No. 11-1322

IN THE

Supreme Court of the United States

SAMICA ENTERPRISES, LLC, et al.,

Petitioners,

v.

MAIL BOXES ETC., INC., et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

L. Michael Hankes
63 Commercial Wharf
Boston, MA 02110

Peter C. Lagarias
Robert S. Boulter
LAGARIAS & BOULTER, LLP
1629 Fifth Ave.
San Rafael, CA 94901

Thomas C. Goldstein
Counsel of Record
Kevin K. Russell
GOLDSTEIN & RUSSELL, P.C.
5225 Wisconsin Ave., NW
Suite 404
Washington, DC 20015
(202) 362-0636
tg@goldsteinrussell.com

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REPLY BRIEF FOR PETITIONERS

UPS's treatment of its franchisees has resulted in two lawsuits advancing the same state law claims based on the same basic underlying conduct. One was litigated in state court while the other was removed to federal court. The petition demonstrated that although the two lawsuits involve similarly situated plaintiffs and claims, one lawsuit has been dismissed while the other has proceeded solely because the state and federal courts have taken conflicting views of the meaning of California law. There is every reason to believe that this untenable situation arose only because the federal courts did not have the benefit of the state appellate court's decision when they dismissed petitioners' claims. Respondents' attempts to obfuscate that basic truth, and to avoid an entirely routine exercise of this Court's GVR authority, are meritless.

I. The California Court Of Appeal's Decision In *D.T. Woodard* Conflicts With The Federal Courts' Construction Of California Law.

Although respondents claim that a GVR order is an "extraordinary remedy," BIO 1, this Court has held that a GVR may be appropriate whenever a "federal court of appeals' decision on a point of state law has been cast in doubt" by an intervening state court decision. *Thomas v. Am. Home Prods., Inc.*, 519 U.S. 913, 913 (1996) (Scalia, J., concurring) (collecting cases); *see also Huddleston v. Dwyer*, 322 U.S. 232, 236-37 (1944) (remand where intervening state decision "has at least raised such doubt as to the applicable Oklahoma law as to require its reexamination in light of that opinion"). Because an

intermediate appellate court's "considered judgment upon [a] rule of law . . . is not to be disregarded by a federal court," *West v. AT&T*, 311 U.S. 223, 237 (1940), this Court has applied the same rule to intervening decisions of those courts as well. *See* Pet. 18 n.6; *see also United Theatres of Fla., Inc. v. Gerstein*, 419 U.S. 1028 (1974).

The state decision need not overrule existing state law. It is enough, as respondents ultimately acknowledge, that the state decision "significantly clarifies" an ambiguous point of state law, BIO 8, adopting "different legal rules of state law than that adopted by the federal court," *id*. 13.[1] That is exactly what happened in this case.

A. *D.T. Woodard* Rejected The Same Defenses That Were The Basis Of The Federal Decisions Below.

There is no significant dispute about the basis of the federal courts' decisions in this case. Although the court of appeals' opinion is brief, respondents do not contest that it is best read to adopt the district court's rationale. *See* BIO 7.[2] Nor do respondents

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[1] *See, e.g.*, *Exxon Co., USA v. Banque de Paris Et Des Pays-Bas*, 488 U.S. 920 (1988) (GVR in light of state intermediate appellate court decision that resolved state law issues differently than prior federal decision, but did not overrule any precedent); *Blaauw v. Grand Trunk W. R.R. Co.*, 380 U.S. 127 (1965) (same).

[2] Thus, respondents do not argue that the court of appeals inexplicably affirmed on the alternative ground – not raised by respondents or decided by the district court – that petitioners failed to produce any evidence of actual reliance. *See* Pet. 23-24;

dispute that the district court resolved both sets of plaintiffs' claims for "much the same reasons," Pet. App. 41a, ruling that: (1) UPS's allegedly fraudulent statements "merely concern[ed] future events" and therefore could not reasonably be relied upon, Pet. App. 33a; and (2) any reliance would have been "unjustifiable as a matter of law" in light of UPS's various disclaimers, Pet. App. 34a. *See* Pet. 10; BIO 3-6.[3]

The California Court of Appeal's decision in *D.T. Woodard* at the very least "cast in doubt" both of these state law holdings. *Thomas*, 519 U.S. at 913 (Scalia, J., concurring) (citations omitted). In fact, it flatly contradicts them. Specifically, the California Court of Appeal rejected respondents' assertion that the "future events" exception to fraud liability applied to protect misrepresentations and omissions about the past and present simply because those

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cf. Stutson v. United States, 516 U.S. 193, 196 (1996) (GVR where basis for court of appeals' decision was ambiguous).

