No. 15-457

IN THE
Supreme Court of the United States

MICROSOFT CORPORATION,
Petitioner,

v.

SETH BAKER, ET AL.,
Respondents.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Faced with a split in the circuits and a position on the merits at odds with this Court's precedent, respondents resort mostly to vehicle arguments. Most prominently, respondents suggest an order striking class allegations might somehow trigger different appellate considerations than an order denying a motion to certify a class. But they said exactly the opposite below, and they were right the first time. There is no relevant difference between the two types of orders; both deny the named plaintiffs' request (either in their complaint or in a motion) to represent a class, leaving plaintiffs free to pursue their individual claims.

This case, therefore, raises exactly the question Microsoft says it does: whether a court of appeals has jurisdiction to review an order "denying class certification" after the named plaintiffs voluntarily dismiss their claims with prejudice. Pet. i; *compare United Airlines v. McDonald*, 432 U.S. 385, 387-93 (1977) (repeatedly characterizing order striking class allegations as a "denial of class certification"). As the four amicus briefs supporting the petition confirm, there is a pressing need for this Court to resolve that question and to require the Ninth and Second Circuits to abide by the appellate restrictions in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978).

1. A leading treatise recently verified that the circuits are split over whether plaintiffs who voluntarily dismiss their claims may appeal orders denying class certification. *See* 2 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 7.1 (12th ed. 2015) (text accompanying notes 51-55). Respondents quibble with this reality, but in vain.

Respondents first assert that the Tenth Circuit's holding in *Bowe v. First of Denver Mortgage Investors*, 613 F.2d 798 (10th Cir. 1980), does not necessarily apply to "a voluntary dismissal" such as the one here because *Bowe* technically arose from a dismissal for refusal to prosecute. BIO 13-14. Respondents are incorrect. The *Bowe* court reasoned that *Livesay* forbids plaintiffs from "establish[ing] an inability to proceed without class certification" to manufacture an appealable order. 613 F.2d at 800. This prohibition applies equally to requests for voluntary dismissals – as treatises confirm. *See* 2 McLaughlin, *supra*, § 7.1 (note 53); Pet. 9 (citing other sources). That the Ninth Circuit – in contrast to every other court to address the question – distinguishes between the means by which plaintiffs secure dismissals only highlights the infirmities of the decision below. It does nothing to undercut the clarity of the Tenth Circuit's position.[1]

Respondents next note that the Third Circuit's holding in *Camesi v. Univ. of Pittsburgh Med. Ctr.*,

[1] The Ninth Circuit itself originally equated voluntary dismissals with dismissals for refusal to prosecute when assessing the appealability of an order denying class certification. *See Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1065-66 (9th Cir. 2014) (quoting with approval the Wright & Miller treatise's recitation of the Second Circuit's holding in *Gary Plastic Packaging Corp. v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176 (2d Cir. 1990), that dismissals for refusal to prosecute create right to appeal). It was only when Microsoft pointed out here that the circuit had previously held in *Huey v. Teledyne, Inc.*, 608 F.2d 1234 (9th Cir. 1979), that a dismissal for failure to prosecute could *not* create appellate jurisdiction over an order denying class certification that the Ninth Circuit suggested a difference between the two types of plaintiff-initiated dismissals. *See* Pet. App. 12a n.4.

729 F.3d 239 (3d Cir. 2013), arose in the context of a collective action under the Fair Labor Standards Act (FLSA) rather than under Rule 23. That is significant, respondents contend, because "[i]n FLSA collective actions, the mooting of the named plaintiff's claim moots the case," whereas "[t]hat is not necessarily the case under Rule 23." BIO 15. But this observation about mootness, even if accurate, has nothing to do with respondents' jurisdictional theory or Third Circuit law on the jurisdictional issue here. Respondents argue their claims are *not* moot because the Ninth Circuit "revived" them. Pet. 16 n.4. And the Third Circuit holds it lacks jurisdiction when named plaintiffs voluntarily dismiss their claims not because the dismissals moot the claims, but because they "constitute impermissible attempts to manufacture finality." *Camesi*, 729 F.3d at 245. Therefore, attempting to appeal a voluntary dismissal in a FLSA collective action is no different in the Third Circuit from attempting the same maneuver in "a class action [brought] under Rule 23." *Id.*; *see also Sullivan v. Pac. Indem. Co.*, 566 F.2d 444, 445 (3d Cir. 1977) (barring "strategy" of generating dismissal to avoid the rule "against interlocutory appeals of class certification determinations" under Rule 23).

