No. 15-457

IN THE

Supreme Court of the United States

MICROSOFT CORPORATION,
Petitioner,

v.

SETH BAKER, *et al.*,
Respondents.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION, NATIONAL ASSOCIATION OF MANUFACTURERS, INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL, AND NFIB SMALL BUSINESS LEGAL CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

CORY L. ANDREWS
Counsel of Record
MARK S. CHENOWETH
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
candrews@wlf.org

March 18, 2016

QUESTION PRESENTED

Whether a federal court of appeals has jurisdiction under both Article III and 28 U.S.C. § 1291 to review an order denying class certification after the named plaintiffs voluntarily dismiss their claims with prejudice.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

Page(s)

Page(s)

Page(s)

Page(s)

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

OTHER SOURCES

INTERESTS OF *AMICI CURIAE*[1]

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to promoting free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF has frequently appeared in this Court in cases recognizing limitations on the power of federal courts to exercise either subject-matter or personal jurisdiction over parties and proceedings. *See, e.g., Clapper v. Amnesty Int'l*, 133 S. Ct. 1138 (2013); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011). In addition, WLF has long opposed procedural gamesmanship by the plaintiffs' bar in federal class-action litigation. *See, e.g., Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547 (2014); *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013).

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs over 12 million men and women, contributes roughly $2.1 trillion to the U.S. economy annually, has the largest economic

---

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties to this dispute have consented to the filing of this brief, and letters of consent have been lodged with the Court.

impact of any major sector, and accounts for two-thirds of private-sector research and development. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

The International Association of Defense Counsel (IADC) is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, culpable defendants are held liable for appropriate damages, and non-culpable defendants are exonerated and can defend themselves without unreasonable costs.

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public-interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, DC, and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents 325,000 member businesses nationwide, and its

membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses.

Amici strongly support faithful adherence to the jurisdictional statutes Congress has enacted to prevent multiple, piecemeal appeals from a single district court proceeding. By strictly limiting the occasions in which a party may appeal an adverse ruling, those federal appellate rules "prevent[] the debilitating effect on judicial administration caused by piecemeal appeal disposition of what is, in practical consequence, but a single controversy." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974).

Amici are concerned that affirmance of the decision below would seriously undermine judicial administration by effectively providing plaintiffs an absolute right to immediate review of a district court order denying a motion to certify a plaintiffs' class under Rule 23. Indeed, such a decision could well result in numerous appeals from a single action. Affording appeals-as-of-right to unsuccessful class-certification movants not only contravenes 28 U.S.C. § 1291, which manifests Congress's longstanding policy against multiple, piecemeal appeals, but it also undermines Rule 23(f), which permits

immediate appeals from class certification orders at the sole discretion of the appeals court. And whereas Rule 23(f) applies regardless of which side lost the class certification issue, the Ninth Circuit's voluntary dismissal tactic benefits only plaintiffs.

STATEMENT OF THE CASE

Article III, § 2 of the Constitution extends the "judicial power" of the United States to only "Cases" and "Controversies." At the same time, Congress has granted the courts of appeals "jurisdiction of appeals from all final decisions of the district courts of the United States," subject to limited exceptions. 28 U.S.C. § 1291. At issue here is whether respondents satisfied the requirements of both Article III and §1291, thereby providing the Ninth Circuit with jurisdiction in this case to review the district court's order striking respondents' class allegations from the complaint.

