grandmother foster parent who intervened in suit seeking determination of welfare benefits met Article III standing requirements, she could pursue appeal after government plaintiff declined to do so, even if she would not have been proper plaintiff and although she had not filed separate complaint).

¹⁴⁰ See, e.g., *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (advising adversely affected nonparties to intervene for purposes of appeal, in context of affirming dismissal of appeal from consent decree by would-be appellants who were not parties to underlying suit; in companion case, equally divided Court affirmed judgments dismissing, as impermissible collateral attack, suit by persons who could have intervened in prior litigation). But see *Martin v. Wilks*, 490 U.S. 755, 755 (1989) (concluding that persons who were neither parties nor intervenors in race discrimination suit were not precluded from challenging employment decisions taken pursuant to consent decree and that their challenge was not impermissible collateral attack).

¹⁴¹ See *Bryant v. Yellen*, 447 U.S. 352, 366 (1980) (upholding conclusion that district court erred in refusing to permit intervention for purposes of appeal by group that had Article III standing and thus could pursue appeal of declaratory ruling that losing plaintiff chose not to appeal); *Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533, 539 (D.C. Cir. 1999) (denying permission to intervene on appeal to pipeline company with interest in precedential impact of law to be made but which lacked Article III standing to appeal order in question, but affording would-be intervenor amicus status).

¹⁴² 520 U.S. 43, 48 (1997).

appellate review”;¹⁴³ that standing to pursue an appeal in the place of the original defendant who chooses not to appeal (as was the case here) demands that the intervenor possess a “direct stake in the outcome”; and that the “decision to seek review ‘is not to be placed in the hands of “concerned bystanders.” ’ ”¹⁴⁴

In summary, would-be intervenors whom courts turn away or limit in their role have standing to appeal the denial of their intervention motions and the limitations imposed upon them, although the would-be intervenors sometimes can appeal immediately and on other occasions have to wait until after final judgment. Those who succeed in intervening may appeal the final judgment and interlocutory rulings merged therein when aggrieved by those decisions. Appellate courts, however, typically refuse to consider issues raised on appeal by an intervenor but not raised by a principal party. The idea that an intervenor may not enlarge the issues presented by the principal parties thus extends beyond the trial court to the court of appeals and prevents the intervenor from introducing even those issues that a full party raised in the trial court but has not raised on appeal. Grievance analysis is appropriately modified to reflect the intervenor’s injury from a judgment or subsidiary decision, and the intervenor who would appeal or defend an appeal without the principal parties must present an Article III case or controversy regardless of whether the trial court made the intervenor’s standing to sue or be sued a prerequisite to the intervention. A solo appeal by an intervenor necessitates an

¹⁴³ *Id.* at 64.

¹⁴⁴ *Id.* at 64-65 (quoting *Diamond v. Charles*, 476 U.S. 54, 62 (1986) (citation omitted)); see also *Warren v. Comm’r of Internal Revenue*, 302 F.3d 1012, 1014-15 (9th Cir. 2002) (holding that court-appointed amicus could not intervene as of right, and would not be permitted to intervene permissively, to oppose parties’ consensual dismissal of appeal and to challenge constitutionality of statute involved, thereby raising issue parties had not raised). The *Warren* court relied in part upon the absence of any direct effect upon the amicus, who asserted a general interest as a taxpayer. 302 F.3d 1012, 1015 (9th Cir. 2002). There are cases allowing intervention for purposes of appeal. See *Alaska v. Suburban Propane Gas Corp.*, 123 F.3d 1317, 1319-20 (9th Cir. 1997) (overturning district court’s denial of putative class member’s motion to intervene to appeal denial of class certification); *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 719-20, 723-24 (9th Cir. 1994) (overturning denial of government’s motion to intervene to appeal dismissal of *qui tam* action without government consent).

exception to the rule that the intervenor may not introduce issues that a principal party has not raised on appeal.

IV. ABSENT CLASS MEMBERS

A. STANDING TO APPEAL COURT-APPROVED SETTLEMENTS

Prior to late June, 2002, the federal circuits were split on whether absent members of a certified class who had not intervened could appeal a court-approved settlement of the class action.¹⁴⁵ The Supreme Court resolved this issue in *Devlin v. Scardelletti*, holding that an unnamed class member who timely objects to a proposed class action settlement at the fairness hearing on that proposal may appeal the court's approval of the settlement, without first intervening.¹⁴⁶ The Court quickly disposed of the standing issue by holding that petitioner's interest as a member of the class that would be bound by the settlement created a case or controversy sufficient to satisfy Article III.¹⁴⁷ In other words, the class member alleged an injury caused by the judgment and that the court of appeals had the ability to redress.¹⁴⁸ Moreover, there was no question that petitioner

¹⁴⁵ The circuit split included *In re Navigant Consulting, Inc.*, 275 F.3d 616, 620 (7th Cir. 2001); *In re Integra Realty Resources, Inc.*, 262 F.3d 1089, 1113 (10th Cir. 2001), revised by, 354 F.3d 1246, 1251, 1255-58 (10th Cir. 2004); *Cook v. Powell Buick, Inc.*, 155 F.3d 758, 761 (5th Cir. 1998); *Shults v. Champion Int'l Corp.*, 35 F.3d 1056, 1061 (6th Cir. 1994); *Gottlieb v. Wiles*, 11 F.3d 1004, 1008-09 (10th Cir. 1993); *Croyden Assocs. v. Alleco, Inc.*, 969 F.2d 675, 680 (8th Cir. 1992); and *Guthrie v. Evans*, 815 F.2d 626, 628-29 (11th Cir. 1987) all holding that unnamed class members who had not successfully and timely intervened could not appeal settlement approval, and *In re PaineWebber Inc.*, 94 F.3d 49, 53 (2d Cir. 1996); *Carlough v. Amchem Products, Inc.*, 5 F.3d 707, 710 (3d Cir. 1993); and *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1176 (9th Cir. 1977), all holding that unnamed class members who objected at fairness hearings could appeal. Many of these cases were cited in *Devlin v. Scardelletti*, 536 U.S. 1, 6 (2002). See also *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000) (holding that nonintervening but objecting class members had standing to appeal attorneys' fee award made in connection with class action settlement, citing lack of necessity to impose procedural burden of intervention and greater importance of assuring fair fee award than of avoiding complication of settlement process).

¹⁴⁶ 536 U.S. at 14.

¹⁴⁷ *Id.* at 6-7. The Supreme Court was not the first to come to this conclusion. The Seventh Circuit in *In re Navigant Consulting, Inc.* came to the same conclusion as to standing to appeal but reached a different ultimate result, noting that "parties are a subset of persons with standing," and refused to consider as parties absent class members who had not timely intervened. 275 F.3d at 620.

¹⁴⁸ As *Shining a Light* discussed, parties may acquiesce in a judgment, and when they do,

met all prudential standing requirements: "The legal rights he seeks to raise are his own [not those of third parties], he belongs to a discrete class of interested parties [he was not asserting a generalized grievance better addressed by a legislature], and his complaint clearly falls within the zone of interests of the requirement [of Rule 23(e), FED. R. CIV. P.] that a settlement be fair to all class members."¹⁴⁹ The rest of the opinion dealt with prerequisites to absent class members' ability to appeal, *other than standing*.

The Court rephrased the question presented as "whether petitioner should be considered a 'party' for the purposes of appealing the approval of the settlement."¹⁵⁰ Somewhat peculiarly, the Court almost immediately undercut this formulation of the critical question by stating that "We have never, however, restricted the right to appeal to named parties to the litigation."¹⁵¹ The Court discussed cases in which it had permitted nonparties to appeal court orders and concluded that "[p]etitioner's interest in the . . . approval of the settlement is similar."¹⁵² If the thrust of the opinion was that petitioner was one of that group of *nonparties* with standing to appeal certain orders, it was unnecessary for the Court to hold nonintervening absent class members (or those of them who timely object at fairness hearings) to be parties, a conclusion that riled the dissenters.¹⁵³ The dissenters, however, were disturbed by more than the party designation.¹⁵⁴

they generally waive any right they otherwise would have to appeal that judgment. *Shining a Light*, *supra* note 1, at 877-79. The *Devlin* Court fully appreciated that the class representatives' consent to a settlement and the judgment predicated on that settlement did not bind members who objected to the settlement so as to waive their right to appeal the judgment. 536 U.S. at 14. On the other hand, one can view *Devlin* as indicating that a class member's failure to assert timely objections to the settlement proposal waives his right to appeal the court's approval of the settlement. See *Leading Cases, II. Federal Jurisdiction and Procedure*, 116 HARV. L. REV. 332, 338 (2002) (discussing situations in which *Devlin* should be limited).

¹⁴⁹ *Devlin*, 536 U.S. at 7.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 8.

¹⁵³ See *id.* at 15-17 (Scalia, J., joined by Kennedy and Thomas, JJ., dissenting) (stating that "it is only those members of the class, and those who intervene or otherwise enter through third-party practice, who are parties to the class judgment").

¹⁵⁴ See *infra* note 175.

The Court concluded that petitioner was a party for purposes of appealing approval of the settlement because he was bound by the settlement.¹⁵⁵ The Court also concluded that, under the precedents it cited as illustrating that nonparties sometimes may appeal court orders, petitioner could appeal approval of the settlement.¹⁵⁶ The approval amounted to a final decision "sufficient to trigger" a right to appeal, and like appellants in those cases, petitioner was being permitted to appeal only that aspect of the trial court's order that affected him, the decision to "disregard his objections."¹⁵⁷ The Court reasoned that petitioner's right to appeal could not be effectuated by the class representatives, who had advocated the settlement, because his interests diverged from theirs.¹⁵⁸

Throughout its opinion, the Court made clear that it was authorizing appeal by only those absent class members who timely objected to the proposed settlement at the fairness hearing.¹⁵⁹ The Court pointed out that petitioner's inability to opt out of the class certified under Rule 23(b)(1) left appeal as his "only means of protecting himself from . . . a disposition . . . he f[ound] unacceptable[,] and that a reviewing court might find legally inadequate."¹⁶⁰ Thus, the absence of an ability to opt out of an action or of a settlement could prove to be a prerequisite to an unnamed class member's right to appeal approval of a settlement.¹⁶¹

¹⁵⁵ *Devlin*, 536 U.S. at 7. It is true that this seems to "turn on[] its head the traditional rule that one is bound by a judgment only if a party (or in privity with a party) to it." *Leading Cases*, *supra* note 148, at 337 n.46. The Court distinguished *Marino v. Ortiz*, 484 U.S. 301 (1988) (per curiam), as not finally disposing of any right or claim that the would-be appellants of a race discrimination class action settlement might have had, "because they were not members of the class" or otherwise parties to the litigation. *Devlin*, 536 U.S. at 9. In *Devlin*, the Court also noted that considering unnamed class members parties for purposes of appeal did not conflict with any other aspect of class action procedure because "class members . . . may be parties for some purposes and not for others," *id.*, comparing the treatment of class members for statute of limitations purposes with their treatment for purposes of diversity jurisdiction. *Id.* at 9-10.

¹⁵⁶ *See Devlin*, 536 U.S. at 8 (noting that petitioner's interest was similar to the interests of nonparties in previous cases who were permitted to appeal court orders).

¹⁵⁷ *Id.* at 9.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 6-14. The Court noted in dicta, however, that unnamed persons in privity with named parties, and hence bound by a judgment, also might be entitled to appeal. *Id.* at 11.

¹⁶⁰ *Id.* at 10-11.

¹⁶¹ *See In re Gen. Am. Life Ins. Co. Sales Practices Litig.*, 302 F.3d 799, 800 (8th Cir. 2002) (questioning, but not deciding, that *Devlin*'s holding applies to FED. R. CIV. P. 23(b)(3) opt-out

This would not be a desirable rule, however. If a class member's opportunity to opt out has expired by the time a settlement is proposed, he effectively is in a nonopt-out class, and he will be bound by the judgment as a member of a mandatory class is bound.¹⁶² On that reasoning, the existence of a *prior* opportunity to opt out should be irrelevant to a class member's standing and ability to appeal rejection of his objections to the settlement. Of course, if a class member has opted out and has not intervened, he will not be bound by the class action judgment and is not a party in any sense, so that *Devlin* will be entirely inapplicable.¹⁶³ Under revised Rule 23(e)(3), effective December 1, 2003, after a settlement is proposed for the court's approval and the terms are made available to class members, the court may afford Rule 23(b)(3) class members a second opportunity to exclude themselves from the class.¹⁶⁴ A continuing opportunity to opt out *could* substitute for a right to appeal the approval of a settlement over a class member's objections. However, I think such a doctrine would make poor policy. Persons who are class members when a settlement is proposed should be able to object to the proposal and see those objections through both the district court's response and the appellate court's review of the district court's ruling. To require objecting class members to opt out before the district court has ruled on the objections or before the appellate court has reviewed the settlement approval would be inefficient and expensive for the former class members and for the court system. It would lead to a potentially unnecessary multiplicity of actions. If the district court or the appeals court responds in a way that satisfies the objectors, their claims can be adjudicated within the class action rather than through new actions and relitigations. But this can occur only if the legal regime has not forced the objectors out of the class action. For this reason, the better policy would be *not* to view the decision to forego an opportunity to opt out as a waiver of the right to appeal a settlement approval over one's objections. Insofar as a court has allowed class

class actions, after appeals court's decision was vacated and remanded for further consideration in light of *Devlin*).

¹⁶² FED. R. CIV. P. 23(c)(3).

¹⁶³ *Id.*

¹⁶⁴ *Id.* 23(e).

members to opt out *after* they know the settlement terms, the court also should allow class members to opt out after the appeals court has reviewed the decision approving a settlement; only then will the settlement terms be clear.¹⁶⁵

In contrast to the Supreme Court's acceptance of the requirement that a class member have timely objected to a settlement proposal, the Court rejected the arguments supporting the position that absent class members should be required to formally intervene in an action as a prerequisite to appealing from a settlement approval.¹⁶⁶ While acknowledging the contentions that allowing class members to appeal without having intervened would undermine the goal of avoiding a multiplicity of suits and make management of class member appeals more difficult, the Court was persuaded that allowing such appeals would not be as problematic as claimed, so long as the power to appeal was limited to those who objected during the fairness hearing.¹⁶⁷ Based on the experience of trial courts, the Court found the "burden of considering the claims of this subset of class members . . . not [to be] onerous."¹⁶⁸ The Court similarly was persuaded that little would be gained by imposition of an intervention requirement.¹⁶⁹ It reasoned that unnamed class members who object at the fairness hearing easily could intervene and that there are few situations in which an intervention requirement would be valuable.¹⁷⁰ The requirement of a motion to intervene would afford the district court an opportunity to screen out "problematic or unnecessary appeals" where the objector was not a class member or for other reasons was not entitled to relief from the settlement, where his objection had been successful, where his objection was untimely, or where there was a need to consolidate duplicative

¹⁶⁵ *Accord Churchill Village, L.L.C. v. Gen. Elec. Co.*, 361 F.3d 566, 572 (9th Cir. 2004) (holding that objecting class members had right to appeal settlement approval, noting that judgment effectively bound objectors because claims were too small to justify individual litigation, and rejecting argument that *Devlin* should be narrowly read to apply only to classes certified under FED. R. CIV. P. 23(b)(1) and not here where objectors could have opted out).

¹⁶⁶ *Devlin v. Scardelletti*, 536 U.S. 1, 7, 14 (2002).

¹⁶⁷ *Id.* at 11.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 13.

¹⁷⁰ *Id.* at 12. The federal government, participating as amicus curiae, conceded this point in its effort to address the fairness concerns of those who would be bound by the settlement. *Id.*

appeals.¹⁷¹ However, the Court found the likelihood of appeal small and easily managed by the appeals court where an objector stood to gain nothing from the appeal.¹⁷² Further, an appeal would be easily and most efficiently managed by the appeals court where an objector had not fulfilled the requirement of timely objection or where judicial consolidation of duplicative appeals made sense.¹⁷³ Finally, the Court found that the structure of the Rules did not require intervention for purposes of appeal, noting that “[j]ust as class action procedure allows nonnamed class members to object to a settlement at the fairness hearing without first intervening, . . . it should similarly allow them to appeal the . . . decision to disregard their objections.”¹⁷⁴ No statute or procedural rule directly addressed the question, “while the right to appeal from an action that finally disposes of one’s rights has a statutory basis.”¹⁷⁵

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 13-14.

¹⁷⁴ *Id.* at 14.

¹⁷⁵ *Id.* Justice Scalia, joined by Justices Kennedy and Thomas, dissented. *Id.* at 15. Scalia’s views were: (1) that to hold objecting unnamed class members to be parties to the judgment was contrary to well-established law that required class members to intervene to become parties; (2) that to read prior Court decisions as allowing nonparties to appeal was wrong; rather, those cases allowed appeals by persons who were parties to collateral orders, although not to the underlying litigation; (3) that the Court never before allowed those in privity with parties to appeal by virtue of the fact that they were bound by the judgment; (4) that the Court’s decision unnecessarily and exponentially increased the indeterminacy of who can appeal; and (5) that the value in requiring intervention includes both avoidance of this indeterminacy and having district courts screen appeals. *Id.* at 15-21. The dissenters believed that proposed appeals that should be screened out would be taken more often than the majority believed and that district courts were better positioned to make these initial decisions. *Id.* at 22. The dissenters also found the arguments for allowing appeal here to have been equally applicable in *Marino v. Ortiz*, 484 U.S. 301 (1988) (per curiam), where the Court rejected them. *Devlin*, 536 U.S. at 22-23.

Responses to the dissenters’ preference for the screening that motions to intervene would permit might include doubt as to the savings of appellate resources that such a system would afford, particularly because denials of intervention of right, other than the timeliness of the motion to intervene, often are reviewed de novo. *Leading Cases*, *supra* note 148, at 336 n.44. In addition, district courts can and do perform some screening function in the process of vetting objections to settlements, often requiring objectors to establish their standing to object and to specify their objections. See, e.g., *Clark v. Experian Info. Solutions, Inc.*, No. 8:00-1217-22, 2004 WL 256433, *7 & n.31 (D.S.C. 2004) (rejecting objections for lack of specificity and supporting evidence); *In re Dow Corning Corp.*, 255 B.R. 445, 505 (E.D. Mich. 2000) (noting that particular objections failed to specify statutory basis); *In re Am. Family Enters.*, 256 B.R. 377, 394-97 (D.N.J. 2000) (noting untimeliness and lack of merit of particular objections); *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 973-75 (E.D.

Some attorneys and commentators hailed *Devlin* as fostering the negotiation of fairer settlements and more careful district court evaluation of settlement proposals, both prodded by the expectation of appellate review.¹⁷⁶ Many courts and commentators had viewed the pre-*Devlin* split in the circuits as reflecting differences in how the courts of appeals weighed fairness factors against efficiency concerns and effective case management.¹⁷⁷ The Court's result came down on the side of those who gave priority to fairness over efficiency. Although some saw the Court's reasoning in *Devlin* as largely avoiding the policy debate that had engaged the courts of appeals,¹⁷⁸ I do not agree with that assessment. The Court's reliance on the binding effect of a class settlement as conferring standing to appeal reflected its belief in the unfairness of binding an absent class member by a settlement that he could not appeal, particularly if he could not opt out of it, whereas the Court's consideration of the case management benefits of an intervention requirement, as compared with an objection requirement, reflected its weighing of efficiency concerns.

The Court's opinion indicates that class members may be parties for some purposes but not for others, recognizes that the Court sometimes has deemed persons who are not formal parties to a case to have standing to appeal, and posits that such persons properly may be deemed to have such standing. The dissenting Justices and some commentators have bemoaned the uncertainty they say is

Tex. 2000) (screening out some objections of intervenors and other objectors as substantively frivolous or made by persons who lacked standing, and indicating that it noted which objections were procedurally deficient, late-filed, or inapposite); *Manners v. Am. Gen. Life Ins. Co.*, No. Civ. A. 3-98-0266, 1999 WL 33581944, *22 n.9 (M.D. Tenn. 1999) (overruling untimely filed objection and finding another objection invalid once objector was no longer class member and therefore lacked standing).

¹⁷⁶ See, e.g., David L. Hudson, Jr., *Appeals to Class Action Settlements Opened up*, ABA JOURNAL REPORT 23 (2002) (quoting attorney Thomas C. Goldstein, who argued on behalf of Robert Devlin before Supreme Court).

¹⁷⁷ See, e.g., *Scardelletti v. Debarr*, 265 F.3d 195, 206-08 (4th Cir. 2001) (noting that crucial difference between majority and minority court positions was way courts balanced class management against fairness concerns); *Leading Cases*, *supra* note 148, at 341 n.69 (citing *Scardelletti* for same proposition).

¹⁷⁸ See *Leading Cases*, *supra* note 148, at 341 (finding that Court had grounded its ruling "not in the robust policy debate engaged in by the circuit courts, but rather in a reconceptualization of the term 'party'").

generated by these aspects of the opinion.¹⁷⁹ None of these aspects of the opinion is particularly surprising, however. For decades, the Court in some contexts and lower federal courts in still others have treated class members as parties for some purposes and not for others. The *Devlin* Court noted that it has treated class members as parties for purposes of tolling of the statute of limitations since its decision in *American Pipe & Construction Co. v. Utah*¹⁸⁰ in 1974,¹⁸¹ while not counting the citizenship of class members for diversity jurisdiction purposes, a rule that typically is viewed as going back to *Supreme Tribe of Ben Hur v. Cauble*¹⁸² in 1921. Lower

¹⁷⁹ *Id.* (criticizing Supreme Court for introducing uncertainties with potentially far-reaching consequences); see *supra* note 175.

¹⁸⁰ 414 U.S. 538, 539 (1974) (holding that filing of purported class action tolls statute of limitations for all purported members pending class certification decision so as to permit prompt intervention into action after denial of class certification); see also *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353-54 (1983) (holding that filing of class action tolls statute of limitations so as to permit members of putative plaintiff class to file individual actions within time remaining on statute of limitations, if class certification is denied).

¹⁸¹ *Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002).

¹⁸² 255 U.S. 356, 361, 365-67 (1921) (holding diversity statute satisfied if all named plaintiffs are diverse from all named defendants). See generally *Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973) (disallowing exercise of supplemental jurisdiction over class members' claims that are insufficient to satisfy jurisdictional amount requirement); *Snyder v. Harris*, 394 U.S. 332 (1969) (requiring each class member in diversity case to satisfy amount in controversy requirement without aggregation where members' claims are separate and distinct rather than deriving from common undivided interest, single title, or right). The courts of appeals are badly split on whether the supplemental jurisdiction statute, 28 U.S.C. § 1367, overrules *Zahn*. Compare *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1254 (11th Cir. 2003) (holding supplemental jurisdiction to exist in diversity class action if one named plaintiff satisfies amount in controversy requirement), *certiorari granted in part*, 2004 U.S. LEXIS 6696 (U.S. Oct. 12, 2004), *Gibson v. Chrysler Corp.*, 261 F.3d 927, 934 (9th Cir. 2001) (concluding that § 1367 authorizes jurisdiction over all class members' claims if named plaintiffs satisfy amount in controversy requirement), and *Rosmer v. Pfizer Inc.*, 263 F.3d 110, 114 (4th Cir. 2001) (same), *Stromberg Metal Works, Inc. v. Press Mech., Inc.*, 77 F.3d 928, 932 (7th Cir. 1996) (holding that where one plaintiff satisfies amount in controversy requirement, § 1367 permits jurisdiction over transactionally related claims by coplaintiffs who do not), *In re Abbott Labs.*, 51 F.3d 524, 529 (5th Cir. 1995) (concluding that § 1367 overrules *Zahn* and authorizes jurisdiction over all class members' claims if named plaintiffs satisfy amount in controversy requirement), with *Rosario Ortega v. Star-Kist Foods, Inc.*, 370 F.3d 124, 132-33 (1st Cir. 2004) (holding that § 1367 preserved traditional rule that each plaintiff in diversity case must separately satisfy amount in controversy requirement, but expressing no view as to application of § 1367 in class actions), *Trimble v. Asarco, Inc.*, 232 F.3d 946, 962 (8th Cir. 2000) (holding that § 1367 does not extend jurisdiction over class members who do not independently meet amount in controversy requirement), *Meritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214, 218 (3d Cir. 1999) (holding that each coplaintiff must independently satisfy amount in controversy requirement), and *Leonhardt v. W. Sugar Co.*, 160 F.3d 631, 637-38, 640 (10th Cir. 1998) (same). With the Supreme Court's grant of

federal courts have grappled with whether class members should be treated as parties for purposes of the discovery Rules that treat parties differently from others,¹⁸³ and for purposes of Rule 13, governing counterclaims.¹⁸⁴ While one could view the issue in these contexts as a matter of statutory interpretation or Rule construction and therefore perhaps view the uncertainty as tolerably cabined, the

certiorari in *Allapattah Services*, the effect of § 1367 on diversity class actions soon should be resolved.