Respondents contend it is "unclear" whether the Seventh Circuit's refusal in *Chavez v. Illinois State Police*, 251 F.3d 612 (7th Cir. 2001), to review a denial of class certification in the posture here "was jurisdictional rather than merely prudential." BIO 17. Respondents are wrong again. In a section entitled "Jurisdiction," the Seventh Circuit explained it could "not review claims that were dismissed pursuant to plaintiffs' request for voluntary

dismissal with prejudice" because plaintiffs cannot "manufacture[] *appellate jurisdiction* by asking the district court to voluntarily dismiss their claims." *Chavez*, 251 F.3d at 628 (emphasis added); *see also id.* at 629 (reiterating this holding).

Turning to *Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88 (4th Cir. 2011), respondents try to push aside the Fourth Circuit's holding on the ground that it invoked Article III, instead of 28 U.S.C. § 1291, to reject the voluntary dismissal tactic. BIO 16. But whatever the basis of the Fourth Circuit's holding, the fact remains that Fourth Circuit law precludes appellate jurisdiction under the precise circumstances here, while the Second and Ninth Circuits claim the power to decide such appeals. In any event, the Fourth Circuit has held that the voluntary dismissal tactic violates *both* Article III and Section 1291. When plaintiffs claim a reversal after a voluntary dismissal would allow them to proceed based on some residual "representative interest" in other class members' claims, then Article III bars the appeal. *Rhodes*, 636 F.3d at 99-100. But to the extent plaintiffs claim such a reversal would revive their own claims, then Section 1291 bars the appeal. *See Himler v. Comprehensive Care Corp.*, 992 F.2d 1537 (4th Cir. 1993) (unpublished opinion). Microsoft makes both arguments here as well. *See* Pet. i (asking simply whether "jurisdiction" exists); Pet. 22-23 (elaborating Article III argument).

Finally, respondents argue the Eleventh Circuit might tolerate the voluntary dismissal tactic because it has not yet directly addressed whether a voluntary dismissal can support an appeal of "a denial of class

certification," and the Eleventh Circuit held in *OFS Fitel, LLC v. Epstein, Becker & Green, P.C.*, 549 F.3d 1344 (11th Cir. 2008), that "plaintiffs may indeed challenge certain interlocutory orders through a voluntary dismissal." BIO 14-15. But the Eleventh Circuit has left no doubt about what its precedent dictates in the circumstances here. In *OFS Fitel*, the Eleventh Circuit held that plaintiffs may dismiss their claims to appeal orders that are "effectively case-dispositive" – that is, orders effectively foreclosing their ability to prove their claims "on the merits." *OFS Fitel*, 549 F.3d at 1358; *see also United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958) (same). By contrast, when "there is no contested court ruling, either interlocutory or final, as to the merits of the plaintiff's claims," the rule of *Druhan v. Am. Mut. Life*, 166 F.3d 1324 (11th Cir. 1999), controls. *OFS Fitel*, 549 F.3d at 1356. Under *Druhan*, appellate jurisdiction is lacking when "[t]he dismissal with prejudice was requested only as a means of establishing finality in the case such that the plaintiff could appeal [an] interlocutory order." *Druhan*, 166 F.3d at 1326.

Orders denying class certification fall squarely on *Druhan*'s side of this dichotomy. Orders involving class certification "in no way touch[] on the merits of the claim but only relate[] to pretrial procedures" – namely, whether plaintiffs may join their claims with other would-be litigants. *Gardner v. Westinghouse Broad. Co.*, 437 U.S. 478, 482 (1978) (quotation marks and citation omitted). Thus, even though *Druhan* was not a class action, Eleventh Circuit law precludes appellate jurisdiction under the circumstances here.