Petitioner Microsoft Corporation (Microsoft) is a leading technology company that develops, manufactures, and sells the Xbox 360 video game console. Respondents are five individuals who, in 2011, brought a putative class-action lawsuit against Microsoft alleging defective design of the Xbox 360 and requesting certification of a nationwide class of all similarly situated purchasers.[2]

---

[2] In 2007, the same lawyers representing respondents in this case brought a nearly identical class action against Microsoft (also in the Western District of Washington). *See* Pet. App. 6a-8a. When the district court denied class certification, those plaintiffs unsuccessfully petitioned the Ninth Circuit for interlocutory appeal under Rule 23(f). When the Ninth Circuit

On March 27, 2012, on Microsoft's motion, the U.S. District Court for the Western District of Washington struck respondents' class allegations from the complaint on the basis that causation and damages could not be proven in one stroke by common evidence. Invoking Rule 23(f), respondents petitioned the Ninth Circuit to grant an interlocutory appeal of the district court's order. Exercising its discretion under Rule 23(f) to grant or deny such petitions, the Ninth Circuit denied appellate review, leaving the plaintiffs to pursue their individual claims on the merits in the district court. Pet. App. 10a.

Rather than pursue their individual claims to finality, respondents moved to voluntarily dismiss their claims with prejudice, declaring their intention to appeal the district court's order striking the complaint's class allegations. Pet. App. 36a. Although Microsoft agreed to the district court's dismissal of respondents' claims with prejudice, Microsoft also maintained that respondents had no right to appeal the court's striking of class allegations following the voluntary dismissal with prejudice. *Ibid.* "[R]eserving to all parties their arguments as to the propriety of any appeal," the district court dismissed respondents' claims with prejudice. *Id.* at 36a-37a.

Exercising jurisdiction over respondents' appeal, the Ninth Circuit reversed. The panel rejected Microsoft's jurisdictional argument solely on

---

denied the petition, those plaintiffs agreed to resolve their individual claims with Microsoft.

the basis of *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061 (9th Cir. 2014), a decision handed down after the appeal in the instant case was fully briefed. Pet. App. 11a-12a. The panel did not address whether respondents—following their voluntary dismissal of all claims, with prejudice—maintained sufficient legal stake in the action to satisfy the case-or-controversy requirement under Article III. Nor did the panel address Microsoft's contention that the interlocutory order striking class allegations was not a "final decision" within the meaning of § 1291. Instead, the panel determined that the only relevant issue under was whether respondents' voluntary dismissal of their claims deprived their appeal of the requisite "adversity." *Ibid.*

The panel concluded that respondents possessed sufficient adversity to warrant exercise of appellate jurisdiction, noting that *Berger* had rejected just such an absence-of-adversity contention:

> [*Berger*] distinguished a stipulated dismissal without a settlement from a stipulated dismissal with a settlement. The former retains sufficient adversity to sustain an appeal. The latter does not. As this case did not involve settlement, *Berger* establishes that "[we] have jurisdiction under 28 U.S.C. § 1291 because a dismissal of an action with prejudice, even when such dismissal is the product of a stipulation, is a sufficiently adverse—and thus appealable—final decision."

Pet. App. 12a (quoting *Berger*, 741 F.3d at 1064, 1065).

Turning to the availability of a class action, the panel concluded that the district court abused its discretion in striking the class allegations from the complaint. Pet. App. 19a. At the same time, the panel expressed no opinion "on whether the specific common issues identified in this case are amenable to adjudication by way of a class action, or whether plaintiffs should prevail on a motion for class certification." *Ibid.* Nor did the panel even attempt to address how the district court should proceed in the absence of any putative class representative with a live, justiciable claim—all five respondents having voluntarily dismissed their individual claims with prejudice. The panel reversed the district court's order and remanded for further proceedings consistent with its opinion.

Microsoft's petition for rehearing en banc was denied. Pet. App. 5a. This Court granted certiorari.

SUMMARY OF ARGUMENT

The panel below held that a district court's adverse class determination becomes an immediately appealable, final order when the district court dismisses the action with prejudice—even when such dismissal results from the plaintiffs' own motion and disposes of *all* claims in the litigation. As shown below, the Ninth Circuit's decision constitutes a sharp departure from many of this Court's long-settled precedents and should be reversed.

