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 CIVIL PROCEDURE SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Robert M. Loeb
Thomas M. Bondy
Randy J. Kozel
Randall C. Smith
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005

E. Joshua Rosenkranz
Counsel of Record
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5380
jrosenkranz@orrick.com

Counsel for *Amici Curiae*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Federal Rules and Regulations

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Amici Civil Procedure Scholars are law professors who teach and write in the field of federal civil procedure:

Stephen B. Burbank is the David Berger Professor for the Administration of Justice at the University of Pennsylvania Law School.

Geoffrey C. Hazard, Jr. is the Trustee Professor of Law Emeritus at the University of Pennsylvania Law School, the Thomas E. Miller Distinguished Professor of Law Emeritus at the University of California's Hastings College of Law, and the Sterling Professor Emeritus of Law at the Yale Law School.

William H. J. Hubbard is Assistant Professor of Law at the University of Chicago Law School.

Thomas D. Rowe, Jr. is the Elvin R. Latty Professor Emeritus of Law at Duke University School of Law. He served on the Advisory Committee on Rules of Civil Procedure for the Judicial Conference of the United States during the period when Federal Rule of Civil Procedure 23(f) was considered and adopted.

---

[1] The parties have consented to the filing of this *amicus* brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

Michael E. Solimine is the Donald P. Klekamp Professor of Law at the University of Cincinnati College of Law.

Jay Tidmarsh is Professor of Law at Notre Dame Law School.

Tobias Barrington Wolff is Professor of Law at the University of Pennsylvania Law School.

Rule 23(f) sets forth the process for requesting an immediate appeal of a class certification ruling. *Amici* submit that allowing parties to force an immediate appeal through a voluntary dismissal with prejudice would undermine Rule 23(f) and contravene the finality requirement of 28 U.S.C. § 1291.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has determined that class certification rulings are not "final decisions" appealable as of right under 28 U.S.C. § 1291. Whether a district court grants or denies a motion for class certification, the party on the losing end has no entitlement to an immediate appeal. Such an appeal as of right arises only after a final judgment has issued. As this Court explained in *Coopers & Lybrand v. Livesay*, class certification rulings are "inherently interlocutory." 437 U.S. 463, 470 (1978).

Although they are not appealable as of right, class certification rulings can be important to the path of litigation. A denial of class certification can make it economically imprudent (or impossible) to continue pressing individual claims, whereas a grant of certification can increase pressure to settle. In two separate statutory amendments in 1990 and 1992, Congress authorized this Court to issue rules addressing the question of appellate jurisdiction in these and other circumstances. The Advisory Committee on Rules of Civil Procedure for the Judicial Conference of the United States ("Advisory Committee") accepted Congress's invitation by proposing a rule that allows a party aggrieved by a ruling on class certification to request an immediate appeal by permission of the appellate court. This Court promulgated that rule, which became effective in 1998. The process for requesting appellate review is set forth in Rule 23(f) of the Federal Rules of Civil Procedure.

In fashioning Rule 23(f), the Advisory Committee recognized the impact that certification rulings can have on whether a case proceeds to trial, settles, or is abandoned. At the same time, the Committee feared that a proliferation of interlocutory appeals would erode the finality principle of § 1291 and encourage piecemeal litigation through multiple appeals in a single case. Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment. To address these concerns, the Committee crafted Rule 23(f) to permit plaintiffs and defendants to request immediate review of certification decisions, but empowered appellate courts, within their discretion, to determine whether an appeal should go forward.[2]

Respondents are proposing a doctrine that would subvert the balance of competing policies that Rule 23(f) struck. They contend that a petition under Rule 23(f) is merely an optional first step for a plaintiff whose request for class certification has been denied. Even if the court of appeals declines to hear an interlocutory appeal—as the Ninth Circuit did in this case—plaintiffs have a simple recourse: They can voluntarily dismiss their claims with prejudice. Through dismissal, respondents argue, the plaintiffs acquire an immediate right to appeal, with no room remaining for the exercise of discretion by the appellate court.

---

[2] The analysis in this brief applies in equal measure whether the appeal challenges a district court order denying class certification or striking the class allegations from the complaint.