[3] Respondents suggest in passing that the district court may have also held that statements to the New Franchisees in the Risk Factor Acknowledgement (RFA) were not actionable because they "were not representations of fact but disavowals of profitability." BIO 16 (citing Pet. App. 33a). But in the passage cited, the district court specifically declined to decide whether the RFA statements constituted representations of fact. Pet. App. 33a (holding that "*to the extent* the RFAs could be read as providing (as opposed to disavowing) any representations regarding profitability, the challenged language merely concerns future events . . . .") (emphasis added). Nor did the Ninth Circuit rule that an acknowledgement form can never contain actionable representations of fact. *See* Pet. App. 3a (resolving claims on reasonable reliance grounds).

statements were offered as support for a prediction about future profitability. Pet. App. 80a. And it held that under California law, respondents could not avoid liability for such frauds by requiring franchisees to sign disclaimers acknowledging that future profitability could not be guaranteed. *See* Pet. App. 80a-82a.

D.T. Woodard thus did far more than simply reiterate the "basic state law principle[]," BIO 1, that "plaintiffs' claims require reasonable reliance," *id*. 9. It clarified state law on two precise points that were critical to the disposition of this case below. At the same time, while respondents say that they disagree with *D.T. Woodard*'s holding, BIO 14, they do not claim that it conflicts with any decision of the California Supreme Court or point to any reason why that Court would reject *D.T. Woodard*'s construction of state law. As a consequence, under established Ninth Circuit precedent, the state court of appeals' interpretation of California law is controlling. *See, e.g.*, *Beeman v. Anthem Prescription Mgmt., LLC*, No. 07-56692, -- F.3d --, 2012 WL 2775005, at *4 (9th Cir. June 6, 2012) (en banc) ("Where there is no convincing evidence that the state supreme court would decide differently, a federal court is *obligated* to follow the decisions of the state's intermediate appellate courts.") (emphasis added, citation omitted).

B. Respondents' Attempts To Evade The Conflict With *D.T. Woodard* Fail.

Respondents nonetheless argue at length that no GVR is warranted because: (1) *D.T. Woodard* did not consider the specific false statements that are the

basis for the New Franchisees' claims; and (2) although *D.T. Woodard* did consider the misrepresentations at the heart of the Converting Franchisees' claims, petitioners abandoned those claims through inadequate briefing in the Ninth Circuit. BIO 15-16. Neither argument has any basis.

1. The Legal Holdings Of D.T. Woodard *Apply Equally To The New Franchisees' Claims.*

As respondents' note, *D.T. Woodard* did not include any New Franchisees and therefore did not consider the fraudulent statements in the Risk Factors Acknowledgement (RFA). But the *legal principles* established in *D.T. Woodard* apply identically to the New Franchisee claims based on the RFA. The district court held that the New Franchisees could not reasonably rely on RFA statements that profitability would be principally within the Franchisees' control because those statements "merely concern[ed] future events." Pet. App. 33a. *D.T. Woodard*, however, makes clear that the "future events" exception nonetheless permits liability for the misleading statements and omissions underlying its assurances to New Franchisees that profitability was within their control, including concealed evidence from UPS's past experience showing that its model left franchisees with almost no control over profitability. *See* Pet. App. 79a-81a; Pl. C.A. Br. §§ III, V (discussing withheld information).

Likewise, *D.T. Woodard*'s holding that a franchisor "cannot contract away liability for his fraudulent or intentional acts or for his negligent

violations of statutory law," Pet. App. 81a, equally precludes the district court's reliance on disclaimers to dismiss the New Franchisee's claims. [4]

Accordingly, respondents' repeated emphasis on the fact that the plaintiffs in *D.T. Woodard* pointed to different specific statements than petitioners in this case is a red herring. Respondents make no effort to show that any difference in the statements is material to either the state or federal courts' decisions. In fact, all of the statements in both cases were identical in the two respects that mattered to the state and federal courts: they all related to claims of future profitability, and they all were accompanied by disclaimers of any guarantee of future profits.