2. Respondents contend for two reasons that this case is an unsuitable vehicle for resolving the conflict over the legitimacy of the voluntary dismissal tactic. Neither contention has merit.

a. When they sought interlocutory review of the district court's order striking their class allegations, respondents explained that "[b]ecause that decision foreclosed the possibility of class certification, it is *functionally equivalent* to a decision on class certification." Pet. for Permission Appeal Under Fed. R. Civ. P. 23(f) at 5 (emphasis added). And when the Ninth Circuit held in *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1064-66 (9th Cir. 2014), that plaintiffs may appeal orders denying class certification after voluntarily dismissing their claims, respondents told the Ninth Circuit that "*Berger* is *indistinguishable* from this case." Pltfs.' Letter Submitting Supp. Authority (Feb. 14, 2014), at 1 (emphasis added). The Ninth Circuit agreed. Pet. App. 11a-12a; *see also Bobbitt v. Milberg LLP*, 801 F.3d 1066, 1069 (9th Cir. 2015) (applying the holding below and *Berger* to assume jurisdiction over an order denying a motion to certify a class), *pet. for cert. filed* (No. 15-734).

Nevertheless, respondents now argue that orders striking class allegations "differ[] significantly" from orders denying motions to certify classes. Unlike an order denying a motion to certify a class, respondents contend, an order striking class allegations is "analogous" to an order "dispos[ing] of less than all claims," such as an order dismissing a negligence claim while allowing a strict liability claim to proceed. BIO 9-10.

Respondents are wrong. "A plaintiff who brings a class action presents two separate issues for judicial resolution. One is the claim on the merits; the other is the claim that he is entitled to represent a class." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 402 (1980). An order denying a motion to certify a class "d[oes] not affect the merits of petitioner's own claim." *Gardner*, 437 U.S. at 480-81. "An order refusing to certify . . . a class" therefore leaves a plaintiff "free to proceed on his individual claim," without prejudicing his ability to obtain a judgment on the merits. *Livesay*, 437 U.S. at 467.

An order striking class allegations is likewise a "denial of class certification," while leaving plaintiffs entirely free to "proceed . . . on an individual basis." *McDonald*, 432 U.S. at 390, 391 & n.4. This case illustrates that reality. Respondents' complaint alleged eleven substantive causes of action. The complaint separately alleged that a class action was proper and asked the district court to "certify a class action" and to "appoint the named Plaintiffs to serve as Class Representatives." Am. Compl. at 43. While the district court's order turned down respondents' request to certify a class action, it left them free to pursue all eleven of their claims on the merits. *See Baker v. Microsoft Corp.*, 851 F. Supp. 2d 1274 (W.D. Wash. 2012). The order is thus identical for purposes of the question presented to an order denying a motion to certify a class.

Respondents also suggest that Rule 23(f) might not apply to orders striking class allegations the same way it applies to orders denying motions to certify classes. BIO 10-11. But the courts unanimously have held – as respondents stressed

when they filed their Rule 23(f) petition – that Rule 23(f) applies equally in both settings. This is because an order striking class allegations "is the functional equivalent of denying a motion to certify the case as a class action." *Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 110 n.2 (4th Cir. 2012) (quoting *In re Bemis Co.*, 279 F.3d 419, 421 (7th Cir. 2002)).

At any rate, respondents overstate the significance of Rule 23(f) to Microsoft's argument on the merits. In *Livesay*, this Court explained that the "death knell" doctrine was illegitimate in part because it allowed plaintiffs to evade the restrictions on interlocutory review embedded in 28 U.S.C. § 1292(b). *See Livesay*, 437 U.S. at 474-75. Microsoft argues the voluntary dismissal tactic likewise allows plaintiffs to evade restrictions on interlocutory review. *See* Pet. 22. Microsoft maintains (as respondents did below) that the pertinent restrictions are now codified in Rule 23(f), which has in practice supplanted Section 1292(b) as to orders denying class certification. But if Microsoft and respondents are wrong that Rule 23(f) governs review of orders striking class allegations (as it governs review of orders denying motions for class certification), then Section 1292(b) would define the limits of appellate jurisdiction here. And Microsoft's argument would remain the same: The voluntary dismissal tactic, just like the "death knell" doctrine, impermissibly allows plaintiffs to evade the applicable restrictions on interlocutory review.