¹⁸³ See, e.g., *Brennan v. Midwestern United Life Ins. Co.*, 450 F.2d 999, 1004 & n.2 (7th Cir. 1971) (affirming dismissal with prejudice of claims of plaintiff class members who failed to respond to interrogatories and document requests and were warned of consequences of their failure, although Rules make interrogatories and Rule 34 document requests available only against parties); *Doe v. Meachum*, 126 F.R.D. 444, 448-50 & n.5 (D. Conn. 1989) (allowing discovery of unnamed plaintiff-class inmates' mental health records, concluding that they waived their privilege to deny access by putting their mental health into controversy). But see *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1552, 1555-57 (11th Cir. 1986) (noting that district judge granted motion to serve interrogatories on class members; disapproving dismissal sanction imposed upon class members who failed to respond, finding that interrogatories were improperly used to reduce class size and that threat of dismissal amounted to impermissible opt-in device); *Blackie v. Barrack*, 524 F.2d 891, 907 n.22 (9th Cir. 1975) (noting that defendants do "not have unlimited rights to discovery against unnamed class members; the suit remains a representative one").

¹⁸⁴ See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 n.2 (1985) (noting that plaintiff class members rarely are subjected to burden of discovery or counterclaims); *Jones v. Ford Motor Credit Co.*, 358 F.3d 205, 214-16 (2d Cir. 2004) (holding that court had supplemental jurisdiction over permissive counterclaims against absent class members and that whether counterclaims predominated over plaintiffs' claims and whether there were compelling reasons to decline jurisdiction over counterclaims in exceptional circumstances could not properly be determined until court decided motion for plaintiff class certification); *Allapattah Servs.*, 333 F.3d at 1259-60 (affirming decision that defendant was not required to assert set-off claims, taking view that Rule 13 is inapplicable in class actions because absent members are not opposing adversaries for purposes of Rule, but declaring it within district court's discretion to decide whether Exxon should be allowed to assert counterclaims); *Heaven v. Trust Co. Bank*, 118 F.3d 735, 738-39 & n.7 (11th Cir. 1997) (holding that district court had not abused its discretion in evaluating counterclaims and difficulties they presented, in declining to certify proposed class; disagreeing with proposition that Rule 13(a) has no application in class certification analysis, and opining that district court has authority to sub-class or exclude counterclaim defendants from plaintiff class); *Fielder v. Credit Acceptance Corp.*, 175 F.R.D. 313, 321 (W.D. Mo. 1997) (opining that Rule 13(a) is inapplicable in class actions; holding defendant's counterclaims permissive and certifying class); *Buford v. H & R Block, Inc.*, 168 F.R.D. 340, 363-64 (S.D. Ga. 1996) (citing 1 NEWBERG ON CLASS ACTIONS § 4.34 for proposition that Rule 13(a) is inapplicable to absent class members and that any counterclaims in class actions are permitted in court's discretion). See generally Joan Steinman, *The Party Status of Absent Plaintiff Class Members: Vulnerability to Counterclaims*, 69 GEO. L.J. 1171 (1981) (arguing for functional test to determine whether absent class members should be treated as parties for various purposes and in particular for purposes of vulnerability to counterclaims; looking to core characteristics of party, purposes of Rule 23, and purposes of Rule 13).

same view can be taken of the uncertainty generated by *Devlin*. *Devlin* determines who is a party, in light of the operation of Rule 23 to bind class members, in the context of the right to appeal.¹⁸⁵ As the *Devlin* Court stated, while “no federal statute or procedural rule directly addresses the question of who may appeal from approval of class action settlements, . . . the right to appeal from an action that finally disposes of one’s rights has a statutory basis. 28 U.S.C. § 1291.”¹⁸⁶ Thus, it is naive to view *Devlin* as “creat[ing] considerable uncertainty by replacing—apparently as a matter of federal common law—a settled definition of ‘party’ with one that varies by context.”¹⁸⁷ The uncertainty has long existed, and the definition of “party” is far less settled than that accusation implies, both within and beyond the class action context.¹⁸⁸

The dissenting Justices and some commentators have criticized *Devlin* for positing and approving the notion that persons who are

¹⁸⁵ *Devlin*, 536 U.S. at 14.

¹⁸⁶ *Id.*

¹⁸⁷ *Leading Cases*, *supra* note 148, at 332. The authors of this piece view *Devlin* as having framed its decision “as an interpretation of the term ‘party’ rather than as an interpretation of FRCP 23 or Federal Rule of Appellate Procedure 3,” and as clarifying that “an individual who qualifies for intervention as of right . . . is a party . . . despite failing to petition a court as required by FRCP 24.” *Id.* at 336-37. I do not see *Devlin*’s interpretation of “party” as wholly separate from Rule 23, although it is fair to question “whether its flexible definition of ‘party’ extends beyond the class action context.” *Id.* at 336. Nor do I see the Court as broadly holding that an individual who qualifies for intervention as of right is a party despite failing to petition as required by FED. R. CIV. P. 24. Rather, the Court holds absent class members to be parties only for purposes of the doctrine that permits aggrieved parties to appeal adverse judgments in light of the binding effect upon them. The Court held formal intervention not to be a procedural prerequisite to appeal only when class members have satisfied the procedural requirements for objecting at a fairness hearing and have made such objections.

Leading Cases also notes:

The Court . . . failed to explain whether its decision is grounded in statutory construction of the Federal Rules of Civil or Appellate Procedure, federal common law, or due process. The Court’s reliance on nineteenth-century precedent . . . indicates that its decision cannot rest on a construction of the term “party” as it appears in the Federal Rules. The Court’s concern to protect individuals bound by a judgment, whose interests may be inadequately represented . . . might be rooted in . . . due process.

Leading Cases, *supra* note 148, at 336 n.45. However, the Court cited nineteenth-century precedent to illustrate nonparties ability to appeal, not to exemplify the construction of the term party.

¹⁸⁸ See *infra* notes 296-316 and accompanying text (showing other contexts in which the definition of “party” for purposes of standing to appeal has been unsettled).

not formal parties to a case sometimes may be deemed to have standing to appeal,¹⁸⁹ but this too is far less remarkable than the criticism suggests. The Court analogized objecting class members' right to appeal to that of (a) a would-be bidder appealing the lower court's refusal of his request to compel or complete a foreclosure sale; (b) a nonparty receiver and officer of the court who was permitted to appeal an order directing him to transfer funds to the court as part of the settlement of his accounts; and (c) a nonparty who was permitted to appeal an adjudication of contempt for failure to comply with a subpoena.¹⁹⁰ The court found the analogy in the fact that each was bound by the order he sought to appeal.¹⁹¹ The Court decided these three cases in 1864, 1877, and 1988, respectively,¹⁹² so there was nothing new about them. The Court merely identified a common characteristic that the *Devlin* appellants also shared. The dissenting Justices had no complaint with the outcomes in any of the earlier cases.¹⁹³ They purported to distinguish the earlier cases by reference to the fact that the earlier appellants were permitted to appeal from collateral orders to which they were parties, although they were not named parties to the underlying litigations.¹⁹⁴ The dissenters thus found these cases distinguishable from *Devlin*, where the appellants were being permitted to appeal from the final judgment.¹⁹⁵ However, the dissenters were playing fast and loose with the term "parties." The appellants in these other cases were no more parties to the underlying suit than are absent class members; indeed, one could argue that they were less so because absent class members are bound by the judgment if their due process rights are respected, while these other appellants were not so bound.¹⁹⁶ Certainly, the appellants in these other cases were

¹⁸⁹ *Devlin*, 536 U.S. at 16-17; *Leading Cases*, *supra* note 148, at 341 (criticizing Supreme Court for introducing uncertainties with potentially far-reaching consequences).

¹⁹⁰ *Devlin*, 536 U.S. at 7-8.

¹⁹¹ *Id.* at 7-8 (citing *Blossom v. Milwaukee & Chi. R.R. Co.*, 68 U.S. (1 Wall.) 655 (1864); *Hinckley v. Clinton & Springfield R.R. Co.*, 94 U.S. 467 (1877); and *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988), in that order).

¹⁹² *Id.*

¹⁹³ *Id.* at 16-17 (Scalia, J., dissenting).

¹⁹⁴ *Id.* at 8, 12-17 (Scalia, J., dissenting).

¹⁹⁵ *Id.* at 16-17 (Scalia, J., dissenting).

¹⁹⁶ *Id.* at 7-8.

not named as parties in the pleadings, nor had they become parties through intervention, substitution, or third-party practice.¹⁹⁷ To say that they were parties to the orders they sought to appeal is to use the term in another, looser sense. Thus, the dissenters' pronouncement that these precedents fail to illustrate that the Court has not restricted the right to appeal to named parties¹⁹⁸ is untenable. Moreover, the absent class members in *Devlin* were being treated analogously to these other appellants: They were being permitted to appeal the order that bound them.¹⁹⁹ What they appealed just happened to be the final judgment, or perhaps a penultimate order approving a settlement, rather than a collateral order.

While *Devlin*'s reasoning may be argued in favor of allowing additional persons to appeal who are not formal parties to a litigation,²⁰⁰ groundwork for these arguments already had been laid. Insofar as absent class members might seek to appeal other adverse rulings, nothing in *Devlin* prevents courts from distinguishing situations in which the named representative parties' interests *will* be aligned with those of the class members, justifying the conclusions that the absent class members are adequately represented, that case management and efficiency concerns favor leaving the litigation solely to the representatives, and that absent class members should be denied an independent right to appeal.

B. QUESTIONS LEFT OPEN BY *DEVLIN*

While *Devlin* certainly resolved one important question concerning the appeal rights of absent class members,²⁰¹ it did not decide them all. It did not decide what implications *Devlin* might have outside the context of appeal, nor is it crystal clear whether the

¹⁹⁷ See *id.* at 15 (Scalia, J., dissenting) (purporting to define "party" under well-established law).

¹⁹⁸ *Id.* at 16-17 (Scalia, J., dissenting).

¹⁹⁹ *Id.* at 7-8.

²⁰⁰ *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 81-82 (2d Cir. 2002), discussed *infra* notes 436-39 and accompanying text.

²⁰¹ *Devlin* has been followed in such cases as *In re Synthroid Marketing Litigation*. 325 F.3d 974, 976-77 (7th Cir. 2003) (holding health insurer class members to have standing to appeal attorneys' fee award to class counsel when they would receive more from settlement if appeal were successful).

holdings of some prior cases survive *Devlin*. Addressing some questions left open by *Devlin*, the Court of Appeals for the Tenth Circuit in *In re Integra Realty Resources, Inc.*, held: (1) that a defendant class representative who did not opt out of a proposed class settlement was a party with the right to appeal from the approval of the class settlement even if he did not file a notice of intention to appear and object at the fairness hearing, as the trial court had required of absent class members, and did not make such an in-person appearance and objection; (2) that nonintervening members of the defendant class who did *not* object to the proposed settlement did not have standing to appeal the court's approval even if they were *named* defendants prior to the class certification; (3) that a class member who filed written objections to the proposed settlement but did not file a notice of intention to appear and object at the fairness hearing as the trial court had required as a prerequisite to "in any way . . . contest[ing] the approval of the Settlement," lacked standing to appeal the court's approval; and (4) that objections to class certification, made at the fairness hearing of a proposed settlement, were sufficient to preserve the objecting defendants' right to challenge class certification on appeal from the order approving the class settlement.²⁰² The Court of Appeals for the Tenth Circuit rejected the argument that the right to opt out of a settlement forecloses the right to appeal the settlement, whether the objector is a class representative or a class member.²⁰³

For reasons elaborated earlier,²⁰⁴ I agree that a right to opt out should not foreclose the right to appeal a settlement. The court also was correct to hold that the class representative had a right to appeal from the settlement regardless of whether he filed a notice of intention to appear and object at the fairness hearing. Unquestionably, the representative has standing to appeal, and the trial judge certainly was free not to impose on the representative procedural requirements that it imposed on absent members.²⁰⁵ The court similarly was correct to treat absent members who no longer

²⁰² 354 F.3d 1246, 1255-58 (10th Cir. 2004).

²⁰³ *Id.* at 1257.

²⁰⁴ See *supra* notes 164-65 and accompanying text.

²⁰⁵ *In re Integra Realty Res.*, 354 F.3d at 1257-58.

had representative status as it treated all other class members.²⁰⁶ Technically, I would have said that such nonintervening members of the defendant class who did not object to the proposed settlement *did* have standing to appeal the court's approval but were barred from appealing by their failure to comply with the additional procedural requirements that the court imposed on class members who wanted to be able to appeal approval of the settlement. I have no quarrel with the court's decisions labeled (3) and (4), above.

Knisley v. Network Associates, Inc., decided after *Devlin*, presented a fact pattern in which the Ninth Circuit held that a class member who timely objected to the settlement and to the size of the attorneys' fee for class counsel did not have standing to appeal the attorneys' fee award.²⁰⁷ The class member originally appealed both the settlement and the fee but settled his challenge to the settlement.²⁰⁸ The court inferred from *Devlin* that unnamed class members who make timely objection to a fee award need not intervene to challenge that award on appeal.²⁰⁹ Harkening back to the Article III requirements for standing to appeal, the court noted that a class member who participates in a common fund settlement, that is, one in which both the class recovery and attorneys' fees are paid from the same fund, generally has standing to appeal the fee award because its reduction enhances the class recovery and thereby redresses an injury claimed by the class member.²¹⁰ Further, on essentially the same reasoning, a class member may have standing to appeal the fee even if he does not also appeal the settlement. Then, reduction of the fee may enhance the pot available for distribution to the class.²¹¹ Further, even a class member who chooses not to participate in the distribution of the recovery may have standing to appeal the settlement because vacation of the settlement would render moot the failure to submit a claim.²¹² Thus, appellant's decision not to submit a claim against

²⁰⁶ *Id.* at 1257.

²⁰⁷ 312 F.3d 1123, 1123 (9th Cir. 2002).

²⁰⁸ *Id.* at 1127.

²⁰⁹ *Id.* at 1126.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

the recovery would not have been fatal had he been appealing the settlement.

The settlement here, however, provided that, after attorneys' fees and other expenses were deducted, the balance of the recovery was to be distributed to the class members who submitted timely claim forms.²¹³ The appealing class member was not among that subgroup; he had reached an out of court resolution of his appeal of the settlement.²¹⁴ Having done so, he had no standing to challenge the settlement's provisions concerning distribution because he would not benefit if the fee award were reduced on appeal.²¹⁵ This was fatal to his appeal of the fee award because he suffered no injury traceable to the fee award that the court could redress.²¹⁶ The court concluded that the class member's complaint related to "a fee he didn't pay, in connection with a settlement that he forsook. His lack of standing should be apparent."²¹⁷ This is a well-reasoned opinion, closely examining a class member's stake in a decision and whether that decision aggrieves him.

Another post-*Devlin* case that raises some questions as to the scope of the Supreme Court's decision is *Rutter & Wilbanks Corp. v. Shell Oil Co.*²¹⁸ There, class member objectors appealed from the court's approval of a settlement of four related cases.²¹⁹ *Rutter* pushed the limits of *Devlin* in that objectors were members of only two of the three class actions involved, and plaintiffs in the third class action argued *inter alia* that the objectors could object to the settlement only as it affected the objectors' interests and sought dismissal of the appeal as it related to other claims.²²⁰ The Tenth Circuit, however, could "see no practical way to separate Objectors' . . . interests from those of the other class members without

²¹³ *Id.*

²¹⁴ *Id.* at 1125, 1127.

²¹⁵ *Id.* at 1126.

²¹⁶ *Id.* at 1127.

²¹⁷ *Id.* at 1128; see also *Duhaime v. John Hancock Mut. Life Ins. Co.*, 183 F.3d 1, 3-4 (1st Cir. 1999) (holding that absent class member had no right to have district court scrutinize and approve side agreement that did not affect class settlement, where there was no showing of fraud).

²¹⁸ 314 F.3d 1180, 1180 (10th Cir. 2002).

²¹⁹ *Id.* at 1182.

²²⁰ *Id.* at 1183 n.1.

upsetting the entire settlement fund.”²²¹ It found moreover that the objections, rejected by the district court, were directed at the entire settlement. The court therefore denied the motion to partially dismiss the appeals although the consequence was delay of distributions while the appeals were pending.²²² The court noted that, if it were to read *Devlin* to apply only to class settlements from which class members have no opportunity to opt out, it could dismiss this appeal because objectors did have the right to opt out of the settlement.²²³ Noting that neither Article III standing nor prudential standing considerations were at issue, however, it elected to leave that question as to the scope of *Devlin* to another time and proceed to the merits of the arguments.²²⁴

*P.A.C.E. v. School District of Kansas City*²²⁵ illustrates questions that may arise with respect to implications of *Devlin* outside the context of appeal. In a well-reasoned opinion, the district court refused to extend *Devlin* to permit class members to move for decertification, seek certification of a subclass, or seek disqualifica-

²²¹ *Id.* Another case distinguishing *Devlin* is *AAL High Yield Bond Fund v. Deloitte & Touche LLP*, 361 F.3d 1305, 1309-11 (11th Cir. 2004) (holding that nonclass-member, nonintervening objectors to class settlement of securities fraud case lacked standing to appeal settlement approval, emphasizing that would-be appellants were not effectively bound by judgment).

²²² *Rutter & Wilbanks*, 314 F.3d at 1183 n.1.

²²³ *Id.* at 1185 n.2; see also *Ludwig v. Gen. Am. Life Ins. Co. (In re Gen. Am. Life Ins. Co. Sales Practices Litig.)*, 302 F.3d 799, 800-01 (8th Cir. 2002) (upon remand of suit vacated and remanded in light of *Devlin*, commenting that interpreting *Devlin* not to apply to opt-out class actions certified under Fed. R. Civ. P. 23(b)(3) “has considerable merit,” but not resting its dismissal of appeal of settlement approval, brought by nonintervening class member, on that distinction; instead dismissing case as moot where objection was grounded in possibility that settlement might result in some class members receiving nothing, and no class members in fact had been denied recovery); *Ballard v. Advance Am.*, 79 S.W.3d 835, 837 (Ark. 2002), *cert. denied*, 538 U.S. 906 (2003) (holding class members whom court held not to have timely intervened not to have standing to appeal approval of settlement agreement or other decisions of trial court where they had had ability to opt out of settlement but elected to object to settlement and risk being bound by it). The Arkansas Supreme Court explicitly distinguished *Devlin* based on differences between the Federal and Arkansas Rules of Civil Procedure and because appellants in *Devlin* had not had the right to opt out. *Ballard*, 79 S.W.3d at 837. The court concluded that appellants’ election not to opt out left them without standing to appeal. *Id.*

²²⁴ *Rutter & Wilbanks*, 314 F.3d at 1185 n.2. In support of that approach, the court noted that the parties had not discussed this aspect of the scope of *Devlin* and that the court’s decision would be unfavorable to objectors, whether reached on the merits or as a result of appellants’ lack of ability to appeal. *Id.*

²²⁵ 312 F.3d 341, 341 (8th Cir. 2002).

tion of class counsel, without having moved to intervene.²²⁶ It concluded that “allowing non-intervening class members to challenge individual litigation decisions by class counsel during the pendency of the suit . . . pose[d] a far greater threat to the efficiency of class litigation than merely allowing individuals to appeal from settlement decisions.”²²⁷ Dismissing for lack of a final appealable order, the Eighth Circuit merely noted that *Devlin* was not on point.²²⁸

A pre-*Devlin* case that posed a slightly different question was *In re VMS Ltd. Partnership Securities Litigation*. There a member of an oversight committee, created by a class action settlement to examine proposed sales of defendant’s property in aid of settlement and to challenge those sales, sought to appeal the trial court’s postsettlement order confirming a particular sale.²²⁹ The Seventh Circuit refused to recognize that a member of both the class and the oversight committee had standing to appeal.²³⁰ The court concluded that oversight committee members, as such, were not parties and, hence, could not appeal.²³¹ After *Devlin*, one reasonably could argue that the in-court challenge to a proposed sale, a challenge that committee members were specifically empowered to make, rendered the committee members analogous to class members who timely object at a fairness hearing and gave committee members the right to appeal a decision rejecting their position. The Seventh Circuit instead analogized the oversight committee to a court-appointed expert who would not have standing to appeal, even after *Devlin*.²³²

²²⁶ *Id.* at 342.

²²⁷ *Id.*

²²⁸ *Id.* at 343. Additional possible implications of *Devlin* outside the context of appeal rights are discussed in *Leading Cases*, *supra* note 148, at 332, 336, 338-41.

²²⁹ 976 F.2d 362, 362 (7th Cir. 1992).

²³⁰ *Id.* at 366-69.

²³¹ *Id.*

²³² *Id.* at 366. The *VMS* court gave additional reasons for not recognizing the oversight committee members’ standing to appeal that were similar to reasons given by other circuits for not recognizing standing to appeal for unnamed class members who objected to settlement proposals but did not intervene. *Id.* at 368-69. The Supreme Court implicitly rejected those reasons in *Devlin* and presumably would do so in *VMS* unless the difference in circumstances strengthens the arguments that such appeals would undermine efforts to maintain manageability, or that the unnamed member has other alternatives. *Id.*

These cases illustrate the range of issues concerning the appeal rights of absent class members that *Devlin* leaves unresolved. However, *Devlin* sets the analytical approach that courts should take, and federal appeals courts are well-equipped to follow *Devlin*'s lead and explore its borders.

C. OTHER QUESTIONS OF STANDING TO APPEAL RAISED IN PROPOSED OR CERTIFIED CLASS ACTIONS

It has been established for some time that the proposed representative of a proposed class has standing to appeal a district court's refusal to certify the class, so long as the representative has a continuing interest.²³³ It also has been established that if the would-be representative chooses not to appeal the denial of class certification, class members may intervene to appeal the denial.²³⁴

Other significant recent decisions of the federal courts of appeals have held: (1) that a would-be class representative who was not an attorney and whose case was barred by the statute of limitations could not appeal the dismissal *pro se* on behalf of proposed class members;²³⁵ (2) that a litigant who timely opted out of a class action

²³³ *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 336-37 (1980) (holding that proposed class representatives could appeal denial of class certification despite defendant's effort to moot their individual claims and their interest in litigation, reasoning that appellants had continuing personal stake in shifting to class members portion of fees and expenses incurred in litigation); *see also* *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 403-04 (1980) (holding that proposed class representative could appeal denial of class certification despite mooting of his individual claim through plaintiff becoming no longer subject to challenged regulations, reasoning that appellant had continuing personal stake in obtaining class certification); *Hines v. Widnall*, 334 F.3d 1253, 1255 & n.3 (11th Cir. 2003) (recognizing putative class representatives' standing to appeal denial of class certification where, although putative representatives had settled their individual claims, settlement agreement preserved their right to appeal class certification denial); *Kerkhof v. MCI Worldcom, Inc.*, 282 F.3d 44, 54 (1st Cir. 2002) (holding similarly to *Geraghty* except that plaintiff's claim was mooted by settlement); *Culver v. City of Milwaukee*, 277 F.3d 908, 910 (7th Cir. 2002) (holding that would-be class representative had standing to appeal denial of class certification and dismissal of his claim as moot to avoid potential buying off of successive class representatives); *cf. Potter v. Norwest Mortgage, Inc.*, 329 F.3d 608, 614 (8th Cir. 2003) (holding that class representative who had settled his claims and who failed to establish clear interest in shifting costs and attorneys' fees to putative class did not have continuing personal stake, and hence that appeal of class certification denial was moot).