2. Petitioners Have Not Waived The Converting Franchisees' Fraud Claims.

With respect to the Converting Franchisees, respondents take a different tact. They do not seriously contest that the Converting Franchisees' fraud claims are based on materially identical statements in both this case and *D.T. Woodard* – namely, repeated assertions in the Gold Shield Summary, Frequently Asked Questions, and road show Powerpoint presentations that the Gold Shield

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[4] Because it is possible that the Ninth Circuit adopted only one of the district court's two rationales, but impossible to tell which one, a GVR would be warranted even if the Court concluded that *D.T. Woodard* was relevant to only one of the two grounds for decision.

tests were reliable. BIO 4.[5] Respondents argue instead that by the time *D.T. Woodard* was decided, petitioners had abandoned the Converting Franchisees' fraud claims wholesale by not adequately briefing them in the Ninth Circuit. *See* BIO 6, 14-15. The court of appeals did not accept this argument when respondents made it below,[6] instead resolving the claims of all the plaintiffs on the merits without making any distinction between the New and Converting Franchisees. *See* Pet. App. 2a-3a. And for good reason: respondents' waiver claim is entirely unsupported.

Respondents do not contest that petitioners' brief challenged both the district court's "future events" and disclaimer holdings.[7] Instead, they argue that this was insufficient because the brief generally discussed these two errors in the context of the New Franchisees' claims. *See* BIO 6 & n.2. That alleged failure would not constitute waiver, even if true. Respondents do not suggest that the correctness of the district court's "future events" or disclaimer holding depends on anything specific to either class of

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[5] *Compare Woodard*, Pet. App. 73a-75a *with* Pl. C.A. Br. §§ III-IV. Petitioners have not attached the briefs because they were filed under seal, but they remain a part of the record in the Ninth Circuit, which can resolve any waiver claim on remand.

[6] *See* Def. C.A. Br. § III(B)(2) (entitled "Converters Have Waived Any Claims As To Misrepresentations And Omissions").

[7] *See* Pl. C.A. Br. 43 (arguing that the "district court erred" in holding that "the challenged language merely concerns future events [and that such] predictions are not actionable"); *id.* § VII(E) (entitled "The District Court Erred That Boilerplate Disclaimers Can Defeat CFIL Claims").

plaintiffs. Repeating the same arguments twice would have served no purpose.

But in any event, petitioners made it quite clear that they were challenging the holdings as applied to all plaintiffs' claims, including the Converting Franchisees' allegations based on the Gold Shield test program and road show presentations. *See* Pl. C.A. Br. § IV (entitled "UPS Misled The Converting Franchisees To Convert By Misrepresenting Test Results And Concealing Facts Showing The Model Was Unprofitable"); *id.* § VI(E) (challenging disclaimer holding without specific reference to either class of plaintiffs); *id.* 45 (at end of section challenging "future events" holding, arguing that "[s]imilarly, the Franchisees raised triable issues over the representations and omissions noted in fact sections III and IV above," sections that discussed in detail the support for Converting Franchisees' claims); *id.* ("Franchisees have fairly demonstrated that Respondents failed to disclose material facts noted above making the FOC, the RFA, *and the Gold Shield and Road Show representations* half-truths or less.") (emphasis added); *see also* C.A. Reply Br. § II(E) (rebutting respondents' waiver claims).[8]

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Ultimately, this Court need not definitively determine how *D.T. Woodard* affects the New

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[8] Respondents' additional assertion that the appellate brief included "just one of the four statements . . . on which petitioners rely in this Court" regarding the Converting Franchisees' claims, BIO 6 n.2, is also false. *Compare* Pet. 4-5 *with* Pl. C.A. Br. § IV(A).

Franchisees' claims or resolve the bona fides of respondents' waiver argument. It is enough that the grounds on which the case was decided below have been drawn into serious question by an intervening state court decision. The purpose of a GVR is to allow the court of appeals to conclusively resolve how the intervening decision affects its judgment and, if necessary, to adjudicate any alternative grounds for affirmance. *See, e.g.*, *Lawrence v. Chater*, 516 U.S. 163, 171-73 (1996) (per curiam).

II. A GVR Cannot Be Avoided Simply Because *D.T. Woodard* Is Unpublished.

Respondents also complain that *D.T. Woodard* is unpublished and therefore not binding on other California courts or the Ninth Circuit. BIO 9-10. But much the same could be said of any decision of an intermediate appellate court, published or not. As respondents themselves point out, "in California, intermediate state court decisions do not bind other appellate courts . . . within the State." *Id*. 10 n.3 (citations omitted). Likewise, even published decisions of state intermediate appellate courts are not strictly binding on the federal courts – they need not be followed when the federal court is "convinced by other persuasive data that the highest court of the state would decide otherwise." *West*, 311 U.S. at 237.