b. Respondents assert the question presented is not outcome-determinative because the Ninth Circuit "was careful to withhold any opinion on whether the case is amenable to adjudication by way of a class

action." BIO 12. This assertion misses the point. The question presented is outcome-determinative because if this Court holds that the voluntary dismissal tactic is illegitimate, then the case is over. *See* Pet. 19. The only relevance of the Ninth Circuit's refusal to decide whether class certification is appropriate is that it underscores the voluntary dismissal tactic's propensity to generate multiple piecemeal appeals. *See* Pet. 12-13.

3. Respondents' arguments on the merits only reinforce the need for review.

a. Respondents contend that in contrast to *Livesay*, they challenge a "final" judgment because the district court not only denied their request to certify a class but also dismissed their claims with prejudice, thereby putting them at "risk of los[ing] their claims" if they fail to secure a reversal. BIO 17-18, 21. But more than finality is needed to secure appellate jurisdiction. Appellants must also show "adversity." *Druhan*, 166 F.3d at 1326; *see also Moore v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 47, 47-48 (1971) (per curiam); *Procter & Gamble*, 356 U.S. at 680. And there is no adversity where a district court dismisses a case *at a plaintiff's request* without previously having entered any orders undercutting the plaintiff's claims "on their merits." *Camesi*, 729 F.3d at 246; *see also Procter & Gamble*, 356 U.S. at 680 (discussing "the familiar rule that a plaintiff who has voluntarily dismissed his complaint may not [appeal]" if the ruling precipitating the dismissal was not "on the merits"); *OFS Fitel*, 549 F.3d at 1356-57 (same).

The order of dismissal here occurred after a ruling having nothing to do with the merits of

respondents' claims. It cannot create appellate jurisdiction.

As a fall-back, respondents argue they are really appealing "the decision to strike class claims," and that order satisfies the adversity requirement because it was entered "over [their] objection." BIO 18. But this argument runs right back into *Livesay*'s holding that an order denying class certification (even if the "death knell" of the case) is interlocutory and not immediately appealable. 437 U.S. at 469, 477. That being so, a plaintiff may not circumvent *Livesay*'s rule by voluntarily dismissing their claims to provide a "graphic demonstration that the 'death knell' has indeed sounded." *Bowe*, 613 F.2d at 800. "If [courts] were to allow such a procedural sleight-of-hand to bring about finality," there would be "nothing to prevent [plaintiffs] from employing such a tactic to obtain review of discovery orders, evidentiary rulings, or any of the myriad decisions a district court makes before it reaches the merits" of class actions. *Camesi*, 729 F.3d at 245-46. "This would greatly undermine the policy against piecemeal litigation embodied by § 1291," *id.* at 246, and give plaintiffs an unfair advantage in putative class actions, *see* Pet. 15.

b. Respondents assert the danger of "serial appeals" here derives only from "Microsoft's own strategic decision" to challenge respondents' class allegations at the outset of the case as matter of law. BIO 22. Not so. As other Ninth Circuit cases show, plaintiffs' use of the voluntary dismissal tactic is just as likely to generate serial appeals when defendants delay challenging the propriety of the proposed class until discovery has taken place and the plaintiffs

have moved to certify a class. *See, e.g.*, *Bobbitt*, 801 F.3d at 1069, 1072 n.5.

c. Finally, respondents assert that a test for appellate jurisdiction should not turn on plaintiffs' "subjective motivations" – specifically, on whether plaintiffs voluntarily dismiss their claims because they deem them no longer economically viable. BIO 19. But nothing about Microsoft's argument depends on plaintiffs' motivations. The simple fact that respondents voluntarily dismissed their claims with prejudice in the absence of any order adversely affecting the merits of their claims foreclosed their ability to appeal. Genuine "death knell" situation or not, the court of appeals should have held that it lacked jurisdiction over this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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