²³⁴ *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 396 (1977).

²³⁵ *Pajarito Plateau Homesteaders, Inc. v. United States*, 346 F.3d 983, 986 (10th Cir. 2003). The Tenth Circuit reasoned that a nonlawyer could not file a notice of appeal on

settlement but who, over her objection, was returned to the class and who was permitted to intervene to challenge the ruling that she had opted back into the class, lacked standing to appeal the orders approving the class settlement;²³⁶ and (3) that a named organizational plaintiff in a class action had standing, on behalf of its members, to appeal the district court's order governing distribution of unclaimed settlement funds, an order to which the organization had objected in the trial court.²³⁷

Another important group of cases recognizes the standing of class members to appeal injunctions (often antisuit injunctions) entered against them.²³⁸ The circumstances under which, and purposes for which, class-action courts have personal jurisdiction to enjoin class members are unsettled.²³⁹ Nonetheless, on numerous occasions class-action courts have entered injunctions against class members.²⁴⁰ Despite the general principle that only parties may appeal and the uncertainty surrounding whether class members should be considered parties for various purposes, federal appellate courts have entertained appeals by class members whom class-action courts enjoined. Examples include *Rodney v. Piper Capital Management, Inc.*, where the appeals court held that a nonintervening investor class member had standing to appeal the injunction against its proceeding with an arbitration, related orders, and the denial of its motion to stay the class action pending

another's behalf. *Id.* A falling out between counsel and the proposed representative had caused her to file the notice of appeal without an attorney. *Id.*

²³⁶ *Snell v. Allianz Life Ins. Co. of N. Am.*, 327 F.3d 665, 670 (8th Cir. 2003). The Eighth Circuit held that she had failed to show that the magistrate judge had erred in limiting the scope of her intervention, and the Eighth Circuit declined to address her challenges to the settlement approval because such action exceeded the limits placed on her intervention. *Id.* The court distinguished *Devlin* on the grounds that this case was an opt-out class action in which appellant had made no objections to the settlement below, either before settlement was final or after she was brought back into the class. *Id.* at 670 n.2.

²³⁷ *Travel Network, Ltd. v. United Air Lines, Inc. (In re Airline Ticket Comm'n Antitrust Litig.)*, 307 F.3d 679, 682 (8th Cir. 2002).

²³⁸ See *infra* notes 241-42 and accompanying text.

²³⁹ See Joan Steinman, *The Newest Frontier of Judicial Activism: Removal Under the All Writs Act*, 80 B.U. L. REV. 773, 855-83 (2000) (discussing federal courts' jurisdiction and ability to enjoin absent members of classes who, according to *Devlin*, are parties for some purposes but not for others).

²⁴⁰ See *infra* notes 241-42 and accompanying text.

arbitration,²⁴¹ and *Class Plaintiffs v. City of Seattle*, holding that nonintervening bondholder class members had standing to appeal approval of a settlement that barred them from filing or pursuing parallel actions against the defendants.²⁴² These decisions are indisputably correct. Enjoined class members are bound by the injunction unless and until they persuade a higher court to vacate or modify the injunction for reasons such as a lack of personal or subject-matter jurisdiction in the enjoining court, the merits of the case, or the equities of the situation. These class members are aggrieved by the injunction, and their grievance is redressable by the appeals court. Thus, they must be entitled to appeal the injunction.

As *Devlin* concludes, regardless of whether absent class members are treated as parties for other purposes, courts should recognize absent class members' standing to appeal all the orders and judgments that bind and aggrieve them whenever the appeals court can redress their grievances and they present an immediately appealable decision.²⁴³

²⁴¹ 71 F.3d 298, 300-01 (8th Cir. 1995).

²⁴² 955 F.2d 1268, 1276-77, 1285 (9th Cir. 1992); *see also* *Supreme Tribe of BenHur v. Cauble*, 255 U.S. 356, 357, 367 (1921) (approving ancillary jurisdiction over bill to restrain class members from prosecuting state court suits that would reopen questions settled in class action); *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189, 200-01 (3d Cir. 1993) (upholding preliminary injunction against prosecution and commencement of similar actions by absent members of plaintiff class where, after preliminary injunction was entered, district court determined that it had personal jurisdiction over class members and that injunction was necessary in aid of district court's jurisdiction); *In re Real Estate Title and Settlement Serv. Antitrust Litig.*, 869 F.2d 760, 762, 767-69, 771 (3d Cir. 1989) (holding that injunction against state court litigation by absent plaintiff class members violated Fifth Amendment due process rights of enjoined where their request to opt out of federal suit had been denied, they did not have minimum contacts with forum state, and they had not consented to class-action court's full jurisdiction); *In re Baldwin-United Corp.*, 770 F.2d 328, 338, 340 (2d Cir. 1985) (finding injunction justified to protect imminent settlement of consolidated cases and holding All Writs Act to grant authority to enjoin nonparties to action when needed to preserve court's ability to reach or enforce decision, so long as enjoined nonparties had threatened to frustrate federal court order, with actual notice of terms of injunction and opportunity to seek relief from it in district court); *infra* notes 357-439 and accompanying text (regarding uncertain limitations on power of federal courts to enjoin nonparties and regarding nonparties' rights to appeal injunctions directed against them or directly affecting them).

²⁴³ *Devlin v. Scardelletti*, 536 U.S. 1, 9-10 (2002).

V. SHAREHOLDERS IN DERIVATIVE SUITS

While *Devlin* held that objecting class members may appeal the approval of a settlement proposal without having intervened, the appeal rights of nonintervening shareholders in derivative suits continue to divide the courts of appeals. One oft-cited case, *Felzen v. Andreas*, holds that nonintervening shareholders may not appeal the approval of a settlement in a derivative action.²⁴⁴ Another line of cases, exemplified by *Bell Atlantic Corp. v. Bolger*, holds that they may appeal the approval of such settlements.²⁴⁵

Felzen relied in part on *Marino v. Ortiz*, in which the Supreme Court rebuffed the attempt by a total nonparty to appeal a consent decree approving a lawsuit's settlement and advised nonparties to seek to intervene for purposes of appeal.²⁴⁶ The Seventh Circuit viewed the Supreme Court as taking the positions that only parties may appeal and that appellate courts may not make exceptions to that rule.²⁴⁷ In the Seventh Circuit's opinion, shareholders in derivative suits are nonparties "who have no more right to speak for the firm or control its litigation decisions than bondholders or banks or landlords, all of whom have contractual interests that may be affected by litigation."²⁴⁸ The Seventh Circuit inferred from *Marino*

²⁴⁴ 134 F.3d 873, 874-75 (7th Cir. 1998), *aff'd by an equally divided Court sub nom.* Cal. Pub. Employees' Ret. Sys. v. *Felzen*, 525 U.S. 315 (1999). In *Kaplan v. Rand*, the Second Circuit noted that the "affirmance of *Felzen* by an equally divided Supreme Court demonstrates that the Court has yet to reject a rule that allows an appeal by a nonparty having an interest affected by the judgment of the trial court." 192 F.3d 60, 68 (2d Cir. 1999); *cf. Harker v. Troutman (In re Troutman Enters., Inc.)*, 286 F.3d 359, 364-65 (6th Cir. 2002) (holding that shareholders lacked standing to appeal decision of bankruptcy court that corporation's failure to disclose insurance policy on shareholder-officer of company that filed for bankruptcy estopped shareholders' claim to insurance proceeds; noting prohibition on shareholder initiation of actions to enforce corporate rights unless management refused to bring action, except when shareholders demonstrate direct personal interest in cause).

²⁴⁵ 2 F.3d 1304, 1308-10 (3d Cir. 1993); *see also Rosenbaum v. MacAllister*, 64 F.3d 1439, 1443 (10th Cir. 1995) (holding that nonintervening class member-shareholders could appeal award of attorneys' fees and expenses, opining that considerations that favor permitting nonintervening class member to appeal attorneys' fee award apply even more clearly to shareholders because they cannot opt out); *Cohen v. Young*, 127 F.2d 721, 724 (6th Cir. 1942) (holding that nonintervening shareholder had standing to appeal approval of settlement of derivative action).

²⁴⁶ *Felzen*, 134 F.3d at 874; *Marino*, 484 U.S. 301, 304 (1988).

²⁴⁷ *Felzen*, 134 F.3d at 874.

²⁴⁸ *Id.*

that nonintervening class members had no right to appeal and believed that any differences between derivative suits and class actions cut against recognizing a right to appeal by nonintervening shareholders.²⁴⁹ Whereas individual class members have a real grievance with the defendant, in derivative suits the corporation, not individual investors, is the injured party and has the right to sue and to recover.²⁵⁰ “Stockholders may *replace* the board [of directors] . . . , but they may not *displace* the board in litigation.”²⁵¹ The Seventh Circuit also noted that stockholders are not treated as parties in derivative litigation in that their citizenship does not count for purposes of diversity jurisdiction, and they are not allowed to opt out.²⁵² In its view, the failure of would-be appellant shareholders to become parties by intervening was fatal to their right to appeal.²⁵³

The *Felzen* court acknowledged that there was precedent to the contrary.²⁵⁴ Foreshadowing *Devlin* in one respect, it concluded that the Court of Appeals for the Third Circuit had misconceived the question as whether the shareholders had standing to appeal.²⁵⁵ The Seventh Circuit acknowledged that the shareholders had suffered an injury in fact in the reduction of the value of their stock.²⁵⁶ To be injured was not tantamount to being a party, however, and the Seventh Circuit read *Marino* to require party status in order to appeal.²⁵⁷

Devlin teaches that one can be a party for purposes of appeal without being named in the caption of the pleadings and recognizes that, in some circumstances, nonparties may appeal.²⁵⁸ Whether or not *Devlin* makes an exception to the usual requirement of party

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 875.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.* at 874.

²⁵⁴ *Id.* at 876 (citing *Bell Atl. Corp. v. Bolger*, 2 F.3d 1304 (3d Cir. 1993)).

²⁵⁵ *Id.*

²⁵⁶ *Id.* This injury may implicitly provide standing to do something. Injury to shareholders' stock value attributable to defendants' conduct would suggest standing to sue, however, whereas an injury attributable to the district court judgment would be necessary for standing to appeal.

²⁵⁷ *Id.*

²⁵⁸ *Devlin v. Scardelletti*, 536 U.S. 1, 7 (2002).

status (an exception the *Felzen* court believed federal courts are not free to make),²⁵⁹ *Devlin* held that nonintervening class members may appeal the settlement of a class action over their objection, and the Supreme Court waved off, as of little relevance, the facts that absent class members' citizenship is not considered in determining diversity jurisdiction and that class members may not be considered parties for some other purposes.²⁶⁰ *Devlin* did not limit its holding to members of opt-out classes and suggested, to the contrary, that an untaken opportunity to opt out might weaken the equitable argument in favor of allowing nonintervening class members to appeal a settlement.²⁶¹ Thus, the fact that nonintervening shareholders in derivative suits cannot opt out favors recognizing their right to appeal a settlement to which they timely objected. Most critical to the *Devlin* Court was that class members are bound by a class action settlement, as only parties and their privies are.²⁶² The same is true of shareholders. They are bound by the judgment predicated on a settlement of a derivative suit so long as they were adequately represented. Much of the undergirding of *Felzen* thus was undermined by *Devlin*. The possible rub remains that the derivative suit presses claims belonging to the corporation, not to the shareholders.²⁶³ Yet if shareholders derivatively can assert the corporation's claims, it is not clear that shareholders should not be able to appeal an adverse judgment in the suit. Indeed, there is no question that the shareholders who are running the litigation may do so.²⁶⁴ Other shareholders would seem to be similarly situated to

²⁵⁹ *Felzen*, 134 F.3d at 874.

²⁶⁰ *Devlin*, 536 U.S. at 9-10, 14.

²⁶¹ *Id.* at 10-11.

²⁶² *Id.* at 10.

²⁶³ See *supra* note 250 and accompanying text.

²⁶⁴ See, e.g., *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 93-94 (1991) (allowing plaintiff shareholder in derivative action to appeal grant of motion to dismiss for failure to plead with sufficient particularity facts excusing precomplaint demand on fund's board of directors); *Rosenberg v. XM Ventures*, 274 F.3d 137, 139 (3d Cir. 2001) (allowing shareholder who brought derivative action against corporation and irrevocable grantor trust shareholder to appeal dismissal of action with prejudice for failure to state claim upon which relief could be granted); *Bivens Gardens Office Bldg., Inc. v. Barnett Banks of Fla., Inc.*, 140 F.3d 898, 902, 906-12 (11th Cir. 1998) (allowing plaintiff shareholders to appeal dismissal of certain derivative claims that district court held they lacked RICO standing to assert); *Levner v. Prince Alwaleed*, 61 F.3d 8, 8-9 (2d Cir. 1995) (allowing plaintiff shareholder who brought derivative action to appeal dismissal of claim and grant of summary judgment to defendant).

absent class members because, in opposition to the suit-controlling shareholders and the defendants, other shareholders contend that the proposed, and then district court-approved, settlement is not fair and adequate.²⁶⁵ If timely-objecting but nonintervening absent class members may appeal the settlement of a class action, it is not at all clear why nonintervening shareholders in a derivative suit should not be able to appeal the settlement of a derivative suit.

Before *Devlin*, *Bell Atlantic Corp. v. Bolger* reasoned to the opposite conclusion from that reached in *Felzen*. The Third Circuit in *Bell Atlantic* found that the risk that litigation would become unwieldy if nonintervening shareholders could appeal derivative suit settlements to which they had objected was outweighed by the benefits of assuring the fairness and adequacy of such settlements.²⁶⁶ The court noted that individual shareholder injuries often are small and that shareholders often are “neither well-suited nor adequately motivated to closely monitor” their attorney-agent because they lack both the necessary information and the financial incentive to become adequately informed and to effectively monitor their attorney.²⁶⁷ This in turn enhances the risk that attorneys will urge upon the court a settlement that is more self-serving than well-serving of the shareholders’ and corporation’s interests.²⁶⁸ In addition, the absence of adversity between plaintiffs and defendants puts the court at an informational disadvantage in assessing the fairness and adequacy of a proposed derivative suit settlement.²⁶⁹ Given this backdrop and the important role objectors can play in alerting the court to information and perspectives relevant to a proposed settlement’s merits, the Third Circuit concluded that courts should hesitate to create further obstacles to shareholder challenges of such settlements.²⁷⁰ It thus decided that a shareholder

²⁶⁵ Courts typically use the “fair and adequate” standard. See, e.g., *Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1310 (3d Cir. 1993) (approving settlement under that standard); *In re Ikon Office Solutions, Inc., Secs. Litig.*, 194 F.R.D. 166, 178 (E.D. Pa. 2000) (approving settlement as “fair, adequate, and reasonable”). See generally 7C WRIGHT, MILLER, & KANE, *supra* note 59, § 1839, at 182.

²⁶⁶ 2 F.3d 1304, 1310 (3d Cir. 1993).

²⁶⁷ *Id.* at 1309.

²⁶⁸ *Id.* at 1310.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

who had voiced objections at the hearing on a proposed and later approved settlement was entitled to appeal the rejection of his objections.²⁷¹

Several commentators have written extensively on this subject.²⁷² Professor Susanna Kim endorsed the *Bell Atlantic* approach.²⁷³ She argued that, although the corporate interests asserted in a derivative suit are technically distinguishable from shareholders' individual interests, realistically, shareholder interests are inextricably intertwined with those of the corporation through shareholders' ownership.²⁷⁴ Moreover, minority shareholders, whose interests typically are represented in derivative litigation,²⁷⁵ cannot opt out

²⁷¹ *Id.*; see also *Kaplan v. Rand*, 192 F.3d 60, 66-68 (2d Cir. 1999) (holding that nonintervening shareholder in derivative suit had standing to appeal rejection of his timely objections to award of legal fees made to plaintiff's counsel, notwithstanding that insurance company would pay fees, where interests of corporation and its shareholders would be affected through impact on insurance premiums and deterrent effect on future lawsuits, observing that it would make little sense to invite shareholder to file objections and deny him right to challenge district court's ruling thereon, and explicitly declining to follow *Felzen*); cf. *Westwood Cmty. Two Ass'n, Inc. v. Barbee (In re Westwood Cmty. Two Ass'n, Inc.)*, 293 F.3d 1332, 1335-36 (11th Cir. 2002) (holding that unofficial committee of homeowners had standing to appeal adverse orders of bankruptcy court that allowed claims against debtor homeowners' association for punitive damages and attorneys' fees, concluding that they were persons aggrieved within meaning of prudential standing requirement because of their direct financial stake).

²⁷² See generally Susanna M. Kim, *Conflicting Ideologies of Group Litigation: Who May Challenge Settlements in Class Actions and Derivative Suits*, 66 TENN. L. REV. 81 (1998) (arguing shareholders' interests intertwined with corporation's interests); Rory Zack Fazendeiro, Note and Comment, *Felzen v. Andreas: The Seventh Circuit Shuts Its Doors to Derivative-Suit Appeals by Unnamed Shareholders*, 4 ROGER WILLIAMS U. L. REV. 533 (1999) (arguing against intervention requirements as unnecessary burden on unnamed shareholders); Kenneth J. Munson, Note, *Standing to Appeal: Should Objecting Shareholders Be Allowed to Appeal Acceptance of a Settlement?*, 34 IND. L. REV. 455 (2001) (arguing that Supreme Court should require intervention in order to appeal from decision in derivative suit); Cecilia Lacey O'Connell, Comment, *The Role of the Objector and the Current Circuit Court Confusion Regarding Federal Rule of Civil Procedure 23.1: Should Non-Named Shareholders Be Permitted to Appeal Adverse Judgments*, 48 CATH. U. L. REV. 939 (1999) (recommending that unnamed shareholders be required to appear but not to intervene in derivative suit to preserve right to appeal).

²⁷³ Kim, *supra* note 272, at 292.

²⁷⁴ *Id.* at 114-15; see also *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 389-97 (1970) (holding that minority shareholders who sued derivatively and on behalf of class of minority shareholders were entitled to award of litigation expenses and attorneys' fees because they conferred benefit on corporation and other shareholders); *Rosenbaum v. MacAllister*, 64 F.3d 1439, 1444 (10th Cir. 1995) (endorsing proposition that shareholders are real beneficiaries of derivative litigation because corporation is alter ego of shareholders).

²⁷⁵ As Kim notes, "[a] derivative suit would be unnecessary if the majority shareholders

and, like absent class members, are parties for purposes of being bound.²⁷⁶ At the same time, plaintiffs, defendants, and the court all have incentives to settle the litigation.²⁷⁷ A settlement may allow parties on both sides to be reimbursed for their legal expenses, and defendant officers and directors to be indemnified by the corporation, and will remove the case from the court's docket.²⁷⁸ The agency costs, collective action problems, and information deficits noted by the *Bell Atlantic* court are present, and the risk of inadequate and collusive settlements is therefore substantial.²⁷⁹ Professor Kim argued that imposition of an intervention requirement would be counterproductive because of the uncertainties surrounding shareholders' ability to intervene given the prolonged lack of notice of the action and the requirements that intervention be timely and that shareholders show that they are not being adequately represented.²⁸⁰ She also noted that shareholders who file objections "are

wished to assert a corporate cause of action because the majority shareholders, by virtue of their control of the board of directors, could have the corporation pursue the action directly."

Kim, *supra* note 272, at 116.

²⁷⁶ *Id.* at 117.

²⁷⁷ *Id.* at 119-20.

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 121-27. Other writings concerning agency costs, collective action, and informational difficulties in derivative suits include John C. Coffee, Jr., *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, 48 LAW & CONTEMP. PROBS. 5 (1985); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 3, 8-9, 44-48 (1991) (noting geographic dispersal, lack of organization, and relatively small economic stakes as contributing to lack of monitoring; also emphasizing plaintiff counsel's conflict of interest because attorneys' fees typically are based on counsel's contribution to creation of common fund or on lodestar that focuses on hours times rate).

²⁸⁰ Kim, *supra* note 272, at 128-30. I believe that Professor Kim exaggerates the difficulties facing shareholders who would like to intervene. For example, while intervenors must show that they are not being adequately represented in order to intervene as of right, it is not true that "to grant the intervention request, the court essentially has to reverse itself and find that the named plaintiff is not an adequate representative." *Id.* Just as in class actions, a lesser showing of inadequacy is required to intervene as of right than would be required to abort the derivative suit, as is evidenced by the Rules' contemplation of intervention into an ongoing class action or derivative action. See FED. R. CIV. P. 23(d) (authorizing court to notify class members of opportunity to intervene); FED. R. CIV. P. 23(d)(2) advisory committee's note (stating that notice may encourage interventions to improve representation of class); FED. R. CIV. P. 23.1 advisory committee's note (noting court's inherent power to provide for conduct of derivative actions, including power to require that any appropriate notice be given to shareholders). Some of the 1966 amendments to Rule 23 broadened the scope of intervention and thereby rejected the decision in *Sam Fox Publishing Co. v. United States*. See *Sam Fox Publ'g Co. v. United States*, 366 U.S. 683, 691 (1961)

persons who [already] have overcome the strong free-rider effects and incentives not to expend time or resources to monitor the derivative litigation.”²⁸¹ Allowing those shareholders to appeal will tend to make plaintiffs’ and defendants’ attorneys wary of proposing settlements that can easily be upset.²⁸² The downside is that the costs of finalizing a settlement will tend to rise, but the price in efficiency is outweighed by the gains in substantive fairness to shareholders.²⁸³

As a newcomer to the debate, but one who has some perspective on rights to appeal, I agree with the courts that do not require shareholders to intervene in derivative suits as a prerequisite to their appealing from approval of a settlement. Adequately represented shareholders are bound by judgments entered by virtue of settlements of shareholder derivative suits.²⁸⁴ Based upon *Devlin*

(indicating that intervention as of right presupposes that intervenor’s interests are not or may not be adequately represented, as necessary to bind intervenor by judgment, and holding that if applicants were bound by judgment against American Society of Composers, Authors, and Professors (ASCAP), “it can only be because [ASCAP’s] representation has been adequate, precluding any right to intervene”). Rule 23.1 was modeled on Rule 23 and was added to the Rules on the same date as the aforementioned amendments were added to Rule 23. FED. R. CIV. P. 23.1 advisory committee’s note.

²⁸¹ Kim, *supra* note 272, at 132.

²⁸² *Id.* at 133.

²⁸³ *Id.* at 132-35; see *Fazendeiro, supra* note 272, at 572-80 (arguing that shareholders in derivative suit have stronger argument in favor of appeal upon objection than do class members, citing policies to minimize agency costs and discourage managerial breaches of fiduciary duties, shareholders’ inability to opt out, risk of plaintiffs’ attorneys placing their own interests over those of shareholders, and risks of collusive settlements); O’Connell, *supra* note 272, at 988 (arguing that “requiring an appearance . . . within . . . the settlement hearing to preserve the right to appellate scrutiny . . . avoids unnecessary litigation costs, preserves the judiciary’s limited resources, and ensures access to all relevant information needed to formulate a fair and judicious settlement”). But see *Munson, supra* note 272, at 465-77 (concluding that courts should require shareholders to intervene in derivative suits as prerequisite to their having right to appeal settlement or related orders, as serving efficiency, being more true to nature of derivative actions, avoiding improper challenges to representation by shareholder plaintiffs, being more consistent with *Marino v. Ortiz*, 484 U.S. 301 (1988) (*per curiam*), and not being unduly burdensome).