As a preliminary matter, this case no longer presents a justiciable case or controversy because

respondents voluntarily dismissed all of their claims, with prejudice, rendering any appeal moot. Neither party contends that the district court erred in entering its final judgment disposing of the action with prejudice—respondents specifically requested it, and Microsoft wisely agreed to it. As a result of that invited dismissal, to which *all parties* stipulated, Article III's adversity requirement is utterly lacking, and a live dispute between the parties no longer exists to support federal subject-matter jurisdiction—appellate, or otherwise.

But even assuming that Article III is somehow satisfied, the panel's holding is utterly inconsistent with this Court's landmark decision in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978), which held that allowing a plaintiff to appeal a class certification denial immediately as of right, rather than from a final judgment after an adverse trial on the merits, violates Congress's longstanding policy against multiple, piecemeal appeals. Such appeals are impermissible, the Court explained, even when the denial of class certification tolls the "death knell" for the plaintiffs' entire case.

In addition, the panel's untethered, expansive reading of 28 U.S.C. § 1291 is wholly inconsistent with the proper understanding of that statute. As this Court has recognized, Congress adopted § 1291's "final decision" rule to ensure that controversies are not reviewed by appellate courts in a piecemeal fashion such as this. But the Ninth Circuit's decision undermines § 1291 by permitting, and thus encouraging, more and more piecemeal appeals. It also creates unfairness by effectively granting plaintiffs—but *not* defendants—an absolute right to

immediate review of adverse class-certification orders.

Lastly, under respondents' self-serving view of § 1291, plaintiffs effectively will get *at least* two (rather than one) appeals from adverse class certification rulings, thereby multiplying their chances of encountering a sympathetic panel. Such a result contravenes Federal Rule of Civil Procedure 23(f), which grants both plaintiffs *and* defendants the right to *request* interlocutory review of class-certification orders, but provides appeals courts with absolute, unreviewable discretion to deny the request. If the Court were to adopt the reasoning of the Ninth Circuit, Rule 23(f) would be rendered a dead letter.

ARGUMENT

I. THE PARTIES' CONTROVERSY BECAME MOOT WHEN THEY AGREED TO DISMISS THE ENTIRE ACTION, WITH PREJUDICE

Well-settled mootness principles control the outcome of this case. After the Ninth Circuit denied respondents' Rule 23(f) petition for interlocutory review of the district court's order striking respondents' class allegations from the complaint, respondents promptly moved "that this action be dismissed with prejudice, with all parties to bear their own costs and fees." J.A. 122. Microsoft stipulated to that dismissal, acknowledging that respondents had the right to voluntarily dismiss the action under Rule 41(a)(1)(A)(i), but pointing out that respondents would be barred from any further appeal. Pet. App. 36a.

Appellate jurisdiction requires not only an appeal from a final order under 28 U.S.C. § 1291, but also the existence of an actual case or controversy under Article III. On appeal, respondents sought review of only the order striking their class allegations from the complaint; they did not complain of the "final" order that dismissed all of their claims with prejudice. Yet the district court's order striking class allegations had "no direct or irreparable impact on the merits of the controversy" and instead "only relate[d] to pretrial procedures." *Gardner v. Westinghouse Broad. Co.*, 437 U.S. 478, 482 (1978) (quoting *Switzerland Cheese Ass'n, Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23, 24 (1966)). Therefore, to the extent that respondents now seek to appeal from the district court's final judgment against them—a judgment that extinguished all of their claims at their own invitation—this Court's precedents make clear that respondents no longer enjoy sufficient legal adversity in the action to satisfy Article III's case-or-controversy requirement.

A. A Justiciable Case Becomes Moot Once There Is No Longer Adversity of Legal Interests

Article III, § 2 of the Constitution extends the "judicial Power" of the United States to only "Cases" and "Controversies." U.S. Const. art. III, § 2. This bedrock jurisdictional requirement ensures that the federal judiciary confines itself to its constitutionally limited role of adjudicating "actual and concrete" disputes. *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016). The central function of Article III's case-or-controversy requirement is to "limit the business of federal courts to questions presented in

an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83, 95 (1968).