Yet this Court has repeatedly GVR'd cases in light of such non-binding intermediate court decisions. *See* Pet. 17 n.5. That practice is perfectly sensible, for reasons that apply equally here. It is the "duty" of federal courts "in every case to ascertain from *all the available data* what the state law is." *West*, 311 U.S. at 237 (emphasis added). Like

considered dicta from a state supreme court,[9] a state appellate court's reasoned opinion, even if not binding precedent, is an important "datum for ascertaining state law." *Id.* After all, an "intermediate state court in declaring and applying the state law is acting as an organ of the State," *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 177 (1940), and applies its special expertise in matters of state law regardless of whether its opinion is published. It therefore follows that even a non-binding declaration of state law, "in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question." *Id.* at 178; *cf. Stutson*, 516 U.S. at 196 (GVR in light of, among other things, "contrary decisions of four other [federal] Courts of Appeals" which, although not binding on sister circuit, nonetheless "shed light on the law applicable to this case").[10]

In accordance with these principles, despite California's rule prohibiting citation of unpublished decisions in state court, the Ninth Circuit has admonished that federal courts "may not summarily disregard the [California] Appellate Department's

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[9] *See Nolan v. Transocean Air Lines*, 365 U.S. 293, 295-96 (1961) (GVR to consider acknowledged dicta in state supreme court decision).

[10] The Court has likewise GVR'd in light of new administrative interpretations of federal statutes, or new positions taken by the Solicitor General, even though such interpretations are not ultimately binding either. *See Lawrence*, 516 U.S. at 167, 172-73.

construction of [state law] merely on the basis that its construction was rendered in an unpublished opinion." *McSherry v. Block*, 880 F.2d 1049, 1052 n. 2 (9th Cir. 1989); *see also Beeman*, *supra* at *4 n.2 (en banc court explaining that "we may nonetheless rely on the unpublished decisions [of California courts of appeal] to 'lend support'" to an interpretation of state law) (citation omitted)); Pet. 22.

Accordingly, the unpublished status of *D.T. Woodard* does not meaningfully detract from the "reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence*, 516 U.S. at 167.[11]

III. Petitioners' Failure To Immediately Discover The Conflicting State Decision Does Not Justify Denial Of A GVR.

Finally, respondents observe in passing that petitioners did not discover and bring the *D.T. Woodard* decision to the Ninth Circuit's attention during the five days between the state court decision and the Ninth Circuit's denial of petitioners' first petition for rehearing en banc. BIO 1.[12] That is no reason to deny a GVR either.

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[11] Respondents do not contest that the Ninth Circuit declined to provide that consideration when it denied petitioners' second petition for rehearing as successive and untimely. *See* Pet. App. 62a; *Lords Landing Village Condo. Council v. Cont'l Ins. Co.*, 520 U.S. 893, 897 (1997).

[12] The petition wrongly stated that *D.T. Woodard* was decided shortly after, rather than shortly before, the denial of the first petition for rehearing. Pet. 2.

Respondents do not dispute that petitioners acted with dispatch, filing a second petition for rehearing the same day they discovered the *D.T. Woodard* decision, a week after it was handed down. The Court has GVR'd in cases involving far less diligence. *See, e.g.*, *Lords Landing*, 520 U.S. at 895 (GVR for reconsideration in light of state decision issued eleven days before the court of appeals' initial decision and not brought to court's attention until after the mandate had issued); *Nolan*, 365 U.S. at 295 (GVR in light of state decision handed down "shortly before argument in the Court of Appeals" but "not brought to the [court's] attention").

The respect owed the courts of the co-sovereign states dictates that "until such time as a case is no longer sub judice, the duty rests upon federal courts to apply state law . . . in accordance with the then controlling decision of the highest state court" or "state intermediate courts." *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 543 & n.21 (1941). A GVR is necessary to fulfill that obligation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, the judgment vacated, and the case remanded to the Ninth Circuit for reconsideration in light of *D.T. Woodard, Inc. v. Mail Boxes Etc., Inc.*, No. B228990, 2012 WL 90084 (Cal. Ct. App. Jan. 12, 2012) (unpublished).

Respectfully submitted,

L. Michael Hankes
63 Commercial Wharf
Boston, MA 02110

Peter C. Lagarias
Robert S. Boulter
LAGARIAS & BOULTER, LLP
1629 Fifth Ave.
San Rafael, CA 94901

Thomas C. Goldstein
Counsel of Record
Kevin K. Russell
GOLDSTEIN & RUSSELL, P.C.
5225 Wisconsin Ave., NW
Suite 404
Washington, DC 20015
(202) 362-0636
tg@goldsteinrussell.com

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