²⁸⁴ See *Nathan v. Rowan*, 651 F.2d 1223, 1226-27 (6th Cir. 1981) (holding derivative suit barred by res judicata where similar claims in prior derivative suit had been dismissed with prejudice, as time-barred; noting that in derivative suits parties and their privies include corporation and shareholders); *Cramer v. Gen. Tel. & Elecs. Corp.*, 582 F.2d 259, 266-69 (3d Cir. 1978) (holding claims asserted in derivative action barred by res judicata and collateral estoppel in view of dismissal on merits of identical claim in prior action brought by different shareholder who provided adequate representation, where court considered corporation to be actual plaintiff in both; but refusing to give preclusive effect to distinct claim that had been

and other precedents, there is a strong argument that shareholders have standing to appeal from such settlement approvals because shareholders are bound as parties or privies.²⁸⁵ The shareholders suffer an injury from a disadvantageous trial court judgment that satisfies the case or controversy requirement and that the court of appeals has the ability to redress.²⁸⁶ Moreover, shareholders meet prudential standing requirements, as evidenced by their ability to bring the derivative suit in the first instance.²⁸⁷ Thus, the debate should not be over standing but over whether there are sufficient reasons to place the procedural barrier of an intervention requirement between shareholders and their ability to appeal from a settlement approval and perhaps from other orders and aspects of the judgment in a derivative suit.

I believe that, as in class actions, courts should not require intervention by objecting shareholders in derivative suits. If, as *Devlin* held, absent class members are to be considered parties for purposes of the right to appeal a settlement-approval,²⁸⁸ then objecting absent shareholders in a derivative suit also should be considered parties for purposes of appeal. Both groups are equally bound by a judgment. Moreover, even if absent shareholders are not considered parties, their position is analogous to that of the nonparties whose right to appeal the *Devlin* Court acknowledged.²⁸⁹ The settlement approval amounts to a final decision sufficient to trigger a right to appeal. The shareholders would be permitted to appeal only that aspect of the court's order affecting them, that is, the court's decision to "disregard [their] objections."²⁹⁰ The shareholders' right to appeal cannot be effectuated by the representative shareholders who advocated the settlement because those lead plaintiffs' interests diverge from the interests of the objecting

voluntarily dismissed with prejudice without Rule 23.1-required notice to other shareholders).

²⁸⁵ See *Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002) (emphasizing that because class members are bound by settlement, they must be allowed to appeal approval of settlement if they objected at fairness hearing).

²⁸⁶ *Id.* at 6-7.

²⁸⁷ *Id.* at 7.

²⁸⁸ *Id.* at 8-9.

²⁸⁹ *Id.* at 8.

²⁹⁰ *Id.* at 9.

shareholders.²⁹¹ Moreover, because objecting shareholders have no right to opt out, appeal is their only way to protect themselves from an unacceptable disposition that a reviewing court might find legally inadequate.

While allowing objecting shareholders to appeal without having intervened might marginally increase an appellate court's burden in managing the suit, there is no apparent reason why the Supreme Court should find such appeals in the derivative suit context any more problematic than it found them in the class action realm. Similarly, little would be gained by imposition of an intervention requirement. Shareholders who objected at the fairness hearing should have little difficulty intervening.²⁹² Furthermore, if an objector was not a shareholder during the pertinent time period,²⁹³ if his objection was successful so that he has no appealable grievance, if his objection was untimely so that he does not qualify to appeal, or if there is a need to consolidate related appeals, the problem would be easily managed by the courts of appeals, and in some of these instances, the likelihood of appeal would be small.

²⁹¹ See *supra* notes 157-74 and accompanying text (noting that class members can appeal only orders as to which members were not adequately represented by class representatives).

²⁹² Although shareholders may be unaware of a derivative suit until the court notifies them of a proposed settlement, if the shareholders must move to intervene, shareholder objectors should easily meet the requirements of FEDERAL RULES OF CIVIL PROCEDURE 24(a)(2) that they: (1) claim an interest relating to the property or transaction that is the subject of the action; (2) are so situated that disposition of the action may, as a practical matter, impair or impede their ability to protect that interest; and (3) that their interests are not adequately protected by the existing parties, who advocate the settlement that they oppose. FED. R. CIV. P. 24(a); cf. *Webcor Elecs. v. Whiting*, 101 F.R.D. 461, 466-67 (D. Del. 1984) (stating that if court disapproved settlement proposal based on objections, it would more than likely grant objector's motion to intervene in derivative suit).

²⁹³ *Rosenbaum v. MacAllister*, 64 F.3d 1439, 1443 n.2 (10th Cir. 1995)

To have standing to sue as a representative plaintiff in a shareholder derivative action, a person must have owned stock at the time of the complained of acts (the "contemporaneous ownership rule"), and "must be a shareholder of the defendant corporation at the time suit is brought." . . .

To merely object to the settlement of a derivative action, however, the objector apparently need only own stock in the corporation at the time of the settlement hearing, and appear at the settlement hearing to raise his or her objections.

Id. (citations omitted); see 7C WRIGHT, MILLER, & KANE, *supra* note 59, § 1839, at 182 n.23 ("A shareholder who had no standing to bring a derivative suit or to intervene, in light of the time at which he acquired his shares, had . . . status of an objector. . ."). The time at which a shareholder had to own shares to be entitled to object at the fairness hearing would be a question of law that the court of appeals would have to decide *de novo*.

Finally, as with Rule 23, the structure of Rule 23.1 does not require intervention for purposes of appeal.²⁹⁴ To paraphrase *Devlin*, just as derivative suit procedure allows absent shareholders to object to a settlement at the fairness hearing without first intervening, it similarly should allow absent shareholders to appeal the decision to overrule their objections without their having intervened.²⁹⁵ Fairer and more adequate settlements likely would result, with little loss of efficiency.

VI. DE FACTO PARTIES AND QUASI-PARTIES

Courts occasionally use the terms “de facto party” and “quasi-party.”²⁹⁶ De facto party refers to “a non-party which an appellate court decides to treat as if it had been a party.”²⁹⁷ Courts tend to be critical of the notion of a de facto party and to reject its applicability to facts before them,²⁹⁸ although courts sometimes describe someone as a de facto party and attribute significance to that rubric or to what it represents.²⁹⁹ In at least one instance, an entity’s de facto

²⁹⁴ FED. R. CIV. P. 23.1.

²⁹⁵ *Devlin v. Scardelletti*, 536 U.S. 1, 14 (2002).

²⁹⁶ See, e.g., *Devlin*, 536 U.S. at 8 (describing receiver in *Hinckley v. Gilman, Clinton, & Springfield R.R.*, 94 U.S. 467, 469 (1876) as able to appeal because he was party in sense that he was bound by compensation order); *Williams v. Morgan*, 111 U.S. 684, 698-99 (1884) (referring to intervenor-appellants, intervenor-appellees, and litigants such as receiver in *Hinckley* as quasi-parties).

²⁹⁷ *Peralta v. U.S. Attorney’s Office*, 136 F.3d 169, 174 (D.C. Cir. 1998).

²⁹⁸ See, e.g., *Peralta*, 136 F.3d 169, 174-75 (refusing to recognize existence of de facto party status in general, and holding that Department of Justice (DOJ) had not established that it would qualify as de facto defendant if such status were recognized where record did not show that DOJ participated as party in district court); *Int’l Ass’n of Machinists Nat’l Pension Fund v. Estate of Dickey*, 808 F.2d 483, 485 (6th Cir. 1987) (observing that district court had invented category of de facto party and that persons cannot be made parties ex post facto by “judicial legerdemain”); *In re Murphy*, 560 F.2d 326, 332-33 n.10 (8th Cir. 1977) (rejecting argument that relation between law firms and parties transformed firms into de facto parties, thus rendering orders of civil contempt against them nonappealable); *United States v. Michigan*, 940 F.2d 143, 166 (6th Cir. 1991) (criticizing allowance of “litigating amicus curiae” as de facto named party because to allow such would potentially convert trial courts into free-wheeling forums of special interest groups that could frustrate expeditious resolution of disputes).

²⁹⁹ Cf. *Remington Rand Corp.-Del. v. Bus. Sys., Inc.*, 830 F.2d 1256, 1259 (3d Cir. 1987) (holding that person’s de facto party status for purposes of right to appeal could not “retroactively transform him into a named defendant encompassed by [an] order to show cause . . . especially . . . [as] this determination was made in an appeal that decided nothing on the merits”).

party status was among the reasons the court denied the entity's motion to intervene; ironically, the court of appeals then denied the entity standing to appeal, relying on its affirmance of the denial of intervention and not explicitly addressing whether de facto party status itself conferred a right to appeal.³⁰⁰ On other occasions de facto party status was held to confer a right to appeal.³⁰¹

The term quasi-party has had wider and more varied usage, although courts used it far more often in the distant past than in recent times.³⁰² The intermediate federal courts of appeals appear to have used the term only five times since 1980 and used it most often between 1880 and 1920.³⁰³ Between 1863 and 1923, the Supreme Court used the term to refer to sureties,³⁰⁴ to persons who were purchasers at a foreclosure sale,³⁰⁵ and to bondholders who had an interest in the fixing of trustees' compensation.³⁰⁶ In the last thirty years, the federal courts of appeals have described as quasi-parties a special master who challenged the order setting his compensation,³⁰⁷ a state indemnitor for the judgment in a § 1983 case whom the § 1983 plaintiff sought to preclude from taking an

³⁰⁰ *United States v. BASF-Inmont Corp.*, No. 93-1807, 1995 U.S. App. LEXIS 9158, at *9 (6th Cir. Apr. 18, 1995) (affirming denial of motion to intervene made by Citizens Union (CU) on ground that CU had participated in litigation as de facto party and district court had considered its objections to consent decree; concluding that, due to denial of intervention, CU had no right to appeal consent decree).

³⁰¹ *See, e.g., Remington Rand Corp.-Del.*, 830 F.2d at 1259 (referring to unpublished opinion, *Remington Rand Corp. v. Bus. Sys., Inc.*, Nos. 85-5151, -5657, -5706, slip op. at 13-19 (3d Cir. Dec. 30, 1985) (dismissing appeal for want of appellate jurisdiction based on holding individual to be de facto party for purposes of right to appeal contempt order)).

³⁰² It appears that the Supreme Court last used the term in 1923. *See Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 427 (1923) (denominating as quasi-parties sureties who had made themselves directly liable upon summary process for prompt payment of decree).

³⁰³ These assertions are based upon a LEXIS search for the terms "quasi party," "quasi-party," and "quasi parties" in the Federal Court Cases Combined database. LexisNexis, at <http://www.lexisnexis.com> (last search Oct. 18, 2004).

³⁰⁴ *See, e.g., Toledo Scale*, 261 U.S. at 427 (describing sureties as quasi-parties); *Pease v. Rathbun-Jones Eng'g Co.*, 243 U.S. 273, 279 (1917) (noting that sureties become quasi-parties against whom judgments may be rendered on their bonds); *accord*, *Blossom v. Milwaukee & Chi. R.R. Co.*, 68 U.S. (1 Wall.) 655, 656 (1863) (stating that sureties and receiptors under writs of attachment become quasi-parties against whom judgments may be rendered).

³⁰⁵ *Blossom*, 68 U.S. (1 Wall.) at 656 (holding that bidder at foreclosure sale was entitled to sue to have sale completed and confirmed and to appeal from order refusing relief sought).

³⁰⁶ *Williams v. Morgan*, 111 U.S. 684, 698 (1884) (holding bondholders entitled to intervene and to appeal from adverse decision).

³⁰⁷ *Cordova v. Pac. States Steel Corp.*, 320 F.3d 989, 995-96 (9th Cir. 2003).

offset against the judgment,³⁰⁸ and a creditor who presented a claim to a receiver and who sought to apply to a court for adjudication of his claim when the receiver rejected the claim in whole or in part.³⁰⁹ Legal commentators have observed that quasi-party status has been attributed to absent members of classes represented in litigation³¹⁰ and to shareholders in derivative suits.³¹¹ Commentators also have noted the occasional conferral of quasi-party powers on governmental and other amici curiae.³¹²

In a number of cases, the courts have held that those dubbed quasi-parties had standing to appeal.³¹³ Courts have permitted court-appointed agents, whom they referred to as quasi-parties, to

³⁰⁸ *Hankins v. Finnel*, 964 F.2d 853, 863 (8th Cir. 1992) (Beam, J., dissenting).

³⁰⁹ *Commodity Futures Trading Comm'n v. Chilcott Portfolio Mgmt., Inc.*, 725 F.2d 584, 586 (10th Cir. 1984) (citing RALPH EWING CLARK, A TREATISE ON THE LAW AND PRACTICE OF RECEIVERS § 541(a) (3d ed. 1959) in dicta).

³¹⁰ See Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213, 244 (1990) (noting that "the quasi-party status of absentees allowed the court to fashion a decree that took account of absentee rights and duties in the face of a technical rule that prevented equity courts from acting . . . on the rights or duties of 'strangers' to a suit," and "meant that [absent class members] were not subject to the restrictive intervention rules applicable to 'strangers'") (citations omitted); Geoffrey C. Hazard, Jr. et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1904 (1998) (referring to 1884 case describing both absent plaintiff-creditor class members and absent defendant-shareholder class members as quasi-parties, with consequence that former could receive benefits of decree but latter could not be prejudiced by it).

³¹¹ See Roslyn Falk, *May a Shareholder Who Objects to a Proposed Settlement of a Derivative Action Appeal an Adverse Decision? A Report on California Public Employees' Retirement System v. Felzen*, 25 DEL. J. CORP. L. 235, 258 (2000) (noting that SEC "points to a long history of treating objecting members of a class as a type of 'quasi part[y]'" (alteration in original) (citation omitted); O'Connell, *supra* note 272, at 983 ("In the derivative context, the quasi-party doctrine could expressly grant to the non-named shareholders the right of settlement approval.") (citation omitted).

³¹² See Thomas C. Arthur & Richard D. Freer, *Close Enough for Government Work: What Happens When Congress Doesn't Do Its Job*, 40 EMORY L.J. 1007, 1011 (1991) (referring to courts that permitted intervention by persons who lacked even colorable legal interest in case, and describing this as intervention of quasi-parties who are glorified amici curiae); Michael K. Lowman, Comment, *The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?*, 41 AM. U. L. REV. 1243, 1265, 1288 (1992) (noting bestowal of quasi-party powers on governmental amici curiae); Nancy Bage Sorenson, Comment, *The Ethical Implications of Amicus Briefs: A Proposal for Reforming Rule 11 of the Texas Rules of Appellate Procedure*, 30 ST. MARY'S L.J. 1219, 1232-34 (1999) (referring to government having been afforded quasi-party status, and exercising power similar to that of named party, with authority to submit pleadings, evidence, arguments, and to initiate proceedings for injunctive relief and for contempt of court).

³¹³ See *infra* notes 315-16 and accompanying text.

appeal orders directed at or directly affecting them.³¹⁴ In *Hinckley v. Gilman, Clinton, and Springfield Railroad Co.*, a receiver was permitted to appeal an order relating to the settlement of his accounts, the Supreme Court noting that the order setting his compensation made him subject to the jurisdiction of the court, with the right to contend against claims made against him.³¹⁵ For that purpose, the receiver occupied the position of a party to the suit.³¹⁶ Similarly, in *Cordoba v. Pacific States Steel Corp.*, the Ninth Circuit held that a special master, whom it had ordered to disgorge money that he had charged for legal services and monies he had overbilled for the services of a legal assistant, had standing to appeal that order.³¹⁷

The notions of de facto parties and quasi-parties are largely obsolete, and the decisions granting such persons standing to appeal can be subsumed into the categories of nonparties whom courts typically permit to appeal. Therefore, little comment is necessary at this point. It should be noted, however, that all the de facto parties and quasi-parties held to have standing to appeal suffered a cognizable injury from the order or judgment they sought to appeal, and their injuries were redressable. Hence, they satisfied the Article III requirements of injury, causation, and redressability.

VII. NONPARTIES

The general rule, although subject to many exceptions, is that nonparties have no standing to appeal from judgments or orders entered in litigation. The Supreme Court has applied this general rule on many occasions,³¹⁸ as have the federal courts of appeals.³¹⁹

³¹⁴ See *infra* notes 315-16 and accompanying text.

³¹⁵ 94 U.S. 467, 469 (1876).

³¹⁶ *Id.*

³¹⁷ 320 F.3d 989, 995 n.2 (9th Cir. 2003).

³¹⁸ *E.g.*, *Karcher v. May*, 484 U.S. 72, 77 (1987) (applying general rule that "one who is not a party or has not been treated as a party to a judgment has no right to appeal therefrom"); *United States ex rel. Louisiana v. Jack*, 244 U.S. 397, 402 (1917) (ruling against state based on principle that person not party or privy to record may not appeal judgment); *Grant v. United States*, 227 U.S. 74, 78-79 (1913) (denying standing to appeal to person who had not been subpoenaed and who had not been held in contempt, concluding that his appearance before court in connection with grand jury proceedings concerning his attorney did not make him party); *In re Leaf Tobacco Bd. of Trade*, 222 U.S. 578, 581 (1911) (denying various writs

The Supreme Court has held, however, that a nonparty may challenge a court's judgment based on lack of subject-matter jurisdiction when appealing a civil contempt citation.³²⁰ Moreover, a number of federal appellate circuits recite and hold that

sought by petitioner because petitioner was not party, and character of interests petitioner alleged did not authorize it to assail action of trial court that had been accepted by parties); *Ex parte Cockcroft*, 104 U.S. 578, 578-79 (1881) (denying petition for mandamus requiring court of appeals to allow appeal by petitioner where petitioner was not party to suit, had not been treated as party, had not sought to intervene, had not had right to intervene, had only remote and contingent interest in setting aside order, and had been heard "as a matter of favor" and to fully inform court on issue); see also *Martin v. Wilks*, 490 U.S. 755, 769-70, 771 (1989) (Stevens, J., dissenting) (observing that parties to litigation may appeal adverse judgment, whereas "persons who merely have the kind of interest that may as a practical matter be impaired by the outcome of a case . . . have a right to intervene . . . or [] may be joined as parties against their will. But . . . [o]ne of the disadvantages of sideline-sitting is that the bystander has no right to appeal from a judgment no matter how harmful," and that "[t]he fact that one of the effects of a decree is to curtail the job opportunities of nonparties does not mean that the nonparties have been deprived of legal rights or that they have standing to appeal from that decree without becoming parties.").

³¹⁹ *E.g.*, *Cal. Dep't of Toxic Substances Control v. Commercial Realty Projects*, 309 F.3d 1113, 1120-21 (9th Cir. 2002) (holding that cities not party to cost recovery action under CERCLA lacked standing to appeal approval of consent decree among parties where cities asserted no extraordinary circumstances); *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 802, 804 (9th Cir. 2002) (noting limited circumstances in which nonparties have standing to appeal, and holding that neither nonparty wholesale generators of electricity to which plaintiff allegedly owed millions of dollars nor trade association for local companies had standing to appeal stipulated judgment between plaintiff utility and defendant public utility commissioners); *Wieburg v. GTE Southwest Inc.*, 272 F.3d 302, 305 (5th Cir. 2001) (dismissing appeal of judgment by bankruptcy trustee because trustee had not been party below and had not sought to intervene in appeal); *Sheldon v. PHH Corp.*, 135 F.3d 848, 855-56 (2d Cir. 1998) (holding that entity that court had refused to substitute as defendant lacked standing to appeal ruling concerning sustainability of plaintiffs' claims because entity was not party and court's conclusions thus were not binding upon it); *Jenkins v. Missouri*, 967 F.2d 1245, 1247-48 (8th Cir. 1992) (holding that nonparty property owners had no standing to appeal settlement agreement providing for increase in property tax to pay salary increases for school district employees); *United States v. LTV Corp.*, 746 F.2d 51, 52-55 (D.C. Cir. 1984) (holding that corporation that had been permitted to participate in proceedings to elicit comments on proposed antitrust settlement had no standing to appeal judgment approving merger where corporation was not party and had declined opportunity to intervene).

³²⁰ *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 74 (1988) (holding that nonparty witnesses could defend against civil contempt adjudication by challenging district court's subject-matter jurisdiction); *Martin*, 490 U.S. at 772 n.5, 773 n.8, 775 (Stevens, J., dissenting) (noting that "strangers to a decree are sometimes allowed to challenge the decree by showing that the court was without jurisdiction[.]" citing 1 A. FREEMAN, JUDGMENTS § 318, 633 (5th ed. 1925); and citing JAMES & HAZARD § 12.15, 681 (3d ed. 1985) for proposition that, if judgment between others places in jeopardy one's legal status or claims to property, one may seek aid of court of equity if one can show that judgment was void for lack of subject-matter jurisdiction or that judgment was product of fraud directed at petitioner).

nonparties may appeal when they have an interest that is affected by a court order or judgment, they participated in the district court proceedings, and the equities favor hearing their appeal.³²¹ Other federal circuits purport to require one or more but fewer than all of these factors, although in practice they appear to look to all three.³²² Also notable is that being a nonparty who lacks standing to appeal sometimes has favorably influenced courts' decisions to grant mandamus, thereby affording theoretically nonappellate relief, courtesy of the court of appeals.³²³

³²¹ See, e.g., *Communications Workers of Am. v. N.J. Dep't of Personnel*, 282 F.3d 213, 219 (3d Cir. 2002) (phrasing interest requirement in terms of "a stake in [the] proceedings discernable from the record," rejecting nonparty's attempt to appeal enforcement of settlement agreement where nonparty chose not to be included in settlement negotiations and to play no part in enforcement proceedings, notwithstanding nonparty's arguments that its participation would have been futile and that its involvement in earlier phases of case sufficed); *Sec. & Exch. Comm'n v. Forex Asset Mgmt. LLC*, 242 F.3d 325, 329 (5th Cir. 2001) (invoking principle recited in text); *Northview Motors, Inc. v. Chrysler Motors Corp.*, 186 F.3d 346, 349 (3d Cir. 1999) (invoking principle recited in text); *EEOC v. La. Office of Cmty. Servs.*, 47 F.3d 1438, 1442 (5th Cir. 1995) (invoking principle recited in text); *Binker v. Pennsylvania*, 977 F.2d 738, 745 (3d Cir. 1992) (looking to stake, participation, and equities); *EEOC v. Pan Am. World Airways, Inc.*, 897 F.2d 1499, 1504 (9th Cir. 1990) (invoking principle recited in text and hearing appeal by former employees whom district court denied permission to participate in age discrimination suit against employer and whom consent decree purported to bar from future litigation).

³²² *Lynch*, 307 F.3d at 804 (holding that neither nonparties to which plaintiff allegedly owed millions of dollars nor trade association for local companies had standing to appeal stipulated judgment between plaintiff utility and defendant public utility commissioners because nonparty has standing to appeal only in exceptional circumstances such as when appellant participated in district court proceedings and equities favor hearing appeal, where appellants had not participated beyond unsuccessfully moving to intervene, and court thus found nothing inequitable about limiting their participation in appeal to submission of amicus briefs); *Curtis v. City of Des Moines*, 995 F.2d 125, 128 (8th Cir. 1993) (looking to interest in case and participation sufficient to make person "privy to the record"); *United States v. Badger*, 930 F.2d 754, 756 (9th Cir. 1991) (reciting need for participation and equities, but also relying on nonparty's stake); *Karpp v. FDIC*, No. 89-55928, 1990 WL 212693, at *1-*2 (9th Cir. Dec. 27, 1990) (citing only need for participation and favorable equities).