Among other things, Article III's case-or-controversy requirement requires that "an actual controversy … be extant at all stages of review, not merely at the time the complaint is filed." *Campbell-Ewald*, 136 S. Ct. at 669 (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997)). A case becomes moot, and therefore no longer a case or controversy for purposes of Article III, "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Murphy v. Hunt*, 455 U. S. 478, 481 (1982) (per curiam); *Campbell-Ewald*, 136 S. Ct. at 669 (an action becomes moot when "an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, at any point in the litigation") (internal citation and quotation omitted).

A central focus of this Court's case-or-controversy requirement has been the presence of adversity. The clash between adverse parties "sharpens the presentation of issues upon which the court so largely depends for illumination of difficult … questions." *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). A justiciable controversy is one that touches not merely the parties' adverse interests but their adverse *legal* interests. Stated differently, "[n]o matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute 'is no longer embedded in any actual controversy about the plaintiffs' particular legal

rights.'" *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726 (2013) (quoting *Alvarez v. Smith*, 558 U.S. 87, 93 (2009)).

This Court has long "disposed of moot cases in the manner 'most consonant to justice' … in view of the nature and character of the conditions which have caused the case to become moot." *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994) (quoting *United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U.S. 466, 477-78 (1916)). The "principal condition" to which the Court has looked is "whether the party seeking relief from the judgment below caused the mootness by voluntary action." *Ibid.* Accordingly, where the parties request "precisely the same result" from the court, there is no adversity, and therefore no Article III case or controversy. *Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47, 47-48 (1971) (holding that no Article III case or controversy exists where both parties urged that the district court's desegregation order be set aside).

B. The Parties' Stipulated Dismissal of the Entire Action, with Prejudice, Destroyed the Requisite Adversity Under Article III

Respondents' claims over Microsoft's alleged defective design of the Xbox 360 ceased to be justiciable when respondents voluntarily dismissed those claims, with prejudice. Because "Article III denies federal courts the power to decide questions that cannot affect the rights of litigants in the case before them," *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990), respondents' abandonment of their

individual claims cannot be reviewed on appeal. As a result of respondents' invited dismissal, to which *all parties* stipulated, Article III's adversity requirement is utterly lacking, and a live dispute between the parties no longer exists to support federal subject-matter jurisdiction—appellate or otherwise.

Voluntary dismissals are governed by Rule 41, which provides for the "voluntary dismissal" of an "action." *See* Fed. R. Civ. P. 41. This Court has interpreted a plaintiff's voluntary dismissal "with prejudice" under Rule 41 as equivalent to an "adjudication upon the merits," which is ordinarily subject to res judicata. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505 (2001); *Warfield v. Allied Signal TBS Holdings, Inc.*, 267 F.3d 538, 542 (6th Cir. 2001) ("A voluntary dismissal with prejudice operates as a final adjudication on the merits and has a res judicata effect."); *Harrison v. Edison Bros. Apparel Stores, Inc.*, 924 F.2d 530, 534 (4th Cir. 1991) (holding that a voluntary dismissal with prejudice "is a complete adjudication on the merits of the dismissed claim[s]").[3]

---

[3] Even in those cases where plaintiffs voluntarily dismiss only peripheral claims to "manufacture" an appeal, "[t]he distinction between dismissal with and without prejudice is crucial." Rebecca A. Cochran, *Gaining Appellate Review by "Manufacturing" A Final Judgment Through Voluntary Dismissal of Peripheral Claims*, 48 Mercer L. Rev. 979, 1009 (1997). "Ignoring labels and searching for intent replaces district court certainty with uncertainty and speculation. … When appellate courts ignore or disregard the label assigned to the dismissal and simply search the record for intent as the real indicia of finality, the appellate process breaks down." *Ibid.*

Under this Court's precedents, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). "Once that litigation is dismissed with prejudice, it cannot be resumed in this or any subsequent action." *Deakins v. Monaghan*, 484 U.S. 193, 201 n.4 (1988) (deeming moot a case where plaintiffs were "barred from reviving" their claims "in federal court" following their voluntary dismissal with prejudice). Because respondents cannot possibly rekindle their claims against Microsoft, no "speculative contingency" exists that is "sufficiently real and immediate to show an existing controversy." *Id.* at 201 & n.4 (citing *Hall v. Beals*, 396 U.S. 45, 49 (1969); *O'Shea*, 414 U.S. at 496).