³²³ See, e.g., *United States v. McClatchy Newspapers, Inc.*, 2 Fed. Appx. 745, 747-48 (9th Cir. 2001) (granting mandamus to nonparty newspaper that sought to reverse postjudgment order in criminal case refusing to unseal certain documents bearing on defendant's sentence, noting that because newspaper lacked standing to appeal order it satisfied requirements for mandamus in that newspaper had no other adequate means to obtain requested relief); see also *United States v. Tinker*, No. 89-10231, 1991 WL 99457, at *1 (9th Cir. June 4, 1991) (treating appeal as petition for mandamus and denying writ, but noting that court recognized nonparties' standing to seek review by petition for mandamus because they could not appeal). When an appeals court grants a writ of mandamus, it is not acting within its appellate jurisdiction but is acting within its original jurisdiction, although it is said that "the power to grant a writ [such as mandamus] is characterized as an appellate power." 16 CHARLES A.

The cases involving nonparty attempts to appeal fall into a few discernible categories.

A. OPT OUTS, DROP OUTS, AND DISMISSED PARTIES OR CLASS MEMBERS

Some cases have involved former class members who opted out of or were dismissed from class actions, or other persons who were dismissed from actions in which they had been parties.³²⁴ The courts typically hold these persons not to be aggrieved by orders or judgments entered in the litigation in which they no longer have any part and dismiss their appeals for lack of standing to appeal and hence lack of appellate jurisdiction.³²⁵ What is interesting about these cases are the grievances claimed and the courts' responses. For example, in *In re Integra Realty Resources, Inc.*, the Tenth Circuit held that former members of a defendant class who opted out of the settlement of the class action had no standing to appeal the order approving the settlement.³²⁶ The former members did claim a grievance, namely that the court's order allowing payments made pursuant to the settlement to be immediately disbursed to the plaintiff enabled plaintiff to generate a "war chest," making it more difficult for the opt-out appellants to defend the cases that existed or would be brought against them.³²⁷ The court's response was that the opt outs' interest in plaintiff's resources for litigation against them did not constitute a legally protected interest.³²⁸ The court opined that "it is not sufficient . . . to show merely the loss of some

WRIGHT, ARTHUR MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3932 (2d ed. 1996 & 2003 Supp.) (stating that "proceedings for an extraordinary writ are formally commenced by an original application to the court of appeals"). *Id.*

³²⁴ *E.g.*, *Planned Parenthood of Columbia/Willamette Inc. v. Am. Coalition of Life Activists*, 244 F.3d 1007, 1014 n.6 (9th Cir. 2001) (striking notice of appeal filed by former defendant who had been dismissed before trial at plaintiffs' request, holding that she had no independent standing to appeal injunction that applied to her only insofar as she remained agent or employee of defendant). But where another nonparty "moved to intervene in the appeal because he was enjoined as an employee and agent of one of the defendant organizations," the same court granted the motion but characterized it as a motion to participate as an amicus. *Id.*

³²⁵ *Id.*

³²⁶ 262 F.3d 1089, 1103 (10th Cir. 2001).

³²⁷ *Id.* at 1102.

³²⁸ *Id.*

practical or strategic advantage in litigating³²⁹ Prejudice exists when a settlement strips a party of a cause of action or interferes with his contract rights, his ability to seek contribution or indemnity, or his right to present relevant evidence at trial.³³⁰ The practical disadvantage claimed by appellants was not sufficient.³³¹

In *Mayfield v. Barr* the Court of Appeals for the District of Columbia Circuit held that class representatives who had objected to, and subsequently were withdrawn from, the settlement of a class action lacked standing to challenge the settlement on appeal.³³² The D.C. Circuit rested its decision on the principle that "those who fully preserve their legal rights cannot challenge an order approving an agreement resolving the legal rights of others."³³³ While that principle seems generally acceptable, and there would be nothing remarkable about the result if the appellants had been mere class members, the outcome seems odd in view of the Supreme Court's holdings that class representatives whose individual substantive claims on the merits have become moot may appeal denials of class certification when they continue to have an Article III case or controversy with respect to the class certification.³³⁴ Thus, an exception to the principle that governed the D.C. Circuit's decision may be appropriate where those whose rights are preserved have been representing those whose rights are being compromised, and seek to continue their representation.³³⁵ However, to find that the representatives have standing to appeal the settlement, one would have to find a basis to conclude that the class representatives have

³²⁹ *Id.*

³³⁰ *Id.* at 1102-03.

³³¹ *Id.* at 1102. Similarly, in *In re Vitamins Antitrust Class Actions*, the Court of Appeals for the District of Columbia Circuit affirmed the district court's refusal to permit intervention by class members who later opted out and who sought to oppose a provision of the proposed settlement. 215 F.3d 26, 30 (D.C. Cir. 2000). The appellants' interest in not being impeded in their efforts to reach a settlement more lucrative than that accepted by the class did not constitute the legal prejudice necessary to justify their intervention. *Id.*

³³² 985 F.2d 1090, 1092 (D.C. Cir. 1993).

³³³ *Id.* at 1093.

³³⁴ See *Shining a Light*, *supra* note 1, at 861-64 (discussing mootness).

³³⁵ Accord *Mayfield*, 985 F.2d at 1093-94 (Sentelle, J., dissenting) ("I do not share my colleagues' view that a class representative is deprived of standing to seek review of a court's approval of the class action settlement by the separate adjudication of his individual claim.").

a cognizable, redressable injury deriving from the class settlement, or that, despite the survival of their own claims, the class representatives have a continuing fiduciary duty to class members that gives rise to a correlative right to appeal the class settlement.³³⁶ The Supreme Court thus far has declined to define how the fiduciary duties of class representatives translate into Article III standing to appeal decisions that, in the view of the representatives, adversely affect the class.³³⁷

B. APPEALS BY PERSONS DIRECTLY AFFECTED BY COURT ORDERS, INJUNCTIONS, OR JUDGMENTS, OR TO WHOM COURT ORDERS, INJUNCTIONS, OR JUDGMENTS HAVE BEEN DIRECTED

1. Orders Entered Against or Directly Affecting Nonparties. Courts often enter orders against nonparties. Sometimes these nonparties are persons whose first involvement with a case comes at their own initiative when they seek something from the court such as permission to intervene.³³⁸ On other occasions, litigants or litigants with the assistance of the court have involved the nonparties, typically by seeking discovery from them, and the nonparties seek to be relieved of the litigation-related burden or seek related protection.³³⁹ When courts enter orders or sanctions against nonparties, or deny orders sought by nonparties, the

³³⁶ See *supra* notes 157-58 and accompanying text.

³³⁷ See *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 358-59 (1980) (Powell, J., dissenting) (raising still unresolved questions regarding fiduciary duties of class representatives).

³³⁸ See *supra* notes 47-48 and accompanying text.

³³⁹ *E.g.*, *Cobbledick v. United States*, 309 U.S. 323, 327-28 (1940) (holding that nonparty witness subpoenaed to testify and produce documents before grand jury had to be held in contempt to challenge order); *Burden-Meeks v. Welch*, 319 F.3d 897, 900 (7th Cir. 2003) (holding order to produce to be immediately appealable and ruling that nonparty had waived any claim of attorney-client privilege to document sought by subpoena, implicitly recognizing nonparty's standing); *Fed. Ins. Co. v. Me. Yankee Atomic Power Co.*, 311 F.3d 79, 81 (1st Cir. 2002) (noting in dicta that nonparty litigants cited for contempt may appeal contempt order); *In re Flat Glass Antitrust Litig.*, 288 F.3d 83, 87 n.10 (3d Cir. 2002) (requiring nonparty witnesses to be held in contempt before court would entertain their appeal from order to produce documents allegedly protected by work product immunity); *R.J. Reynolds Tobacco v. Philip Morris, Inc.*, 29 Fed. Appx. 880, 881 (3d Cir. 2002) (entertaining nonparty's appeal of order enforcing subpoenas requiring production of documents at nonparty's expense).

nonparties may want to appeal.³⁴⁰ Their appeals often raise issues concerning the immediate appealability of that which they seek to appeal,³⁴¹ but that timing issue is not the concern of this Article.³⁴² So far as standing to appeal is concerned, a key issue always is the nonparties' interest in the case.

Most recently, the Court of Appeals for the Second Circuit held that the United States could appeal the district court's default judgment against the Zimbabwe African National Union-Pacifc Front, in the absence of a party-appellant, only because the United States asserted an injury that fulfilled the requirements of Article III in contending that the district court's interpretation of two international Conventions would violate executive norms setting the terms on which foreign ambassadors are received and place the United States in breach of treaty obligations.³⁴³

In *Plain v. Murphy Family Farms*, a deceased's adult children had been denied standing to intervene in the wrongful death action brought by the decedent's estate.³⁴⁴ Although the children failed to timely appeal that denial, the district court invited them to file an amicus brief concerning the distribution of the damages award, which they did.³⁴⁵ After the court rejected their proposed division of the award and their motion for a new trial or relief from the judgment, the children appealed.³⁴⁶ The Tenth Circuit concluded that it lacked jurisdiction to review the denial of the children's motion for a new trial because of the children's failure to timely appeal the denial of their intervention motion, but the court took

³⁴⁰ *E.g.*, *Sec. & Exch. Comm'n v. Cook*, No. 00-15359, 2000 WL 1367918, at *1 (9th Cir. Sept. 21, 2000) (entertaining appeal by nonparty upon whom district court imposed monetary sanctions for failure to appear for deposition).

³⁴¹ *E.g.*, *Cunningham v. Hamilton County*, 527 U.S. 198, 209-10 (1999) (holding that order imposing sanctions on plaintiff's attorney was not immediately appealable final decision, even where counsel no longer represented client); *New Pac. Overseas Group (U.S.A.) Inc. v. Excal Int'l Dev. Corp.*, 252 F.3d 667, 669-70 (2d Cir. 2001) (per curiam) (holding that order imposing sanctions jointly and severally on plaintiff and its attorney was not immediately appealable final decision); *In re Tetracycline Cases*, 927 F.2d 411, 413 (8th Cir. 1991) (holding that contempt order that did not specify amount of sanction was not final appealable order).

³⁴² See *Shining a Light*, *supra* note 1, at 891-92, as to the differences and relationship between appealability and standing to appeal.

³⁴³ *Tachiona v. United States*, 386 F.3d 205, 211-14 (2d Cir. 2004).

³⁴⁴ 296 F.3d 975, 978 (10th Cir. 2002).

³⁴⁵ *Id.*

³⁴⁶ *Id.* at 978-79.

jurisdiction over the children's appeal from the apportionment of damages.³⁴⁷ In support of this action, the Tenth Circuit cited the children's status as heirs, which gave the children a unique interest in the allocation of the award, and the children's timely and court-invited opposition to the apportionment.³⁴⁸ The court noted that the children satisfied both constitutional and prudential standing requirements in light of the redressable injury to their interests inflicted by the judgment.³⁴⁹

Similarly, in *Maiz v. Virani*, the Court of Appeals for the Fifth Circuit held that corporations that were not parties to a judgment creditor's collection action but that were included in the district court's turnover order and divested of property allegedly worth tens of millions of dollars had standing to appeal the turnover order.³⁵⁰ They clearly had a redressable actual injury and a personal stake that the court found sufficient to require an exception to the general rule that a nonparty may not appeal a judgment.³⁵¹ Likewise, in

³⁴⁷ *Id.* at 980-81.

³⁴⁸ *Id.* at 979-80.

³⁴⁹ *Id.* at 980 n.6; *see also* *Curtis v. City of Des Moines*, 995 F.2d 125, 128 (8th Cir. 1993) (holding that parents of rape victim could appeal order awarding to rapist's attorneys rapist's recovery from officers who beat him, where parents actively participated in posttrial executions on judgment, made appearances and filed briefs to contest issues raised on appeal, were treated as parties by district court, and had interest based on their own judgment against rapist); *cf.* *IPSCO Steel (Ala.), Inc. v. Blaine Constr. Corp.*, 371 F.3d 150, 154-55 (3d Cir. 2004) (opining, where nonparty sought to appeal alone from settlement agreement between parties and approved by court, that nonparty who lacks standing to sue nonetheless may have standing to appeal if adversely affected by judgment, but holding nonparty appellant not to be sufficiently aggrieved).

³⁵⁰ 311 F.3d 334, 339 (5th Cir. 2002). The judicial action taken against the nonparty was based on the court's finding that the judgment debtor controlled the nonparty corporations. *Id.*

³⁵¹ *Id.*; *see also* *Sec. Exch. Comm'n v. Forex Asset Mgmt., LLC*, 242 F.3d 325, 328-30 (5th Cir. 2001) (holding that investors had standing to appeal approval of receivership distribution plan that directly affected amount allocated to investors where they had participated in various ways); *Northview Motors, Inc. v. Chrysler Motors Corp.*, 186 F.3d 346, 349 (3d Cir. 1999) (holding that debtor car dealership's principals had standing to appeal order enforcing settlement agreement with auto manufacturer because of nonparty principals' stake, participation, and equities favoring appeal); *United States v. Badger*, 930 F.2d 754, 756 (9th Cir. 1991) (holding IRS to have standing to appeal order holding that levy by IRS on taxpayer's bail bond had to be exonerated where IRS had stake, had participated, and justice required allowing appellate review). By contrast, the court held injury and interest insufficient to allow a nonparty appeal in *In re Shaffaat*, No. 98-1340, 1998 WL 904650, *1 (4th Cir. Dec. 29, 1998) (holding that wife of man against whom district court entered civil forfeiture was insufficiently affected by final order to have standing to appeal judgment

Hal Roach Studios, Inc. v. Richard Feiner & Co., the Ninth Circuit held that a person who had been named in the original complaint but not in the amended complaint and against whom judgment was entered had standing to appeal the judgment without having intervened to challenge the district court's assertion of jurisdiction over him and without having moved in the trial court for relief from the judgment.³⁵² Because the nonparty clearly was aggrieved by the judgment, and the issue of the impropriety of entering a judgment against the nonparty had been raised in the trial court by the remaining defendant, the appellate court held that it had jurisdiction to correct the error.³⁵³

In *Wang v. Hsu*, the Tenth Circuit entertained a nonparty deponent's appeal of the district court's denial of his motion for a protective order that would have precluded copying of documents he produced under subpoena.³⁵⁴ Although the court easily affirmed the denial of a protective order, it regarded the deponent's interest in preventing dissemination of his documents to be an injured interest, which justified allowing his appeal.³⁵⁵

In all of these cases, the critical questions were whether the judgment or order appealed from inflicted redressable injury on the appellant. The courts allowed the appeal where they found such injury.

2. Injunctions Entered Against Nonparties.

a. Judicial Authority to Enjoin Nonparties. Despite the general rule that an in personam order can bind only persons brought within a court's jurisdiction,³⁵⁶ courts sometimes have authority to enjoin nonparties. Both the source and the scope of the authority to enjoin nonparties are unclear, however. The Supreme

despite her contentions that subject firearms were held in trust for her minor son, of whom she was sole guardian).

³⁵² 896 F.2d 1542, 1546-47 (9th Cir. 1990).

³⁵³ *Id.*

³⁵⁴ 919 F.2d 130, 130-31 (10th Cir. 1990).

³⁵⁵ *Id.*

³⁵⁶ *Martin v. Wilks*, 490 U.S. 755, 761-62 (1989) (stating " '[i]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process' " (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940))); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969).

Court in *United States v. New York Telephone Co.*, over four dissents, held that the All Writs Act³⁵⁷ authorizes federal courts to enjoin even strangers to federal litigation if they are “in a position to frustrate the implementation of a court order or the proper administration of justice.”³⁵⁸ The Court’s opinion may suggest that the All Writs Act provides a basis for in personam jurisdiction to enjoin nonparties when the court has subject-matter jurisdiction over the litigation sought to be protected and personal jurisdiction over the parties to the underlying litigation.³⁵⁹ Professor Henry Paul Monaghan has argued, however, that “[n]o evidence exists that the All Writs Act was intended to be a bottomless reservoir of such [in personam] jurisdiction. Surely, as a general matter, the All Writs Act cannot properly be read to side-step standard tests governing in personam jurisdiction.”³⁶⁰ The fact that in *New York*

³⁵⁷ 28 U.S.C. § 1651 (2000) [hereinafter Act]. The Act provides in part that “[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” *Id.* In appropriate circumstances, the Act empowers federal courts to issue antisuit injunctions directed to either federal or state courts or the parties thereto, unless those injunctions are elsewhere prohibited. *See, e.g., In re Johns-Manville Corp.*, 27 F.3d 48-49 (2d Cir. 1994) (affirming stay of all litigation against personal injury settlement trust); *Wesch v. Folsom*, 6 F.3d 1465, 1470-74 (11th Cir. 1993) (affirming, as in aid of jurisdiction and to effectuate judgment, injunction of prosecution of state court action in which plaintiffs sought to have congressional districts redrawn where federal court had imposed redistricting); *United States v. BNS, Inc.*, 858 F.2d 456, 461-62 (9th Cir. 1988) (upholding, as modified, preliminary injunction to preserve federal court’s jurisdiction under Antitrust Procedure and Penalties Act).

³⁵⁸ 434 U.S. 159, 174 (1977) (citation omitted). *But cf. id.* at 186-90 (Stevens, J., dissenting in part) (focusing not on personal jurisdiction but on lack of support for proposition that writ was necessary or appropriate to aid district court’s jurisdiction and on writ issued not being “agreeable to the usages and principles of law”).

³⁵⁹ *See id.* at 172, 174 (“The power conferred by the [All Writs] Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice.”) (citation omitted); Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148, 1190 (1998) (conceding that *New York Telephone* could be “read to suggest that the Act might provide a basis for in personam jurisdiction when subject matter jurisdiction otherwise exists”).

³⁶⁰ Monaghan, *supra* note 359, at 1190. Professor Monaghan notes that the purpose of the Act is “to preserve jurisdiction that the court has acquired from some other independent source of law.” *Id.* at 1190 n.196 (citing *Taiwan v. United States Dist. Court*, 128 F.3d 712, 717 (9th Cir. 1997) (quoting *Jackson v. Vasquez*, 1 F.3d 885, 889 (9th Cir. 1993))); *see also United States v. Int’l Bhd. of Teamsters*, 907 F.2d 277, 281 (2d Cir. 1990) (holding All Writs Act to authorize injunctions against persons who are not parties to federal litigation and

Telephone only the commanded third party was capable of giving effect to the court's pen register order may have created a situation of "jurisdiction by necessity" that could distinguish *New York Telephone* from most other cases raising the question of federal judicial authority to assert personal jurisdiction to enjoin persons who are not parties to federal litigation.³⁶¹ The fact that the trial court's coercive process was directed to a third party who clearly was within the territorial jurisdiction of the district court also could serve to distinguish *New York Telephone* from some other cases.³⁶² Thus, Professor Monaghan has concluded that "*New York Telephone* provides no basis for believing that the Act should be construed as a general 'emergency all purpose' nationwide long-arm statute used to relax the requirements of Rule 4(k)(1)(A) whenever a court deems that result desirable."³⁶³ Consistent with that conclusion, there are

judgment sought to be protected but only if persons enjoined have minimum contacts constitutionally required as matter of due process); *In re Baldwin-United Corp.*, 770 F.2d 328, 338, 340 (2d Cir. 1985) (finding important feature of All Writs Act to be its grant of authority to enjoin nonparties to action when needed to preserve court's ability to reach or enforce decision, but only if those persons threatened or engaged in conduct that frustrated federal court order or proper administration of justice with actual notice of terms of injunction).

³⁶¹ *N.Y. Tel. Co.*, 434 U.S. at 174. I use the phrase "jurisdiction by necessity" to refer to a situation in which the only way the court can provide the relief it believes ought to be granted is to assert jurisdiction and enjoin a particular entity. The phrase, as it has been used by others, is of somewhat ambiguous scope. It has been described as based on the idea that "there must be at least one forum somewhere with power to adjudicate every case." LARRY L. TEPLY & RALPH U. WHITTEN, *CIVIL PROCEDURE*, at 254 (1991). Jurisdiction by necessity may apply where there are multiple defendants and conflicting claims to property or assets located within a state. See, e.g., *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (concluding that "the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident"). However, it is not clear in what other situations jurisdiction by necessity properly can be applied. See TEPLY & WHITTEN, *supra*, at 254-57 (describing relative uncertainty and lack of guidance from courts regarding doctrine).

³⁶² See Monaghan, *supra* note 359, at 1190 (discussing various aspects of Court's ruling, including division of Court regarding whether Act provided statutory source for coercive process directed to nonparty within territorial jurisdiction of district court).

³⁶³ *Id.* at 1190 & n.20 (citing *Additive Controls & Measurement Sys., Inc. v. Flowdata*, 96 F.3d 1390, 1396 (Fed. Cir. 1996) (stating that "[n]othing . . . suggests that the All Writs Act can be employed as a general license for district courts to grant relief against nonparties whenever such measures seem useful or efficient," and citing with approval proposition that injunction of nonparties must be reserved for extraordinary cases in which activities of third parties threaten to undermine court's ability to render or effectuate binding judgment)). Professor Monaghan also cites the Supreme Court's characterization of the Act in

cases holding that federal courts exceeded their authority in enjoining nonparties, particularly those outside the jurisdictional reach of the court.³⁶⁴

The importance of personal jurisdiction to enjoin is illustrated by *R.M.S. Titanic, Inc. v. Haver*, which speaks in addition to the right of an enjoined nonparty to appeal the injunction.³⁶⁵ The district court had exercised “constructive *in rem* jurisdiction” over the wreck and wreck site of the R.M.S. Titanic.³⁶⁶ To protect the salvage rights it had awarded, the court purported to enjoin any person with notice of its order, and specifically Deep Ocean Expeditions (“DOE”), from searching, photographing, or entering the area of the ocean surrounding the wreck.³⁶⁷ Upon DOE’s appeal, the Fourth Circuit concluded that “[t]he court’s authority to exercise *in rem* jurisdiction does not carry with it a concomitant, derivative power to enter ancillary *in personam* orders.”³⁶⁸ Thus, injunctive relief could not be obtained against a person without the court first having obtained *in personam* jurisdiction over that person, even when the court was seeking to give effect to rights previously declared in an *in rem* proceeding.³⁶⁹ Here, the district court never had obtained in

Pennsylvania Bureau of Correction v. United States, 474 U.S. 34, 43 (1985), as providing extraordinary remedies when the need arises, but not authorizing federal courts to issue “ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate.” *Id.* (quoting *Pa. Bureau of Corr.*, 474 U.S. at 43); see also *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189, 198 (3d Cir. 1993) (noting that neither Anti-Injunction Act nor All Writs Act “dispels the federal court’s jurisdictional requisites”).

³⁶⁴ *E.g.*, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110-12 (1969) (noting that injunction is ineffective insofar as directed at persons over whom court lacks personal jurisdiction); *Doctor’s Assocs. v. Reinert & Duree, P.C.*, 191 F.3d 297, 302-03 (2d Cir. 1999) (holding that district court exceeded its discretion in preliminarily enjoining nonparty franchisees from prosecuting suits against their franchisor where suits did not aid or abet party-franchisees in evading court decrees); *Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1202-03 (7th Cir. 1996) (holding antisuit injunction of parallel state court suit to be inappropriate to protect 28 U.S.C. § 1407 transferee court’s discovery order insofar as it purported to reach persons and counsel whose cases were not and had not been part of multidistrict litigation); *Alemite Mfg. Co. v. Staff*, 42 F.2d 832, 832 (2d Cir. 1930) (stating that, “[N]o court can make a decree which will bind anyone but a party. . . . If [a court of equity or of law purports to enjoin the world at large], . . . the decree is *pro tanto brutum fulmen* and the persons enjoined are free to ignore it.”).

³⁶⁵ 171 F.3d 943 (4th Cir. 1999).

³⁶⁶ *Id.* at 951.

³⁶⁷ *Id.*

³⁶⁸ *Id.* at 957.

³⁶⁹ *Id.* at 957-58.

personam jurisdiction over DOE.³⁷⁰ DOE's actual notice of the motion for an injunction was not enough.³⁷¹ Thus, the injunction against DOE had to be vacated for lack of personal jurisdiction.³⁷² Before the court could nullify the injunction, however, it first had to permit DOE to appeal.³⁷³ The Fourth Circuit did just that, holding that "[d]ue process dictates and principles of fairness counsel that DOE be given an opportunity to challenge the district court's assertion of jurisdiction over it, particularly when the court specifically entered an injunction against DOE."³⁷⁴

Another important source of authority for injunctions against nonparties is Federal Rule of Civil Procedure 65(d), which provides that an injunction may bind parties and their "officers, agents, servants, employees, and attorneys, and . . . those persons in active concert or participation with them who receive actual notice of the order."³⁷⁵ Rule 65(d) codifies a common-law rule that permitted the injunction of persons who would aid or abet violation of a federal court injunction.³⁷⁶

³⁷⁰ *Id.* at 958. It was unclear from the record whether the Federal Rules of Civil Procedure would have authorized service upon DOE, but DOE had not been served, DOE did not have a complaint filed against it, DOE never was made a party, and DOE had not voluntarily subjected itself to the court's jurisdiction. *Id.*

³⁷¹ *Id.*

³⁷² *Id.*; see also *United States v. Kirschenbaum*, 156 F.3d 784, 794-95 (7th Cir. 1998) (holding that district court order was void to extent it purported to enjoin nonparty over whom district court lacked personal jurisdiction, who was not among persons enumerated in FED. R. CIV. P. 65, and whom district court had not found was acting in concert with defendant or aiding and abetting defendant in proceeding to which she was nonparty); Steinman, *supra* note 239, at 865-66 (expanding on *Titanic* discussion).

³⁷³ *Titanic*, 171 F.3d at 955.

³⁷⁴ *Id.*; see also *Kirschenbaum*, 156 F.3d at 794 (holding that nonparty whom district court purported to enjoin had standing to appeal from denial of her motion to modify restraining order).

³⁷⁵ FED. R. CIV. P. 65(d).

³⁷⁶ *Doctor's Assocs., Inc. v. Reinert & Duree, P.C.*, 191 F.3d 297, 302-03 (2d Cir. 1999) (noting that Rule 65(d) was designed to codify common-law doctrine that defendants may not nullify decree by carrying out prohibited acts through aiders and abettors); *Additive Controls & Measurement Sys., Inc. v. Flowdata*, 96 F.3d 1390, 1395 (Fed. Cir. 1996) (noting that Rule 65(d) codified common-law rules set forth by Judge Hand in *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 833 (2d Cir. 1930), to effect that court may punish person who abets or is legally identified with enjoined defendant); *Travelhost, Inc. v. Blandford*, 68 F.3d 958, 961 (5th Cir. 1995) (noting that Rule 65(d) codified common-law doctrine that injunction binds persons identified in interest with parties, in privity with parties, represented by them, or subject to their control).

Thus, although the contours of the federal courts' injunctive powers are hazy, federal courts sometimes may direct injunctions against nonparties, mandating or prohibiting conduct in the world outside the litigation in which the injunction is entered. Although there is not always a bright line distinguishing such injunctions from orders that have to do with the conduct of litigation, the next few paragraphs will focus on nonparties' standing to appeal injunctions concerning extra-litigation conduct.³⁷⁷

b. Nonparties' Standing to Appeal Injunctions Entered Against Them. A leading case on the ability of nonparties to appeal injunctions entered against them is *Zenith Radio Corp. v. Hazeltine Research, Inc.*³⁷⁸ The Supreme Court there approved an appeal by both Hazeltine, the nonparty parent company of a named counter-defendant, and Hazeltine's party-subsiary to challenge a money judgment and an injunction against patent misuse and conspiracy to prevent Zenith from exporting electronic equipment into a foreign market.³⁷⁹ The district court had entered the money judgment and the injunction against both appellants.³⁸⁰ The Supreme Court held that a pretrial stipulation, entered into in the district court by Hazeltine's subsidiary, stating that Hazeltine and its subsidiary would be considered one entity for purposes of the litigation, did not foreclose Hazeltine from being heard on the propriety of treating parent and subsidiary as one entity or from challenging the relief ordered against it.³⁸¹ Citing Rule 65(d), the Court held that the district court erred in entering an injunction against Hazeltine without having determined in a proceeding to which Hazeltine was a party that Hazeltine was in active concert or participation with the named defendants and that Hazeltine had notice of the injunction.³⁸²

³⁷⁷ The timing of these appeals typically is not in issue because 28 U.S.C. § 1292(a)(1) authorizes immediate appeals to the federal courts of appeals of interlocutory district court orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court." 28 U.S.C. § 1292(a)(1) (2000).

³⁷⁸ 395 U.S. 100 (1969).

³⁷⁹ *Id.* at 105-07.

³⁸⁰ *Id.*

³⁸¹ *Id.* at 105-07, 110, 112.

³⁸² *Id.* at 112. It could be argued that so long as Hazeltine's party subsidiary was

More recent cases also recognize the right of nonparties to appeal from injunctions entered against them. These cases include an action prohibiting nonparties from destroying or disposing of devices that allegedly infringed a patent;³⁸³ an action permanently enjoining the nonparty Republic of the Philippines from acting as an agent, representative, aider or abettor of the defendant-estate of its deposed ex-president Ferdinand Marcos;³⁸⁴ an action preliminarily enjoining a nonparty insurer from settling an employment discrimination action despite its authority to settle under the policy;³⁸⁵ and an action ordering the nonparty federal Secretary of Health and Human Services to respond within fifteen days to any complaint of a processing delay by a state department of social services.³⁸⁶ These cases and others allow nonparties to appeal on the ground that the injunction entered against them exceeds the permissible scope of injunctions against nonparties.³⁸⁷ As was true of the nonparty

appealing, thereby maintaining an Article III case or controversy, Hazeltine could “go along for the ride.” See *supra* note 122 and accompanying text (discussing ability of litigants to appeal along with others who have an Article III case or controversy). However, insofar as Hazeltine sought redress from judgment-engendered injuries distinct from those suffered by its subsidiary, that argument does not satisfactorily explain Hazeltine’s standing to appeal.

³⁸³ Additive Controls & Measurement Sys. Inc. v. Flowdata, Inc., 96 F.3d 1390, 1394-96 (Fed. Cir. 1996) (responding to nonparties’ appeal, vacating injunctions entered against them, where injunctions did not govern only aspects of appellants’ conduct that were in concert with enjoined party but also independent conduct).

³⁸⁴ Hilao v. Estate of Marcos (*In re Estate of Ferdinand Marcos Human Rights Litig.*), 94 F.3d 539, 543-48 (9th Cir. 1996) (vacating injunction because Republic was entitled to sovereign immunity and was beyond personal jurisdiction of court, having entertained Republic’s appeal because injunction injured Republic by putting it to choice of conforming conduct to injunction or risking contempt).

³⁸⁵ Caplan v. Fellheimer Eichen Braverman & Kaskey, 68 F.3d 828, 836-38 (3d Cir. 1995).

³⁸⁶ Thompson v. Freeman, 648 F.2d 1144, 1146-48 n.5 (8th Cir. 1981) (holding that nonparty HHS had standing to appeal district court’s jurisdiction to bind it by injunction, and finding error in enjoining HHS under FED. R. CIV. P. 65(d)).

³⁸⁷ E.g., Doctor’s Assocs., Inc. v. Qasim, No. 99-9434, 2000 WL 1210868, at *1, *7-13 (2d Cir. Aug. 23, 2000) (holding that injunction exceeded court’s discretion to extent injunction barred prosecution of actions that did not constitute aiding or abetting of, or active concert or participation with, defendant-franchisee parties). Both Rule 65(d) and its common-law antecedent need to be read in conjunction with the Anti-Injunction Act, which permits federal courts to enjoin state court proceedings only when expressly authorized by Act of Congress, where necessary in aid of the federal court’s jurisdiction, or to protect or effectuate a federal court judgment. 28 U.S.C. § 2283 (1994). At least one court has held that an employee or agent of an enjoined defendant has *no* independent standing to appeal, despite being bound as an employee or agent, but may be heard as an amicus. Planned Parenthood, Inc. v. Am. Coalition, 244 F.3d 1007, 1014 & n.6 (9th Cir. 2001).

appeals discussed in Part VII.B.1,³⁸⁸ in all of these cases the critical questions were whether the judgment or injunctive order appealed from inflicted redressable injury on the appellant.³⁸⁹ The courts allowed the appeal where they found such injury.³⁹⁰

The authority to enjoin nonparties should be distinguished from the authority to hold nonparties in contempt for violating injunctions directed against others. Courts generally rule that they may hold a nonparty with notice in contempt for aiding and abetting the violation of an injunction entered against a party.³⁹¹ Nonparties who are sanctioned for violating an injunction can of course appeal that sanction.³⁹²

3. Injunctions Directly Affecting Nonparties. Even when an injunction is not specifically directed to a nonparty but directly and significantly affects the nonparty's interests, courts of appeals often allow the nonparty to appeal.³⁹³ In these cases one often sees the courts examine the prudential considerations of whether the nonparty actually participated in the proceedings below and has a

³⁸⁸ See *supra* notes 344-55 and accompanying text.

³⁸⁹ See *supra* notes 385-87 and accompanying text.

³⁹⁰ See *supra* notes 385-87 and accompanying text.

³⁹¹ *E.g.*, *Chi. Truck Drivers v. Bhd. Labor Leasing*, 207 F.3d 500, 506-07 (8th Cir. 2000) (holding plaintiff entitled to further development of record regarding possible contempt finding against sole officer and shareholder of corporate party against whom court had entered payment order, citing contempt power over nonparties and aiders and abettors with notice of court order and responsibility to comply); *United States v. Barnette*, 129 F.3d 1179, 1185 & n.10 (11th Cir. 1997) (indicating appellate court's view that district court properly entered contempt order against appellant who aided and abetted violation of forfeiture judgment and other orders of which she had notice); *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 833 (2d Cir. 1930) (overturning contempt holding because it failed to satisfy principle that nonparty may be held in contempt for knowingly aiding and abetting violation of injunction entered against party).

³⁹² See, *e.g.*, *Gilchrist v. Gen. Elec. Capital Corp.*, 262 F.3d 295, 299-301 (4th Cir. 2001) (holding that nonparties whom court held in contempt for filing involuntary bankruptcy petition against debtor, in violation of court's order, had standing to appeal determination that receivership proceeding was not subject to automatic stay); *Travelhost, Inc. v. Blandford*, 68 F.3d 958, 965 (5th Cir. 1995) (on appeal by nonparties held in contempt, holding to be clearly erroneous finding that nonparty participated with enjoined party in scheme to violate injunction).

³⁹³ *E.g.*, *United States v. Bd. of Sch. Comm'rs*, 128 F.3d 507, 511-12 (7th Cir. 1997) (holding that school board had standing to ask court to lift injunction requiring interdistrict busing of school children and to appeal court's denial, although busing order was based upon and sought to remedy acts of other public entities not of school board, finding that wrongdoing entities had little incentive to challenge injunction and that constraints that decree placed on school board gave it standing to challenge decree).

personal stake in the outcome, and whether the equities favor hearing the appeal.³⁹⁴ For example, in *Castillo v. Cameron County* the Fifth Circuit looked to both Article III and prudential considerations in holding that the state had standing to appeal a district court's decision to continue injunctive relief directed at the county and aimed at reducing overcrowding in the county jail.³⁹⁵ The court relied on the facts that the state (1) had actively participated as a defendant in the lawsuit until the state was dismissed; (2) had sought to have the injunctions terminated; and (3) had a personal stake because the injunctions permitted the county to turn away some state parole violators who otherwise would have to be jailed and thus injured the sovereign and quasi-sovereign interests of the state.³⁹⁶ Also, because the state had been a party to the earlier proceedings in which the now-retained injunctions were entered and those injunctions required action by the state, including the transfer of prisoners from the county jail, the injunctions had an economic impact on the state, and their violation could lead to the state being held in contempt.³⁹⁷

Among the other examples of cases allowing nonparty appeals of injunctions that directly affected the nonparties are (1) an action allowing an individual nonparty investor to appeal the method to apportion funds to be disgorged at the behest of the Commodities Futures Trading Commission, where appellant had been brought into the proceedings by a receiver's notice requiring him to file a claim and written objections, had participated to the full extent possible for an individual investor, and had a financial stake, all of which caused the equities to favor hearing his appeal;³⁹⁸ (2) an action allowing a nonparty applicant for a permit to place advertising displays along a freeway to appeal the preliminary injunction disallowing the issuance of any such permits;³⁹⁹ and (3) an action

³⁹⁴ See *infra* notes 395-405 and accompanying text.

³⁹⁵ 238 F.3d 339, 347-49 (5th Cir. 2001).

³⁹⁶ *Id.* at 350-51.

³⁹⁷ *Id.* at 347-51 n.16.

³⁹⁸ *CFTC v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1113-14 (9th Cir. 1999) (applying test for nonparty standing to appeal that required exceptional circumstances, participation below, and equities favoring hearing appeal).

³⁹⁹ *Keith v. Volpe*, 118 F.3d 1386, 1391 (9th Cir. 1997) (applying test for nonparty standing that looked to whether appellant participated in district court proceedings and whether

according a parent corporation standing to appeal a preliminary injunction ordering the defendant corporate president and controlling shareholder to cause its parent corporation to repatriate funds transferred overseas and imposing restrictions on the use of those funds.⁴⁰⁰ In another action, the court permitted a nonparty law firm to appeal an order releasing a redacted version of a sealed investigative report, filed with the district court pursuant to a consent decree, that examined the relationship between the firm and certain of its partners with a particular local union against which allegations of corruption had been made.⁴⁰¹ The court did not discuss the firm's standing to appeal, but the court's discussion of the merits made clear that the firm had privacy interests that deserved consideration.⁴⁰² Although the opinion does not say so, the firm also may have been in the best position to argue against unsealing on grounds of unintelligibility, untrustworthiness, or lack of public interest, factors also weighed by the court.⁴⁰³ In still other cases, the Seventh Circuit permitted a nonparty insurer to appeal the modification of a bankruptcy-related injunction that allowed personal injury plaintiffs to reopen a suit against the bankrupt-insured in order to proceed against the insurer,⁴⁰⁴ and the Second Circuit recognized the standing of news agencies to appeal a gag order restraining extrajudicial speech by all trial participants, thereby interfering with the news agencies' rights as potential recipients of speech concerning alleged corruption by public officials.⁴⁰⁵

equities favored hearing appeal).

⁴⁰⁰ *Hoxworth v. Blinder, Robinson & Co., Inc.*, 903 F.2d 186, 194 n.12 (3d Cir. 1990) (holding that nonparty corporation had standing to appeal preliminary injunction against its president and controlling shareholder insofar as that injunction encumbered nonparty corporation's assets). The nonparty corporation arguably participated through its subsidiary and its subsidiary's chairman, chief executive officer, and president, who were parties.

⁴⁰¹ *United States v. Amodeo*, 71 F.3d 1044, 1047 (2d Cir. 1995).

⁴⁰² *Id.* at 1050-53.

⁴⁰³ *See id.* at 1047-53 (noting that report contained unsworn statements and that portions of document were made unintelligible by redactions).

⁴⁰⁴ *Hendrix v. Page (In re Hendrix)*, 986 F.2d 195, 200 (7th Cir. 1993) (noting that insurer had participated in that it, nominally through its insured, had won summary judgment against personal injury plaintiffs); *see also United States v. Vahlco Corp.*, 895 F.2d 1070, 1073 (5th Cir. 1990) (holding purchaser of property at subsequent foreclosure sale able to appeal order to sell property in connection with foreclosure of junior lien).

⁴⁰⁵ *In re Application of Dow Jones & Co.*, 842 F.2d 603, 604-08 (2d Cir. 1988); *see also Radio & Television News Ass'n v. United States Dist. Court*, 781 F.2d 1443, 1445-47 (9th Cir.

What distinguishes the cases in which nonparties affected by an injunction against others have been denied standing to appeal? In *Microsystems Software, Inc. v. Scandinavia Online AB*, the district court permanently enjoined writers of certain computer code that permitted users to gain access to blocked sites, entities that hosted the websites of the named defendants, and persons in active concert with the defendants from publishing or using designated bypass codes.⁴⁰⁶ Nonparties who had copied the bypass codes, posted them on their own websites, and were given notice of the injunction by the plaintiff appealed.⁴⁰⁷ The First Circuit rejected the argument that these appellants themselves were targeted by the injunction,⁴⁰⁸ and denigrated as mere dictum its own observation in a 1991 case that “ ‘when a lower court specifically directs an order at a nonparty or enjoins it from a course of conduct’ the nonparty may enjoy a right to appeal.”⁴⁰⁹ The court then rejected the arguments that appellants’ mere interest in the outcome of the litigation gave them standing to appeal and that their participation in the proceedings below, where they had been permitted to oppose the injunction, either alone or in combination with their interest, conferred upon them standing to appeal.⁴¹⁰ The First Circuit took the view that any equities that favored hearing an appeal were irrelevant when the question was standing to appeal, a jurisdictional matter,⁴¹¹ and found, in any event, that the equities here did not favor the appellants.⁴¹² According to the court, appellants’ “decision to forgo intervention work[ed] a forfeiture of any claim to appellate standing [T]hey [could] not evade potential liability by declining to seek party status and still . . . test[] the validity of an ensuing decree.”⁴¹³ The court concluded that any due process

1986) (recognizing nonparty news organizations’ standing to seek mandamus to challenge restraints on criminal trial participants’ extrajudicial statements, as impairing petitioners’ ability to gather news).

⁴⁰⁶ 226 F.3d 34, 40 (1st Cir. 2000).

⁴⁰⁷ *Id.* at 38-39.

⁴⁰⁸ *Id.* at 40-41.

⁴⁰⁹ *Id.* at 40 (quoting *Dopp v. HYP Corp.*, 947 F.2d 506, 512 (1st Cir. 1991)).

⁴¹⁰ *Id.* at 39, 42.

⁴¹¹ *Id.* at 41.

⁴¹² *Id.*

⁴¹³ *Id.*

problem that otherwise might arise from appellants' inability to contest the validity or terms of the injunction in a contempt proceeding were obviated by appellants having had an opportunity to oppose the injunction before it was entered, by their own decision not to intervene in the proceedings below, and by the safeguards to constitutional rights that exist in contempt proceedings.⁴¹⁴ Similarly, in *Citibank International v. Collier-Traino, Inc.*, the Ninth Circuit refused to permit a nonparty Libyan bank to appeal an order refusing to reconsider its motion to vacate the judgment in a case where Citibank had been permanently enjoined from paying the nonparty Libyan bank on a letter of credit.⁴¹⁵ Observing that a district court should apply standards similar to those used in deciding whether to allow a nonparty to appeal, the Ninth Circuit held that because the nonparty had chosen not to participate in the case despite its actual knowledge of the proceedings and because it refrained from taking any action that might subject it to the court's jurisdiction on related claims, the nonparty had to accept the disadvantages of its strategic behavior.⁴¹⁶ Thus, the nonparty had neither the right to move to vacate nor the right to appeal the denial of that motion.⁴¹⁷

In both *Microsystems Software* and *Citibank International*, the appeals courts' decisions appear to have been strongly influenced by the would-be appellants' strategic decisions not to intervene, thereby avoiding liability or other judicial impositions in the current or other cases.⁴¹⁸ Both courts took the position that these would-be appellants should suffer consequences from the choices they made.⁴¹⁹ In dictum, the First Circuit took the more extreme position, one that contrasts with the view of most federal courts of appeals, that any equities that favor hearing an appeal by a nonparty are irrelevant to standing to appeal because it is a jurisdictional matter.⁴²⁰

⁴¹⁴ *Id.* at 42-43.

⁴¹⁵ 809 F.2d 1438, 1441 (9th Cir. 1987).

⁴¹⁶ *Id.*

⁴¹⁷ *Id.*

⁴¹⁸ *Microsystems Software*, 226 F.3d at 38; *Citibank Int'l*, 809 F.2d at 1441.

⁴¹⁹ *Microsystems Software*, 226 F.3d at 40; *Citibank Int'l*, 809 F.2d at 1441.

⁴²⁰ *Microsystems Software*, 226 F.3d at 41.

Let us consider whether this last proposition is correct. Based on principles developed in *Shining a Light* and referred to earlier in this Article, if a nonparty is the only appellant, a court of appeals can hear the case only if there is an Article III case or controversy between the would-be appellant and the opposing parties.⁴²¹ Given that the would-be appellant is not herself a party, not an intervenor, not an absent member of a plaintiff- or defendant-class, and not a shareholder in a derivative suit, the requisite case or controversy between the remaining participants would seem to be lacking. It is possible, however, that participation short of party status or intervenor status, including, but not limited to, participation as a class member or shareholder in a derivative suit could suffice to create an Article III case or controversy. If it does, that could explain the courts' insistence upon participation by nonparties as necessary, although not sufficient, to their standing to appeal. If participation short of party status, intervenor status, class membership, or status as a shareholder in a derivative suit does *not* create an Article III case or controversy, however, the First Circuit would be correct that such participation and equities favoring appeal cannot suffice to confer jurisdiction on the appeals court. But if parties or others competent to create a case or controversy also are appellants, then there is a case or controversy on the coattails of which nonparty appellants can ride without violating Article III.⁴²² Thus, the equities favoring appeal, including participation below, would be relevant and could be determinative prudential factors governing whether a court of appeals, in its discretion, should hear the nonparties' appeal.

The cases discussed above can be viewed as consistent with this analysis, but most of them did not focus on the Article III issue. In some of the cases, there were appellants other than the nonparty appellant, allowing the court to decide whether to permit the nonparty's appeal based upon prudential and equitable considerations.⁴²³ In other cases, such as *Microsystems Software* and

⁴²¹ See *supra* note 1 and accompanying text (discussing principles developed in *Shining a Light*).

⁴²² See *supra* notes 318-421 and accompanying text; see *infra* notes 423-40 and accompanying text (discussing when nonparties have standing to appeal).

⁴²³ *E.g.*, *Commodity Futures Trading Comm'n v. Topworth Int'l*, 203 F.3d 1107, 1111 (9th

Citibank International, the nonparty appellant was the sole appellant.⁴²⁴ To reconcile with Article III the cases in which the nonparty appellant was permitted to appeal despite being the sole appellant, one would have to say either that the nonparty appellant was a de facto intervenor or simply that the nonparty's participation combined with its injury and the redressability thereof created an Article III case or controversy *vis á vis* the parties in the litigation whose interests were adverse.

In exercising discretion to hear or to reject nonparty appeals, the courts' inclination to attach great importance to would-be appellants' strategic decisions not to intervene, so as to avoid liability or other judicial impositions in the current or other cases, is similarly appropriate. It is audacious for the would-be appellant to purposefully stay on the sidelines so as to avoid liability or other judicial impositions and then seek to appeal adverse decisions, even if those decisions do not formally bind that would-be appellant. Such behavior is reminiscent of the one-way intervention that the drafters of Rule 23 sought to prevent in designing a class action system in which one ordinarily cannot await the outcome of litigation before deciding whether to join the litigation.⁴²⁵ If one wants to be able to avoid the adverse effects of a judicial decision

Cir. 1999) (involving defendant appeal of turnover while nonparty appealed planned distribution of ordered turnover funds); *United States v. Int'l Bhd. of Teamsters*, 931 F.2d 177, 180 (2d Cir. 1991) (involving defendant appeal arguing that several election rules were beyond scope of consent decree or contrary to federal labor law); *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 194 (3d Cir. 1990) (involving multiple party appellants).

⁴²⁴ *Microsystems Software*, 226 F.3d at 37; *Citibank Int'l*, 809 F.2d at 144; *see also* *United States v. Vahlco Corp.*, 895 F.2d 1070, 1073 (5th Cir. 1990) (upholding property purchaser's standing to appeal order to sell property in connection with foreclosure of lien); *In re Application of Dow Jones & Co.*, 842 F.2d 603, 607-08 (2d Cir. 1988) (finding case or controversy via appellants' standing to appeal as potential recipients of speech by trial participants whom court restrained).