This case has "therefore lost its character as a present, live controversy of the kind that must exist if [this Court is] to avoid advisory opinions." *Beals*, 396 U.S. at 48; *Honig v. Doe*, 484 U.S. 305, 317 (1988) ("That the dispute between the parties was very much alive when suit was filed … cannot substitute for the actual case or controversy that an exercise of this Court's jurisdiction requires."); *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 247 (3d. Cir. 2013) (dismissing appeal as moot because "[t]he claims that Appellants dismissed with prejudice are gone forever—they are not reviewable by this Court and may not be recaptured at the district court level"); *Druhan v. Am. Mut. Life*, 166 F.3d 1324 (11th Cir. 1999) (dismissing appeal as moot where the "required adverseness is lacking" because "final judgment was entered in response to the plaintiff's motion for a dismissal with prejudice").

In light of these principles, an unbroken line of this Court's decisions stretching back to 1809 has firmly established that a plaintiff cannot appeal the propriety of a dismissal with prejudice to which he consented. *See Bancorp*, 513 U.S. at 25 ("Where mootness results from [the parties' agreement] … the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari."); *Deakins,* 484 U.S. at 200 ("Because this [dispute] was rendered moot in part by [plaintiffs'] willingness permanently to withdraw their equitable claims from their federal action, a dismissal with prejudice is indicated."); *United States v. Procter & Gamble Co.*, 356 U.S. 677, 680 (1958) (acknowledging the "familiar rule that a plaintiff who has voluntarily dismissed his complaint may not sue out a writ of error"); *Cent. Trans. Co. v. Pullman's Palace Car Co.,* 139 U.S. 24, 39 (1891) ("[A] plaintiff, who appears by the record to have voluntarily become nonsuit, cannot sue out a writ of error."); *Nashville, C. & St. L. Ry. Co. v. United States*, 113 U.S. 261, 266 (1885) ("[T]he insurmountable difficulty is that the former decree appears upon its face to have been rendered by consent of the parties, and could not therefore be reversed, even on appeal."); *United States v. Babbitt*, 104 U.S. 767, 768 (1881) ("The consent to the judgment below was in law a waiver of any error now complained of."); *Evans v. Phillips*, 17 U.S. (4 Wheat.) 73, 74 (1819) ("A writ of error will not lie on a judgment of nonsuit."); *United States v. Evans*, 9 U.S. (5 Cranch) 280, 280 (1809) ("It is not ground for a writ of error that the judge below refused to reinstate a cause after nonsuit.").

Respondents invited, then stipulated to,

dismissal of their entire action with prejudice. Because "to qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review," this action is moot, and respondents may not appeal from the judgment or any other order below. *Arizonans*, 520 U.S. at 67. This is merely a further "application of the principle that '[a] suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks.'" *Bancorp*, 513 U.S. at 25 (quoting *Sanders v. United States*, 373 U.S. 1, 17 (1963)).[4]

II. THE NINTH CIRCUIT'S FLAWED APPROACH TO APPELLATE JURISDICTION UNDERMINES THIS COURT'S UNANIMOUS HOLDING IN *LIVESAY*

The Ninth Circuit has essentially justified its rule with a "big risk/big reward" rationale. That is, a