⁴²⁵ FED. R. CIV. P. 23(c)(3) advisory committee's note states, in part:

Hitherto, in a few actions . . . designed to extend only to parties and others intervening *before* the determination of liability, courts have held or intimated that class members might be permitted to intervene *after* a decision on the merits favorable to their interests, in order to secure the benefits of the decision for themselves, although they would presumably be unaffected by an unfavorable decision. Under proposed subdivision (c)(3), one-way intervention is excluded; the action will have been early determined to be a class or nonclass action.

Id.

and in that sense derive benefits from the system, it seems fair that one should have to take the risks of the system as well. And yet, one might well ask whether such an attitude can be reconciled with the Court's decision in *Martin v. Wilks*⁴²⁶ and whether the nonparties affected by injunctions whom courts have allowed to appeal have conducted themselves any differently than those whom the courts have not allowed to appeal.

First, I believe that this stance is reconcilable with *Martin*. The Court there concluded that white employees had no duty to intervene in a suit by black co-employees seeking remedies from their employer for past race discrimination. The Court further held that, as persons who were neither parties to nor intervenors in the race discrimination suit, the white employees were not precluded from challenging the employment decisions taken pursuant to the consent decree rendered in that suit.⁴²⁷ Preventing the white employees from challenging the legality of conduct taken pursuant to a consent decree entered in litigation to which they were not parties would in effect bind them by the judgment in that prior litigation, in violation of their due process rights.⁴²⁸ But allowing such an attack on the prior judgment, or at least on conduct taken pursuant to it, for the very reason that the current challengers were not parties to the earlier litigation in no way implies that such persons could have appealed the judgment they now challenge, a privilege that is paradigmatically reserved for parties. Thus, although strangers to litigation are permitted to freeride and reap the indirect benefits of any success by parties in the case whose interests are aligned with theirs, and even to collaterally attack conduct taken pursuant to a consent decree, such strangers should not be entitled to appeal an adverse decision.⁴²⁹

Second, it is hard to be sure whether the nonparties, affected by injunctions, whom courts have allowed to appeal have conducted

⁴²⁶ 490 U.S. 755, 765-68 (1989).

⁴²⁷ *Id.*

⁴²⁸ *Id.* at 761-63.

⁴²⁹ *But see* *United States v. Int'l Bhd. of Teamsters*, 931 F.2d 177, 184 n.2 (2d Cir. 1991) (relying on *Martin* to reject argument that appellants' failure to intervene waived any right to challenge election rules order on appeal; describing *Martin* as holding that failure to intervene does not bar subsequent challenge to actions taken pursuant to consent decree).

themselves any differently than those whom the courts have not allowed to appeal. It may well be that courts sometimes have permitted nonparties to appeal who could have, and arguably should have, sought to intervene in the action. In those cases, however, the nonparties' participation may have been tantamount to intervention, or the nonparties may have merely neglected to intervene rather than affirmatively refused to intervene in order to keep themselves outside the power of the district court. The courts found affirmative refusals to intervene in *Microsystems Software* and *Citibank International*.⁴³⁰ In other cases, courts have found participation by a nonparty nonexistent or insufficient to justify standing to appeal⁴³¹ or found that the would-be appellant lacked an interest justifying its standing to appeal.⁴³²

Courts ought to pay more attention to whether there is an Article III case or controversy when nonparties alone seek to appeal. It is ironic that courts have paid a good deal of attention to the Article III issue when intervenors alone have appealed⁴³³ and seemingly less attention when the sole appellant was a nonparty, nonintervenor participant. Even when there is no Article III problem, the frequency with which courts allow appeals by nonparties affected by injunctions or by other judicial decisions suggests that something

⁴³⁰ *Microsystems Software, Inc. v. Scandinavia Online AB*, 226 F.3d 35, 38 (1st Cir. 2000); *Citibank Int'l v. Collier-Traino, Inc.*, 809 F.2d 1438, 1439 (9th Cir. 1987).

⁴³¹ *E.g.*, *Communications Workers of Am. v. N.J. Dep't of Pers.*, 282 F.3d 213, 219 (3d Cir. 2002) (holding that local union that made no attempt to participate in proceedings lacked standing to appeal); *Hutchinson v. Pfeil*, 211 F.3d 515, 518 (10th Cir. 2000) (concluding that individuals whom named plaintiff sought to add as plaintiffs did not have standing to appeal denial of motion to so amend, noting proposed plaintiffs' passive relationship to proceedings); *Jones v. Clinton*, 206 F.3d 811, 812 (8th Cir. 2000) (holding that nonparty witness lacked standing to appeal denial of her motions where her participation did not make her privy to record and she lacked requisite interest); *EEOC v. La. Office of Cmty. Servs.*, 47 F.3d 1438, 1443 (5th Cir. 1995) (holding that employee could not appeal judgment in favor of employer in EEOC action brought on employee's behalf where employee did not participate and was adequately represented).

⁴³² *E.g.*, *Trueman v. Historic Steamtug N.Y.*, 14 Fed. Appx. 106, 108 (2d Cir. 2001) (dismissing appeal for lack of standing to appeal of appellant who had been held not to have any valid claim of ownership to vessel involved in salvor's in rem action to establish title); *Davis v. Scott*, 176 F.3d 805, 807-08 (4th Cir. 1999) (holding that prisoner lacked standing to appeal denial of his wife's application for writ of habeas corpus purportedly filed on behalf of prisoner-husband, where he lacked significant interest because dismissal did not affect his right to seek habeas).

⁴³³ See *supra* notes 61-97 and accompanying text.

ought to change.⁴³⁴ Courts should recognize the descriptive inaccuracy of the generalization that only parties and intervenors may appeal and should decide normatively how the system should work. The categories of persons whom appellate courts will permit to appeal could be narrowed to parties and intervenors, thus rendering the black letter generalization accurate. The courts then would require joinder or intervention by anyone desiring to appeal a judicial decision and would refuse to permit appeal by anyone who made no effort to intervene. Alternatively, the appellate courts could maintain greater breadth in the categories of persons whom those courts permit to appeal and could abandon or qualify the traditional black letter generalization. The appellate courts should, however, decide the criteria for the right to be an appellant or appellee and adhere to those criteria, thereby bringing greater honesty and greater certainty to this area of the law. Whichever way is chosen, the courts ought to strive for legal rules that conform to the realities and realities that conform to clearly articulated legal rules in the realm of standing to appeal.

My preference is for courts (1) to recognize the right of sufficiently affected nonparties to coattail, even if they did not participate in the trial court proceedings, if the equities favor allowing their appeal; (2) to take the position that a person who does not participate in the trial court proceedings runs the risk of being unable to appeal because no party seeks review on which the nonparty may coattail and, without a party appeal, one who did not participate below does not have an Article III controversy with those having adverse interests; and (3) to recognize an Article III case or controversy between litigation adversaries and a nonparty who participates in the trial court proceedings to a significant degree, where all the requisites to an Article III case or controversy aside from party status are present, so as to permit even a solo appeal by the participant. Of course, these guidelines beg certain questions such as when a nonparty is sufficiently affected by trial court decisions and when nonparty participation is sufficiently significant. But having an understanding of when it is and when it is not important to have an Article III case or controversy present between

⁴³⁴ See *supra* notes 61-97 and accompanying text.

the nonparty and its litigation adversaries should assist courts to apply these standards. Equity and efficiency may favor allowing a coattail appeal, but they would not suffice to permit a nonparty's appeal where no appeal otherwise would go forward.

I am ambivalent about whether participants who wish to appeal should be required to intervene as a procedural prerequisite distinct from standing. The courts' experience indicates that formal intervention can be dispensed with where nonintervenor participants seek to participate and later seek to appeal. Such a regime would recognize that nonparty, nonintervenor participants may appeal solo if they pose an Article III case or controversy and, in the court's discretion, may coattail on a party's or intervenor's appeal if such participants do not pose an Article III case or controversy but do have a redressable grievance attributable to the court's decisions. The problem may not be with an intervention requirement, however, but with onerous administration of the intervention requirements set forth in the Federal Rules, which deters motions to intervene.⁴³⁵ The district courts could permit intervention by the same kinds of nonparties whom the federal appeals courts are permitting to appeal without imposing a significant additional burden on those nonparties, who often already are participating in the trial court proceedings.

4. *Appeals by Persons Bound by an Order or Judgment.* Relying on *Devlin v. Scardelletti*,⁴³⁶ the Second Circuit in 2002 held that the Ministry of Finance of the Republic of Indonesia had standing to appeal a ruling that the Republic owned funds upon which a judgment creditor of an oil and gas company owned and controlled

⁴³⁵ FED. R. CIV. P. 24(c) requires persons desiring to intervene to draft and serve on all parties both a motion to intervene that states the grounds of the motion and a pleading "setting forth the claim or defense for which intervention is sought." A burden is imposed by these requirements. Moreover, all applicants for intervention of right who do not hold an unconditional statutory right to intervene must demonstrate, *inter alia*, that their interest is not adequately represented by existing parties. *Id.* 24(a)(2). Absent class members and absent shareholders who seek to intervene in class actions and derivative suits carry a higher burden than other applicants, as a practical matter, because they must overcome a previous judicial finding that their interests are adequately protected by class and shareholder representatives. See 7B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE § 1799 at 440-41 ("[I]f the court determines that the nonparty class members are adequately represented, intervention as of right under Rule 24(a) should be unavailable.").

⁴³⁶ 536 U.S. 1 (2002); see *supra* notes 146-200 and accompanying text.

by the Republic sought to execute.⁴³⁷ Although the Ministry was not a named party, did not participate in the proceedings until after the funds in question were attached, and failed to intervene, the Ministry could appeal in light of its affected interest where the court found that the Ministry was a party to the judgment for purposes of appeal.⁴³⁸ It is likely that *Devlin* will similarly influence other appellate decisions in the future. *Devlin* also may engender decisions concerning what counts as being bound.⁴³⁹

Participants in litigation who have roles different from the parties constitute a distinct category of nonparties who often are held to have standing to appeal. Thus, there are appeals brought by attorneys, witnesses, special masters, receivers, and the like.⁴⁴⁰ Some of the quasi-party cases have involved such actors, as have some of the cases involving nonparties to whom courts had directed orders or injunctions.⁴⁴¹

C. ATTORNEYS

1. *Attorneys' Fee Appeals.* In the context of attorney appeals of attorneys' fee awards, a frequent preliminary issue is whether the award is made directly to the attorneys or is made to the client. Courts recognize attorneys' standing to appeal an award made to the attorneys.⁴⁴² However, courts typically refuse to recognize

⁴³⁷ *Karaha Bodas Co. v. Perusahaan Petambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 80-81 (2d Cir. 2002).

⁴³⁸ *Id.* at 81-82.

⁴³⁹ Compare *Martin v. Wilks*, 490 U.S. 755, 761-63, 765 n.6 (1989), *with id.* at 769-73, 782, 792 n.32 (Stevens, J., dissenting) (debating whether nonintervening white firefighters who sued alleging that they suffered adverse consequences as result of promotion decisions taken pursuant to consent decrees between black employees, city, and county personnel board were bound by those consent decrees if white firefighters lost their litigation for the reasons firefighters alleged).

⁴⁴⁰ See *supra* note 16 and accompanying text.

⁴⁴¹ See *supra* notes 307-20 and accompanying text.

⁴⁴² E.g., *Lamie v. United States Tr.*, 540 U.S. 526, 529 (2004) (entertaining attorney's appeal of denial of attorneys' fee for legal services he provided to bankrupt debtor after proceeding was converted to Chapter 7 bankruptcy); *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 287-88 (7th Cir. 2002) (permitting attorneys for class member objectors to appeal trial court's refusal to award them fee for conferring benefit on class, noting that their clients sought no relief since they were content with settlement as ultimately approved; contrasting need for client to appeal when fees are sought under fee-shifting statute that entitles litigants, rather than lawyers, to fees; and in dicta, expressing doubt that lawyer with claim

attorney standing to appeal an attorneys' fee award made to the client, instead recognizing the client's standing to appeal the award.⁴⁴³ Some courts make exceptions to this rule and allow the attorney to appeal the award.⁴⁴⁴ Those courts may allow an attorney's appeal when the attorney no longer represents his past client and therefore cannot count on the past client to take the appeal or may allow an attorney's appeal when the attorney continues to represent the client, reasoning that whether the attorney or the client takes the appeal then is an unimportant technicality.⁴⁴⁵ Attorneys who are not injured by an award of attorneys' fees to other counsel do not have standing to appeal that award.⁴⁴⁶

to portion of common fund created by litigation would have to intervene in order to appeal or to be appellee if class members opposed fee award); *Uselton v. Commercial Lovelace Motor Freight, Inc.*, 9 F.3d 849, 853 (10th Cir. 1993) (entertaining class attorney's appeal from denial of attorney's motion to reconsider fee award).

⁴⁴³ *E.g.*, *In re Synthroid Mktg. Litig.*, 325 F.3d 974, 976-77 (7th Cir. 2003) (holding health insurer class members to have standing to appeal attorneys' fee award to class counsel, where they would receive more from settlement if appeal were successful); *Weeks v. Indep. Sch. Dist. No. 1-89*, 230 F.3d 1201, 1213 (10th Cir. 2000) (denying attorney standing to appeal attorneys' fee award or order reducing costs award under FED. R. CIV. P. 54(d) on ground that such orders applied only to client).

⁴⁴⁴ *E.g.*, *Mathur v. Bd. of Trs. of S. Ill. Univ.*, 317 F.3d 738, 741-42 (7th Cir. 2003) (holding attorneys to be actual parties in interest, entitled to appeal award of attorneys' fees to their client, where award was not intended as additional compensation to plaintiff and plaintiff did not dispute award); *Samuels v. Am. Motors Sales Corp.*, 969 F.2d 573, 576-77 (7th Cir. 1992) (allowing attorney to appeal attorneys' fee award in Magnuson-Moss Act case, despite Act's allowance of attorneys' fee award to prevailing consumer, where there was no evidence that plaintiff contested fee his attorney had sought and appeal would not interfere with plaintiff's control over case); *Lowrance v. Hacker*, 966 F.2d 1153, 1156-57 (7th Cir. 1992) (holding that attorney had standing to appeal for reasonable and uncontested attorneys' fees incurred in postjudgment proceedings notwithstanding that contractual entitlement to fees belonged to his client, but he could not petition for fees incurred during garnishment proceedings when attorney and client were estranged and difference between attorney and client no longer was technicality); *Lipscomb v. Wise*, 643 F.2d 319, 320-21 (5th Cir. 1981) (stating that "[w]hen they are the real parties in interest, attorneys are entitled to a day in court," and holding that attorneys for intervenors could appeal denial of attorneys' fees).

⁴⁴⁵ *See supra* note 444 (citing cases).

⁴⁴⁶ *E.g.*, *Uselton*, 9 F.3d at 854-55 (denying class counsel standing to appeal fee award to objectors' counsel where appellant-counsel was not aggrieved because grant of fees to objectors' counsel did not adversely affect appellant's fee). *See generally* *Wolff v. Cash 4 Titles*, 351 F.3d 1348 (11th Cir. 2003) (dismissing appeal on ground that liquidators, settlement administrator, and receiver lacked standing to appeal attorneys' fee award to plaintiffs in class action to which appellants were nonparties, as none of appellants was injured or aggrieved since, *inter alia*, none was responsible for paying fee).

2. *Sanctions Appeals.* Attorneys have standing to appeal sanctions entered against them.⁴⁴⁷ The controversial and interesting issue in these cases is whether and when judicial criticism of an attorney's conduct in and of itself imposes an injury from which the attorney can appeal. There is a split in the circuits over whether a district court's decision finding attorney misconduct but imposing no separate sanction can be appealed.⁴⁴⁸ The disagreement flows in

⁴⁴⁷ See, e.g., *In re Bellsouth Corp.*, 334 F.3d 941, 954-55 (11th Cir. 2003) (entertaining, but denying, petition for writ of mandamus filed by disqualified attorney and his firm); *Weeks*, 230 F.3d at 1207-08 (holding that counsel had standing to appeal disqualification order entered against her, noting that favorable decision would likely provide partial redress from injury by helping to ameliorate damage to her professional reputation); *Clark v. County of L.A.*, No. 92-55895, 1994 WL 68252, *1 (9th Cir. Mar. 3, 1994) (entertaining appeal by attorneys upon whom district court imposed monetary sanctions for discovery abuses); *Ted Lapidus, S.A. v. Vann*, 112 F.3d 91, 92 (2d Cir. 1997) (entertaining attorney's appeal from sanctions imposed under 28 U.S.C. § 1927, permitting counsel liability for excess costs caused by attorney's vexatious multiplication of proceedings); *Hendrix v. Naphtal*, 971 F.2d 398, 399 (9th Cir. 1992) (entertaining law firm's appeal of sanctions imposed pursuant to FED. R. CIV. P. 11); cf. *United States v. Chesnoff (In re Grand Jury Subpoena Issued to Chesnoff)*, 62 F.3d 1144, 1145-46 (9th Cir. 1995) (holding that attorney and his law firm lacked standing to appeal disqualification order because they failed to identify any injury to them; client could appeal to extent he claimed interference with his right to counsel of his choice).

⁴⁴⁸ *United States v. Gonzales*, 344 F.3d 1036, 1039-40 (10th Cir. 2003) (describing conflict and positions of various federal courts of appeals). Compare *Walker v. City of Mesquite*, 129 F.3d 831, 832-33 (5th Cir. 1997) (holding attorney to have standing to appeal verbal reprimand and finding of professional misconduct stated in court opinion, as both were injurious to his reputation and career prospects), with *Clark Equip. Co. v. Lift Parts Mfg. Co.*, 972 F.2d 817, 820 (7th Cir. 1992) (holding that attorney could not appeal from order finding misconduct but not imposing monetary sanction, despite potential, but speculative, effects on professional reputation), and *Bolte v. Home Ins. Co.*, 744 F.2d 572, 573 (7th Cir. 1984) (dismissing appeal from finding of attorney misconduct for lack of final decision). Both *Clark Equip.*, 972 F.2d at 820, and *Bolte*, 744 F.3d at 573, suggest that an attorney so situated should seek a writ of mandamus against the district judge. Some courts take a middle road, permitting appeal only when a court has made a formal finding of a violation of a specific rule of ethical conduct, as akin to an explicit reprimand. E.g., *Precision Specialty Metals, Inc. v. United States*, 315 F.3d 1346, 1350-53 (Fed. Cir. 2003) (holding formal reprimand for misconduct appealable); *United States v. Talao*, 222 F.3d 1133, 1137-38 (9th Cir. 2000) (finding appealable sanction where district court found that attorney violated specified state rule of professional conduct, distinguishing between routine judicial commentary and that which is "inordinately injurious to a lawyer's reputation"); *Weissman v. Quail Lodge, Inc.*, 179 F.3d 1194, 1200 (9th Cir. 1999) (holding disparaging remarks about counsel and criticism of specific conduct not to constitute appealable sanction because they were not identified as reprimand); *In re Williams*, 156 F.3d 86, 90-92 (1st Cir. 1998) (concluding that published findings of fact attributing misconduct to government attorney were not appealable where monetary sanctions were nullified and where findings were not expressly identified as reprimand); see also *United States v. Sigma Int'l, Inc.*, 300 F.3d 1278, 1280 (11th Cir. 2002) (holding attorney not entitled to name-clearing hearing to challenge unfavorable statements made about him in vacated court of appeals decisions, where attorney claimed no loss more

part from the black letter principle that courts review judgments, not opinions.⁴⁴⁹ This principle really goes to reviewability rather than to standing to appeal,⁴⁵⁰ but it also turns in part on competing views as to whether and when the injury inflicted engenders standing to appeal. Some courts take the view that attorneys may not appeal such orders despite these orders' potential effects on professional reputation.⁴⁵¹ Other courts hold that orders finding professional misconduct impose an appealable injury, while still others fall in between and find standing to appeal only if the trial court's action is tantamount to a formal reprimand or other sanction.⁴⁵²

There even appears to be some hairsplitting within circuits. In one recent case, the Court of Appeals for the Tenth Circuit held that an order characterized by the appellant and the dissent as public censure of an attorney did not constitute a written finding of professional misconduct and, therefore, did not provide standing to appeal.⁴⁵³ About six months later, another panel of the Tenth Circuit held that after final judgment an attorney could appeal an

tangible than loss of reputation).

⁴⁴⁹ *Texas v. Hopwood*, 518 U.S. 1033, 1034 (1996) (Ginsburg, J., joined by Souter, J.) (explaining denial of petition for writ of certiorari by noting that petition did not challenge lower court's judgment that particular admissions procedure used by University of Texas Law School during prior year was unconstitutional because procedures had been abandoned, but challenged only rationale relied on by court of appeals); *California v. Rooney*, 483 U.S. 307, 311 (1987) (stating principle in refusing state's request that Court review pronouncement that search of trash was unconstitutional, where state had won judgment that its search warrant nonetheless was valid); *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) (invoking principle in conjunction with observation that plaintiff-respondents could rely on arguments rejected by court of appeals and could choose not to defend court of appeals' legal reasoning); *Black v. Cutter Labs.*, 351 U.S. 292, 297-98 (1956) (invoking principle when deciding not to pass on federal questions discussed in state court opinion that appeared to rest on adequate and independent state grounds); *ASARCO, Inc. v. Sec'y of Labor*, 206 F.3d 720, 722 (6th Cir. 2000) (so stating); *In re O'Brien*, 184 F.3d 140, 142 (2d Cir. 1999) (so stating); *United States v. Accra Pac, Inc.*, 173 F.3d 630, 632 (7th Cir. 1999) (stating that "someone who seeks an alteration in the language of the opinion but not the judgment may not appeal" whether decision is administrative or judicial); *Sea-Land Ser., Inc. v. Dep't of Transp.*, 137 F.3d 640, 647 (D.C. Cir. 1998) (so stating); *EEOC v. Chi. Club*, 86 F.3d 1423, 1431 (7th Cir. 1996) (observing that "[a] judgment is the resolution of the case or controversy, not a statement or intermediate finding to which the prevailing party might take exception").

⁴⁵⁰ See *Shining a Light*, *supra* note 1, at 871-74 (discussing reviewability).

⁴⁵¹ *Id.*

⁴⁵² See *supra* note 448 (describing cases).

⁴⁵³ *United States v. Gonzales*, 344 F.3d 1036, 1037, 1041, 1047-49 (10th Cir. 2003) (Baldock, J., dissenting), *cert. denied sub nom. English v. Vazquez*, 540 U.S. 1150 (2004).

order finding an ethical violation on his part during litigation, where the order adversely affected the attorney's professional reputation but did not formally reprimand him or impose a monetary sanction.⁴⁵⁴ In the latter case, the district court had ordered the clerk of court to mail a copy of its order finding that the attorney had violated rules of professional conduct to every court in which the attorney was admitted to practice,⁴⁵⁵ indisputably harming the attorney's reputation. The Tenth Circuit concluded that "damage to an attorney's professional reputation is a cognizable and legally sufficient injury"⁴⁵⁶ and rejected efficiency-based and other concerns about allowing such appeals.⁴⁵⁷ By requiring a finding of attorney misconduct in the district court order, the Tenth Circuit sought to hold the line against appeals from " 'every negative comment or observation from a judge's pen about an attorney's conduct or performance.' "⁴⁵⁸

3. *Other Attorney Appeals.* Occasionally, attorneys attempt to appeal other orders. For example, in *In re Grand Jury Subpoena*, a corporation's in-house attorney sought to appeal the denial of a motion to return a memorandum he prepared, that the corporation inadvertently had disclosed in response to a subpoena.⁴⁵⁹ The attorney also appealed the court's decision to turn over to the government this and other documents the court had reviewed in camera.⁴⁶⁰ The Fifth Circuit concluded that the in-house attorney had no standing to assert a work-product privilege in the disputed documents and, therefore, that the court lacked jurisdiction over his appeal.⁴⁶¹

⁴⁵⁴ Butler v. Biocore Med. Techs. Inc., 348 F.3d 1163, 1167 (10th Cir. 2003).

⁴⁵⁵ *Id.* at 1166.

⁴⁵⁶ *Id.* at 1168.

⁴⁵⁷ *Id.* at 1168-69. The Tenth Circuit believed that concern over the lack of adversary positions on appeal was not preclusive because the trial judge's position was articulated in his opinion; the Tenth Circuit thought the burden of appellate supervision was manageable because of the deferential standard of review to be employed and because excess appeals would be deterred by attorneys' fear that an affirmance would only make matters worse. *Id.*

⁴⁵⁸ *Id.* at 1168, quoting *Gonzales*, 344 F.3d at 1047 (Baldock, J., dissenting).

⁴⁵⁹ 220 F.3d 406, 407-08 (5th Cir. 2000).

⁴⁶⁰ *Id.* at 408-09.

⁴⁶¹ *Id.* at 409. The court apparently regarded the corporation as having waived work-product immunity by its disclosure. *Id.*

D. WITNESS APPEALS

Witnesses may appeal the denial of witness and subsistence fees to them, but the parties who subpoenaed the witnesses normally cannot appeal those denials.⁴⁶² Witnesses also may appeal sanctions entered against them and may challenge a civil contempt adjudication on the ground, among others, that the district court lacked subject-matter jurisdiction, thus depriving the district court of authority to issue binding orders to nonparty witnesses.⁴⁶³

E. AMICI

Traditionally, an amicus curiae assisted the court by providing impartial information, especially in matters of public interest, as a friend of the court rather than as an adversary party.⁴⁶⁴ Over time, courts have accepted an increasingly partisan role for, and adversary presentation by, amici.⁴⁶⁵ On some occasions, where a court

⁴⁶² See, e.g., *Demarest v. Manspeaker*, 498 U.S. 184, 185 (1991) (reversing denial of witness fees to prisoner); *United States v. Viltrakis*, 108 F.3d 1159, 1160-61 (9th Cir. 1997) (noting that courts afford witnesses right to challenge courts' denial of witness fees by mandamus, civil action, or appeal, but holding that defendant lacked standing to appeal order to pay witness and subsistence fees for only three of twenty requested days, despite contention that his constitutional right to subpoena witness was thereby hampered, where defendant did not provide evidence that he would have difficulty securing witnesses if again defendant).

⁴⁶³ *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 74, 76-77 (1988). Although a nonparty witness ultimately may obtain review even of a discovery order requiring production of information or documents, the witness's right to appeal generally is not triggered until the court holds the witness in contempt for failure to comply. *Cunningham v. Hamilton County*, 527 U.S. 198, 204 n.4 (1999); see also *In re Flat Glass Antitrust Litig.*, 288 F.3d 83, 90 (3d Cir. 2002) (dismissing appeal where nonparty witnesses ordered to produce documents they claimed were protected by work-product doctrine had not been held in contempt).

⁴⁶⁴ *United States v. Michigan*, 940 F.2d 143, 164 (6th Cir. 1991).

⁴⁶⁵ See *Neonatology Assocs. v. Comm'r of Internal Revenue*, 293 F.3d 128, 131-34 (3d Cir. 2002) (opining that friend of court may be friend of party rather than impartial and that notion that amicus cannot have pecuniary interest in outcome "flies in the face of current appellate practice," and rejecting argument that amicus must show that party to be supported is unrepresented or inadequately represented); *United States v. Michigan*, 940 F.2d at 164-65 (stating that some courts have departed from view of amici as impartial friends of court). See generally Ernest Angell, *The Amicus Curiae: American Development of English Institutions*, 16 INT'L & COMP. L.Q. 1017, 1017, 1020-21 (1967) (depicting amicus as originating as disinterested bystander providing benefit of knowledge to court and discussing, *inter alia*, changed role of amici); Samuel Krislov, *The Amicus Curiae Brief: From Friendship to*

believes a would-be intervenor is not entitled to that role, the court offers and allows amicus status in lieu of intervention.⁴⁶⁶ Participation as an amicus remains a privilege within the sound discretion of the court, however, and amici seldom, if ever, are accorded the full litigating status of parties.⁴⁶⁷ The general rule has been that amici may not appeal judgments⁴⁶⁸ and that an amicus involved in an appeal may not expand the scope of the appeal to issues not presented by the parties,⁴⁶⁹ unless the issues the amicus raises go

Advocacy, 72 YALE L.J. 694, 694-721 (1963) (describing historical amicus as bystander who offers suggestions of law or fact to court and who has no personal interest; tracing history of amici at common law and in United States, and discussing consequences of shift to admitted adversary). Court Rules now may require the filer to indicate whether counsel for a party authored the amicus brief in whole or in part and to identify each other entity that made a financial contribution to the writing or submission of the amicus brief. *E.g.*, SUP. CT. R. 37.6.

⁴⁶⁶ See, e.g., *Planned Parenthood, Inc. v. Am. Coalition of Life Activists*, 244 F.3d 1007, 1014 n.6 (9th Cir. 2001) (construing nonparty's motion to intervene in appeal as employee and agent of enjoined defendant organization as motion to participate as amicus, and granting that motion); *In re Vitamins Antitrust Class Actions*, 215 F.3d 26, 32 (D.C. Cir. 2000) (affirming denial of opt-out plaintiff class members' right to intervene to challenge settlement, but not disturbing district court's grant to them of amicus status); *Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533, 539 (D.C. Cir. 1999) (denying plaintiff-intervenor status to pipeline company similarly situated with plaintiff on ground that intervenor must have standing, and granting amicus status to would-be intervenor so that its views on shared issues could be considered where would-be intervenor had interest arising from possible precedential impact of this case).

⁴⁶⁷ There is a slight trend toward allowing "amicus-plus" status, however. See, e.g., *Alliance of Auto. Mfrs. v. Gwadowsky*, 297 F. Supp. 2d 305, 308 (D. Me. 2003) (granting amicus-plus status to auto dealers association in case challenging new provision of state motor vehicle franchise law). Although the association claimed no right to intervene, did not seek permission to intervene, and did not contend that the state attorney general would not provide adequate representation in defending the statute, the court accorded the association the right to file memoranda and briefs on motions and to present legislative facts, allowed the association to participate separately in oral arguments on dispositive motions, ordered that the association receive notice and service of all documents as if it were a party, allowed the association to examine or cross-examine witnesses at the discretion of the state attorney general, and denied the association the right to engage in independent written discovery. *Id.* at 307-08. While the court recognized that amici are not parties, in affording these extraordinary privileges the court cited the association's strong support for the legislation in question, the association's unique and special interest in the outcome, and the association's ability to offer the court guidance on the implications of the legislation and witnesses to supplement the court's knowledge and inform its judgment. *Id.*

⁴⁶⁸ See, e.g., *United States v. Michigan*, 940 F.2d at 165 (stating that amici may not participate in adversarial fashion, including by appeal); *Moten v. Bricklayers Int'l Union*, 543 F.2d 224, 227 (D.C. Cir. 1976) (per curiam) (stating that amici may not appeal judgments, and disallowing appeal by one whom court found to "stand in a relationship analogous to that of an amicus curiae"); cf. *United States v. Oregon*, 913 F.2d 576, 589-90 (9th Cir. 1990) (refusing to allow appeal by tribe with status similar to amicus).

⁴⁶⁹ See *Knetsch v. United States*, 364 U.S. 361, 370 (1960) (noting that Court had no

to the court's jurisdiction.⁴⁷⁰ In unusual situations where the natural appellee has agreed with the appellant's position, an amicus has been appointed to defend the decision of the court below.⁴⁷¹

VIII. IRREGULAR APPELLEES

This section of the Article is devoted to persons other than full-fledged parties who seek to be appellees in the federal system. An issue could arise as to whether someone seeks to act as an appellee in the same capacity in which he sued or was sued. An issue might arise as to whether a party joined under Rule 19 or a person who intervened under Rule 24 can be a sole appellee,⁴⁷² in light of the questions that may exist as to whether the issues involving that person constitute an Article III case or controversy. It would be unusual for an absent class member or a shareholder in a derivative suit to be an appellee. If the class or corporation whose claim was asserted by its shareholders won in the trial court, the named class representative or shareholder representative (or a new representative whom the court appointed) ordinarily would act as appellee, but perhaps some situations would lead an absent class member or shareholder to serve as appellee. One such situation might arise if

reason to pass upon amicus's argument never advanced by petitioners); *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 719 n.10 (9th Cir. 2003) (refusing to entertain amicus' argument, not urged by any party and absent any exceptional circumstances, that complaint should have been dismissed for failure to join indispensable parties); *Garcia-Melendez v. Ashcroft*, 351 F.3d 657, 662 n.2 (5th Cir. 2003) (citing referenced principle and refusing to consider arguments raised only by amicus); *DiBiase v. Smithkline Beecham Corp.*, 48 F.3d 719, 731 (3d Cir. 1995) (refusing to consider amicus's argument that plaintiffs' claims were actionable under disparate impact theory, absent substantial public interests prompting court to depart from general practice of considering only issues argued by parties); *R.I. v. Narragansett Indian Tribe*, 19 F.3d 685, 705 n.22 (1st Cir. 1994) (declining to address constitutional claims advanced only by amici, noting that amici should not "usurp the litigants' prerogative and introduce new issues or issues not properly preserved for appeal"); *Richardson v. Ala. State Bd. of Educ.*, 935 F.2d 1240, 1247 (11th Cir. 1991) (refusing to consider Title VII defenses not raised in trial court and raised on appeal only by amici).

⁴⁷⁰ See, e.g., *R.I. Dep't of Envtl. Mgmt. v. United States*, 304 F.3d 31, 40 (1st Cir. 2002) (addressing challenge to district court's jurisdiction raised by amicus for first time on appeal).

⁴⁷¹ E.g., *Forney v. Apfel*, 524 U.S. 266, 268-69 (1998) (appointing amicus to defend Ninth Circuit's decision that appellant lacked right to appeal district court remand to social security agency for further proceedings, where appellant had sought outright reversal of denial of disability benefits and appellee Solicitor General agreed that appellant had right to appeal).

⁴⁷² See *supra* notes 45-52 and accompanying text.

an absentee raised objections that the trial court sustained, and the absentee (even unaccompanied by the named representative) sought to defend that success on appeal by the class's or shareholders' adversary. Likewise, a de facto party, a quasi-party, or even a nonparty could find itself as appellee if the trial court ruled in its favor by, for example, denying an injunction sought against that nonparty or denying sanctions sought against that nonparty. Research into nonparty appellees turned up a number of cases of these varieties as well as cases in which nonparties who had defeated efforts to compel discovery from them were appellees on appeals from those rebuffed discovery efforts.⁴⁷³ There also are some cases in which nonparties with a strong interest in the case on the merits were among the appellees.⁴⁷⁴ What is perhaps most remarkable is the absence from the cases of discussion regarding the propriety of having nonparty appellees.

I see no reason why the analyses that the federal appeals courts have brought to bear on irregular appellants should not apply, however. Then, one could be an appellee only in the capacity in which one prevailed in the trial court. One could not be an appellee merely because one's coparty won or because others aligned with one in a case consolidation prevailed. One would have the right to act as appellee only if one personally benefited by the judgment, if

⁴⁷³ See, e.g., *Ratliff v. Davis Polk & Wardwell*, 354 F.3d 165, 167 (2d Cir. 2003) (involving appellee nonparty law firm that plaintiffs had unsuccessfully moved to compel to comply with subpoena to produce nonprivileged documents within its control); *Am. Sav. Bank, FSB v. UBS Fin. Servs., Inc.*, 347 F.3d 436, 437 (2d Cir. 2003) (involving appellee nonparty former employees of defendant against whom plaintiff sought to enforce subpoenas); *Ameristar Jet Charter, Inc. v. Signal Composites, Inc.*, 244 F.3d 189, 190 (1st Cir. 2001) (involving appellee nonparties who successfully had deposition subpoenas quashed); *In re Citric Acid Litig.*, 191 F.3d 1090, 1107-08 (9th Cir. 1999) (involving appellees, some of whom were nonparties, who had defeated motions to compel production of documents); *In re Infant Formula Antitrust Litig.*, 72 F.3d 842, 842-43 (11th Cir. 1995) (including among appellees nonparty to antitrust action that court had refused to enjoin); *United States v. Amodeo*, 71 F.3d 1044, 1045 (2d Cir. 1995) (involving appellee nonparty newspaper that had successfully sought access to report that court officer filed with court in connection with consent decree entered in RICO action).

⁴⁷⁴ See, e.g., *Karaha Bodas Co. v. Perusahaan Perambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 70-71 (2d Cir. 2002) (permitting nonparty Minister of Finance to be cross-appellee regarding portion of funds that plaintiff judgment creditor had not been permitted to execute against, as well as appellant); *Girard v. Donald W. Wyatt Det. Facility*, 50 Fed. Appx. 5, 5-6 (1st Cir. 2002) (including nonparty detention facility owner and operator among appellees in inmate's appeal from dismissal of his civil rights complaint against detention facility).

one's claims or defenses were joint with those of the coparty who was directly benefited, or if one had standing to assert rights that nominally belonged to one's successful coparty or co-consolidatee.

Courts have not treated Rule 19 parties any differently than parties joined pursuant to other Rules, with respect to appeal rights,⁴⁷⁵ although courts have not allowed intervenors to appeal solo unless the intervenors presented an Article III case or controversy.⁴⁷⁶ It would be logical for the courts to allow intervenors to act as solo appellees only if they too were party to an Article III case or controversy. The same Constitutional and policy considerations that speak to the treatment of intervenor-appellants would dictate a parallel conclusion as to intervenor appellees.

It would be unusual for an absent class member or a shareholder in a derivative suit to be an appellee, but if the situation did arise, the analysis used to determine the ability of absent class members and shareholders to appeal could be extended to determine their ability to act as appellees.⁴⁷⁷ By analogy to *Devlin*,⁴⁷⁸ so long as class members are bound by the judgment or other decision being appealed, they would have standing to be an appellee. The focus instead should be on what, if any, other procedural hurdles class members should be required to have jumped. For example, if a class member objected to a proposed settlement and the court sustained his objection and therefore refused to approve the proposed settlement, and if the representative plaintiff and defendant appealed that interlocutory decision under an exception to the final judgment rule and argued that it was an abuse of discretion, it would be appropriate for the objecting class member to serve as appellee. Were the trial court's decision reversed, the objecting class member would suffer an injury caused by the appellate court's holding; the class member would be asserting rights of her own; she would belong to a discrete class of interested persons (not asserting a generalized grievance); and her position would clearly fall within the zone of interests protected by Rule 23(e)'s requirement that a

⁴⁷⁵ See *supra* notes 122-44 and accompanying text.

⁴⁷⁶ See *supra* notes 122-44 and accompanying text.

⁴⁷⁷ See *supra* notes 473-74 and accompanying text.

⁴⁷⁸ *Devlin v. Scardelletti*, 536 U.S. 1 (2002).

settlement be fair to all class members. Whether the class member (or a comparably situated shareholder in a derivative suit) is considered a party, a de facto party, a quasi-party, or a participating nonparty, there would seem to be every reason to allow her to be appellee in the case. No reason to require such a class member to intervene survives the Supreme Court's rejection of an intervention requirement for class members who seek to appeal the approval of a settlement over their properly presented objections.⁴⁷⁹

When it comes to de facto parties, quasi-parties, and other nonparties, the analysis of appellants seems to be similarly transferable. The courts need to be concerned that there is an Article III case or controversy between the appellant and the appellee. If such a controversy exists by virtue of the nonparty appellee having an interest that has been affected by the trial court's appealed decision and that likely will be affected by the appellate court's decision, however, then if the appellee participated in the district court proceedings and the equities favor hearing the appeal, there are no compelling reasons to deny the nonparty the opportunity to be an appellee, or even the sole appellee. Just as a court's order, injunction, or judgment may directly and adversely affect a nonparty, just as a nonparty may be bound by an adverse order or judgment, just as a nonparty may be subjected to a sanction or disappointed by the denial or the amount of an attorney's fee award, a nonparty may be the prevailing person when there is a controversy over whether a particular order, injunction, sanction, or judgment should be entered. In those circumstances, the nonparty should be recognized to have the right to defend the decision below, on appeal. If the decision-benefited nonparty did not participate below sufficiently to have become party to an Article III case or controversy, she should be limited to the role of a coattail co-appellee if equity favors even that role.

⁴⁷⁹ *Accord* *Tachiona v. United States*, 386 F.3d 205, 214 (2d Cir. 2004) (assuming *arguendo* that government had to establish standing to defend ruling on appeal, holding that United States, granted leave to intervene for purposes of appeal, could act as appellee to cross-appeal of ruling that individual defendants were immune from suit, absent party-appellee, because United States asserted injury that fulfilled requirements of Article III in contending that district court's interpretation of international Conventions was correct in light of executive norms concerning diplomatic and head-of-state immunity and United States' treaty obligations).

IX. CONCLUSION

Irregulars has explored the ways in which our law's limitations on standing to appeal and the right to defend judgments apply to various categories of persons who are not full-fledged parties but who are would-be appellants and appellees and to the grievances they assert or seek to avert. This exploration suggests that the law's treatment of these parties is largely consistent with the law governing the circumstances in which full parties have standing to appeal and may serve as appellees. However, there are some inconsistencies and failures in this regard. In particular, the courts' rhetoric is inconsistent with practice insofar as the courts sometimes say that even permissive intervenors have the same rights of appeal from a final judgment as all other parties, but then the courts typically refuse to entertain issues raised on appeal by intervenors but not raised by a principal party. In addition, while persons may intervene under the same circumstances that would require them to be joined under Rule 19, the appellate courts do not limit the issues they will entertain at the urging of persons joined under Rule 19 in the way that the appellate courts limit the issues they will entertain at the urging of intervenors. I suggest that the courts treat intervenors of right in the same manner as they treat Rule 19 parties, and that both be recognized to have the same standing to raise issues on appeal and to defend on appeal as other parties have. Permissive intervenors, like other parties, should have standing to raise on appeal issues that those intervenors properly raised in the trial court (that is, issues within the scope of their intervention) and issues that the trial court decided against them.⁴⁸⁰ In such a regime, no exception to a presumption against hearing intervenor-raised issues would be required to accommodate a solo appeal (or a solo defense of the judgment below) by an intervenor, where an Article III case or controversy is present.⁴⁸¹ If,

⁴⁸⁰ Intervenors also might have standing to raise on appeal issues that other litigants properly raised in the trial court, if the intervenor could show that it was aggrieved by the decision below and that its grievance was redressable by the appeals court.

⁴⁸¹ Of course, the appeals court has discretion to refuse to consider issues that were *not* raised below, no matter who raises them. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (stating general rules that federal appellate court does not consider issue not passed upon

however, the federal appeals courts continue to exercise discretion to refuse to entertain issues raised by intervenors but not by principal parties, the appeals courts should cease to recite that intervenors have the same rights of appeal from a final judgment as all other parties, and should bring their rhetoric into line with reality. Moreover, the decision that someone may intervene of right or the exercise of discretion to permit someone to intervene should recognize that the intervenor will have a right to appeal or defend an appeal solo if she poses an Article III case or controversy, and a right to coattail on a party's appeal or appeal defense if she does not have an Article III case or controversy but does have a redressable grievance attributable to the court's decisions.

A related anomaly is that courts typically (and properly) scrutinize whether there is an Article III case or controversy when an intervenor is the sole appellant or appellee, the principal parties being willing to accept the trial court's decision, while courts typically fail to make a similar inquiry if a Rule 19 party is the sole appellant or appellee, even though the Rule 19 party's interest in the litigation may be entirely comparable to that of an intervenor. Still more ironically, in cases in which the sole appellant is a nonparty, the courts often neglect to do the kind of exacting examination, or any examination, of whether there is an Article III case or controversy that one typically finds when an intervenor is the sole appellant. Appeals courts always should confirm the existence of an Article III case or controversy before proceeding to the merits of an appeal.

Despite the Supreme Court's decision in *Devlin v. Scardelletti* as to absent class members' standing and right to appeal approval of

below and that choice of questions that may be resolved for first time on appeal is left primarily to discretion of courts of appeals, but noting that federal appellate court may be justified in resolving issue not passed on below where proper resolution is beyond doubt or where injustice otherwise might result); *Friendly Farms v. Reliance Ins. Co.*, 79 F.3d 541, 544-45 (6th Cir. 1996) (reciting factors to be considered in determining whether to exercise discretion to consider new issues, including whether issue newly raised on appeal is question of law or requires determination of facts; whether proper resolution of new issue is clear; whether failure to take up issue will result in miscarriage of justice; and parties' right to have issues considered by both district judge and appellate court); *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 720 (10th Cir. 1993) (citing *Singleton*, *supra*).

a class action settlement without having intervened,⁴⁸² the courts remain in conflict over whether absent shareholders in a derivative suit have equivalent standing and right to appeal approval of a settlement in such an action.⁴⁸³ For the reasons elaborated earlier, the better rule would recognize or confer on shareholders appeal rights comparable to those of absent class members.

Finally, the general rule that nonparties have no standing to appeal from (or to defend) judicial orders or judgments may be useful to deter efforts to appeal (or to defend on appeal) made by total strangers to a litigation, but the rule is subject to so many exceptions as to be largely worthless and misleading. In fact, the federal legal system permits appeals and defense of appeals by many nonparties, including persons to whom court orders or judgments were addressed and as to whom injunctions were entered (or, in the case of appellees, denied); persons who are adversely (or, in the case of appellees, favorably) affected by court orders, injunctions, or judgments entered against others; persons who were sanctioned by the trial court (or, in the case of appellees, against whom sanctions were refused); and persons who were denied attorneys' fees or witness fees or awarded less of those fees than they believe they deserve (or, in the case of appellees, who were awarded fees that are challenged on appeal). Courts should change either their rhetoric or the legal reality so the two are congruent. If courts are to continue to allow nonparties to litigate on appeal—and I believe there are good reasons to do so—the courts should better articulate the circumstances in which they will permit nonparties to bring and defend appeals.

The appeals courts can openly recognize that a nonparty, nonintervening participant may appeal solo if he poses an Article III case or controversy and, in the court's discretion, that a nonparty nonintervenor may coattail on a party's or Article III intervenor's appeal if the nonparty does not pose such a case or controversy but does have a redressable grievance attributable to the trial court's decision and equity favors his participation in the appeal. Similarly, the appeals courts can openly recognize that a nonparty,

⁴⁸² 536 U.S. at 14.

⁴⁸³ See *supra* notes 243-57 and accompanying text.

nonintervenor may coattail as an appellee if he was benefited by the trial court's decision and equity favors his participation in the appeal, and may act as sole appellee if he has an Article III case or controversy with the appellant. Past practice suggests that courts can dispense with formal intervention; participation short of intervention apparently has been working, and courts occasionally have even permitted appeals and appeal-defenses by persons who did not participate below. Thus, courts can alter their pronouncements to reflect that nonparties addressed by court orders, injunctions, or judgments, nonparties adversely affected by court orders, injunctions, or judgments entered against others, nonparties sanctioned by the trial court, and nonparties denied attorneys' fees or witness fees or awarded less of those fees than the nonparties believe they deserve, all may have standing to appeal insofar as they suffered a cognizable and redressable injury. And courts can frame a parallel principle for appellees. These principles will be far lengthier, more cumbersome, and more complex than our current rules, but these principles also can be far more accurate. In all instances, of course, the appeals courts will have to check that an Article III case or controversy is presented. This will be necessary, but not sufficient. The regime I propose would leave significant latitude for discretion to reject nonparty appeals. Rejection might be appropriate, for example, when the nonparty made a strategic decision not to intervene so as to avoid liability or other judicial impositions. But more uniform acknowledgment and definition of judicial power to hear appeals from coattailing but aggrieved nonparties would enhance the coherence of our law.