---

[4] This is not a case in which the defendant voluntarily ceased its own conduct in an attempt to undermine plaintiffs' continuing stake in the outcome of the litigation. *See, e.g., United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326 (1980). Both *Roper* and *Geraghty* turned on the critical fact that the events giving rise to the defendants' mootness allegations were engineered by the defendants and were not (as here) voluntarily initiated and stipulated to by the plaintiffs. As Chief Justice Burger explained in *Roper*, the fact that the plaintiffs opposed the order of dismissal was an important factor in the Court's determination that the plaintiffs' post-judgment appeal from the denial of class-certification was not moot, because ordinarily a party cannot appeal from a dispositive order that it instigated. *Roper*, 445 U.S. at 332 (emphasizing that the "factual context in which this question arises is important" because the "judgment was entered in [the plaintiffs'] favor by the court without their consent, and the case was dismissed over their continued objections").

plaintiff who is willing to risk his entire lawsuit on a bet that he can get the pre-trial order reversed on appeal ought to be rewarded by being permitted to use the gimmick of a voluntary dismissal with prejudice to obtain immediate appellate review. Not only does that rationale enjoy no support in this Court's precedents, but it actively cuts against this Court's unanimous holding in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), which held that orders concerning class certification are not appealable final orders under 28 U.S.C. § 1291.

In *Livesay*, the Court examined and rejected the "death knell" doctrine, under which several courts of appeals had exercised jurisdiction over appeals from district court orders that did not resolve all issues in the case. *See Livesay,* 437 U.S. at 475. Under that doctrine, when deciding whether to exercise appellate jurisdiction, some appeals courts examined the impact of the district court order on the individual case. If those courts concluded that the costs of trying the individual's case so exceeded the potential judgment (considering the plaintiff's resources) that further pursuit of the plaintiff's claim was improbable, the order was deemed a "final decision" and thus subject to federal appellate jurisdiction under § 1291.

In rejecting the "death knell" doctrine as a basis for permitting appeals from orders denying class certification, the Court explained that Congress adopted § 1291's "final decision" rule to ensure that controversies are not reviewed by appellate courts in a piecemeal fashion. *Livesay*, 437 U.S. at 473. Recognizing the potential for abusive, frivolous appeals, this Court concluded that the doctrine

"would have a serious debilitating effect on the administration of justice" by permitting "multiple appeals" within a single case. *Id.* at 473-74. Most relevant here, the Court was critical of the fact that "the doctrine operates only in favor of plaintiffs even though the class issue—whether to certify, and if so, how large the class should be—will often be of critical importance to defendants as well." *Id.* at 476.

The holding below thus creates an anomaly by affording greater opportunity for plaintiffs than defendants to obtain judicial review of an adverse class-certification determination. Inviting such an untoward result undermines this Court's clear precedent and does violence to the entrenched policy opposing piecemeal review. That "finality" rule, which derives from the Judiciary Act of 1791, promotes judicial efficiency and deters "the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise." *Will v. Hallock*, 546 U.S. 345, 350 (2006) (internal quotations omitted).

A. The Holding Below Contravenes *Livesay*'s Policy Against Piecemeal Appeals

Congress's longstanding policy against piecemeal appeals, which animated the *Livesay* Court's construction of § 1291 in the context of class-certification appeals filed *before* entry of a final judgment, applies with equal force in the context of class-certification appeals filed *after* a voluntary dismissal with prejudice, which manifests the named plaintiffs' refusal to proceed to trial on their individual claims. As a practical matter, if § 1291

were interpreted to permit a plaintiff to obtain immediate review of every adverse class-determination order by procuring a dismissal with prejudice, it would render the venerable policy against piecemeal appellate review a dead letter.

It is impossible to overstate the mischief that the Ninth Circuit's novel approach to appellate jurisdiction would foment if left undisturbed. As the Third Circuit has warned in a very similar context:

> If a litigant could refuse to proceed whenever a trial judge ruled against him, wait for the court to enter a dismissal for failure to prosecute, and then obtain review of the judge's interlocutory decision, the policy against piecemeal litigation and review would be severely weakened. This procedural technique would in effect provide a means to avoid the finality rule embodied in 28 U.S.C. § 1291. To review the district court's [order] … under the facts of this case is to invite the inundation of appellate dockets with requests for review of interlocutory orders and to undermine the ability of trial judges to achieve the orderly and expeditious disposition of cases.

Sullivan v. Pac. Indem. Co., 566 F.2d 444, 445-46 (3d Cir. 1977) (citing *Marshall v. Sielaff*, 492 F.2d 917, 919 (3d Cir. 1974)).

Here, as in *Livesay*, "allowing appeals of right from orders that turn on the facts of a particular

case thrusts appellate courts indiscriminately into the trial process and thus defeats one vital purpose of the final-judgment rule—that of maintaining the appropriate relationship between the respective courts." *Livesay*, 437 U.S. at 476. Unless this Court reverses the misguided decision below, that "vital purpose" will be abandoned entirely.

B. The Ninth Circuit's Holding Improperly Favors Plaintiffs over Defendants

By adopting a one-sided rule that favors plaintiffs over defendants, the panel decision conflicts with *Livesay*, which cautioned that rules governing appellate review ought to treat plaintiffs and defendants even-handedly. *Livesay*, 437 U.S. at 476 (rejecting the "death knell" doctrine in part because "the doctrine operates only in favor of plaintiffs").

Class-certification decisions severely impact defendants as well as plaintiffs. Indeed, a decision to certify a class can just as readily sound the "death knell" of a class-action defense. As *Livesay* recognized, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense. Yet the Courts of Appeals have correctly concluded that orders granting class certification are interlocutory." *Ibid.*

It is no secret that a "court's decision to certify a class … places pressure on the defendant to settle even unmeritorious claims." *Shady Grove*

Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting). Whereas "administrative simplicity is a major virtue in a jurisdictional statute," the voluntary dismissal tactic embraced by the Ninth Circuit is more likely to result in multiple appeals and protracted litigation, which not only invite procedural "gamesmanship, [but] diminish the likelihood that results and settlements will reflect a claim's legal and factual merits." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010).

Even so, the panel below created a pathway for plaintiffs by which they can always obtain pre-trial appellate review of class-certification orders without creating a similar pathway for defendants. That is patently unfair, and this Court should reverse the deeply flawed decision below.

III. THE NINTH CIRCUIT'S EXPANSIVE READING OF § 1291 IS INCONSISTENT WITH THE PROPER UNDERSTANDING OF THE STATUTE

This is not a case where plaintiffs previously "lost on the merits" and now "only seek" an "expeditious review." *See Procter & Gamble Co.*, 356 U.S. at 681. Barring such circumstances, the Ninth Circuit opinion fails to explain how an interlocutory order effectively denying class certification can be suddenly transformed into a "final decision" within the meaning of 28 U.S.C. § 1291 when the district court enters a stipulated order dismissing the entire case with prejudice.

Simply put, "the fact that an interlocutory order may induce a party to abandon his claim

before final judgment is not a sufficient reason for considering it a 'final decision' within the meaning of § 1291." *Livesay*, 437 U.S. at 476. The panel's contrary reading of 28 U.S.C. § 1291 is inconsistent with the very purpose of that statute. As this Court recognized in *Livesay*, Congress adopted § 1291's "final decision" rule to ensure that controversies are not reviewed by appellate courts in a piecemeal fashion as issues arise. The decision below undermines § 1291 by effectively granting plaintiffs (but not defendants) an absolute right to immediate review of adverse class-certification orders.

Orders denying class certification do *not* merge into the judgment (and thus become reviewable in an appeal under § 1291 from the final order of dismissal) when the final order of dismissal results from the plaintiffs' refusal to prosecute their claims. A contrary view would allow plaintiffs to use the dismissal order they procured as a vehicle to circumvent finality principles and secure piecemeal review of an interlocutory procedural ruling on class certification. By failing to address that issue, the panel implicitly adopted an expansive view of federal appellate jurisdiction that is inconsistent with longstanding notions of finality.

Nor is there any principled way to limit an affirmance solely to interlocutory class-certification decisions. Under the same reasoning adopted by the Ninth Circuit, any time a plaintiff is dissatisfied with a discovery or other interlocutory order, he can simply dismiss all his claims, take an appeal, and obtain immediate review of the order. Sanction orders, discovery orders, even evidentiary orders on

motions in limine, could all be appealed by this artifice. Permitting litigants to undertake piecemeal appeals whenever they disagree with adverse interlocutory decisions would unduly delay the resolution of district court litigation and needlessly burden the courts of appeals—precisely the outcome that § 1291 forecloses.

IV. THE NINTH CIRCUIT'S HOLDING IS INCONSISTENT WITH A PLAIN READING OF FED. R. CIV. P. 23(f)

The panel decision is also inconsistent with Rule 23(f), which grants both plaintiffs and defendants the right to *request* interlocutory review of class-certification orders but provides federal appellate courts unreviewable discretion to deny such requests. By conjuring a means by which plaintiffs can essentially appeal class-certification orders as of right, the decision below undermines Congress's directive that the appeals courts' acceptance of such appeals must be discretionary. *See* Advisory Committee Notes Accompanying 1998 Amendments to Rule 23 ("The court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari. … Permission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive.").

This case starkly demonstrates the utter incoherence of Rule 23(f) under the Ninth Circuit's view. Here, the Ninth Circuit granted respondents an appeal-as-of-right, even though a different panel of that court had previously rejected their Rule 23(f)

request for an interlocutory appeal from the district court's order striking all class allegations from the complaint. The first appeals court panel's discretion under Rule 23(f) to reject an interlocutory request was therefore no longer unreviewable once a second appellate panel was permitted to second-guess that discretionary denial. As a result, not only can plaintiffs (but not defendants) in the Ninth Circuit obtain an interlocutory appeal-as-of-right, but plaintiffs also can effectively get *at least* two appeals (rather than one) from adverse class-certification rulings, thereby multiplying their chances of encountering a sympathetic panel.[5]

The Ninth Circuit's holding also effectively eliminates Rule 23(f)'s directive that petitions for interlocutory appeals be filed expeditiously. While 23(f) requires such petitions to be filed within 14 days after the adverse order on class determination is entered, the decision below permits plaintiffs to delay their appeal until up to 30 days after entry of the stipulated dismissal with prejudice—a dismissal that may well be entered months after a class certification ruling, as was the case here. *See* Fed. R. App. P. 4(a)(1)(A) (providing that "the notice of appeal … must be filed with the district court within 30 days after entry of the judgment or order appealed from").

---

[5] By merely reversing the order striking class allegations, but expressly declining to evaluate the suitability of class certification, *see* Pet. App. 19a, the Ninth Circuit's ruling in this case creates the strong likelihood of a *third* appeal. When the district court eventually rules (yet again) on the suitability of class certification, the party opposing that ruling will almost certainly appeal to the Ninth Circuit.

Rule 23(f) was promulgated in reaction to *Livesay* to give courts unfettered discretion to hear appeals of class-certification rulings, but the rulemakers quite pointedly did not exercise their authority under 28 U.S.C. § 2072(c) to define such rulings as "final" orders appealable as a matter of right under § 1291. The Ninth Circuit, in contrast, holds that a district court's adverse class determination becomes an immediately appealable, final order even when the district court dismisses the entire action *with prejudice*—at the plaintiff's invitation. Not even under the strictly construed collateral-order doctrine—a narrow exception to the final-judgment rule—do courts countenance such a significant departure from settled principles of finality. *See Livesay*, 437 U.S. at 468-70.

CONCLUSION

For the foregoing reasons, *amici curiae* Washington Legal Foundation, National Association of Manufacturers, International Association of Defense Counsel, and National Federation of Independent Business Small Business Legal Center, respectfully request that the Court reverse the decision below.

Respectfully submitted,

CORY L. ANDREWS
Counsel of Record
MARK S. CHENOWETH
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave. NW
Washington, D.C. 20036
(202) 599-0302
candrews@wlf.org

March 18, 2016