This use of voluntary dismissals with prejudice to force appellate review would undermine Rule 23(f). Rule 23(f) establishes a procedural mechanism for interlocutory review of class certification rulings that is discretionary, balanced as between plaintiffs and defendants, and designed to minimize disruption of the trial process. Permitting plaintiffs' dismissal tactic would supplant that mechanism and replace it with a system in which plaintiffs (and only plaintiffs) are authorized to demand interlocutory review of class certification rulings as a matter of right.

The finality requirement of 28 U.S.C. § 1291 forecloses any such dilution of Rule 23(f). As this Court explained in 1995, the available mechanisms for interlocutory appeal are "[o]f prime significance to the jurisdictional issue" of whether there has been a final decision under § 1291. *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 45 (1995). The Court has refused to interpret § 1291 in a way that would "undermin[e]" established procedures for interlocutory review. *Id.* at 47. Congress's twin grants of tailored rulemaking power in 28 U.S.C. §§ 2072(c) and 1292(e) represent a designation of "rulemaking, not expansion by court decision, as the preferred means for determining whether and when prejudgment orders should be immediately appealable." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 113 (2009) (internal citations and quotation marks omitted).

The Advisory Committee and this Court could have written Rule 23(f) to allow immediate appeals as a matter of right after any class certification ruling. They did not. In light of the congressional preference

for rulemaking, the balance struck by Rule 23(f) "warrants the Judiciary's full respect," *Swint*, 514 U.S. at 48, and this Court should not construe § 1291's finality principle in a way that would subvert Rule 23(f).[3]

ARGUMENT

I. Rule 23(f) Was Crafted to Balance the Benefits of Immediate Review Against the Costs of Interlocutory Appeals.

Congress gave this Court the power to prescribe general rules of practice and procedure in 1934. 28 U.S.C. § 2072. In 1990, Congress supplemented that delegation by empowering this Court to promulgate rules to "define when a ruling of a district court is final for the purposes of appeal under section 1291." Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 315, 104 Stat. 5089, 5115 (1990) (codified at 28 U.S.C. § 2072(c)). In 1992, Congress authorized the Court to make rules "to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for" by 28 U.S.C. § 1292(a)-(d). Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 101, 106 Stat. 4506, 4506 (1992) (codified at 28 U.S.C. § 1292(e)).

---

[3] *Amici curiae* do not address here whether respondents' attempt to appeal from a voluntary dismissal with prejudice following the district court's order striking the class allegations from the complaint creates a jurisdictional problem under Article III of the Constitution.

This Court promulgated Rule 23(f) under the authority granted to it by 28 U.S.C. § 1292(e). 177 F.R.D. 530 (1998). The Rule sets out the process by which an appellate court can authorize an immediate appeal from an order granting or denying class certification. The centerpiece of the Rule is its emphasis on appellate court discretion. Appellate courts are not required to entertain appeals from class certification rulings. Instead, the Rule provides that they "may permit an appeal." It is up to the appellate court—not the litigants or the district court—whether an immediate appeal will lie.

This discretionary regime reflects a considered choice. The Advisory Committee was sensitive to the value of immediate appeals in some cases, but it was equally sensitive to the dangers of eroding the final judgment rule of 28 U.S.C. § 1291 by making interlocutory review the norm. To understand the Committee's rationale and Rule 23(f)'s ultimate formulation, it is useful to examine the historical backdrop against which the Committee acted.

A. Emergence of the Death Knell Doctrine

Federal appellate courts have jurisdiction over "all final decisions of the district courts of the United States." 28 U.S.C. § 1291. An appeal as of right extends only to final decisions and a limited class of specified nonfinal orders (such as injunctive orders), 28 U.S.C. § 1292(a). Class certification decisions do not fit the bill; as this Court has explained, they are "inherently interlocutory." *Livesay*, 437 U.S. at 470.

Following the 1966 amendments to Rule 23, which gave rise to Rule 23 in its modern form, *see* Fed. R. Civ. P. 23 advisory committee's note to 1966 amendment, some lower courts held that denials of class certification could be final decisions under § 1291. Those courts thought that a denial of class status could create a right of appeal if it was "likely to sound the 'death knell' of the litigation" by removing "the incentive of a possible group recovery." *Livesay*, 437 U.S. at 469. This "death knell doctrine" was founded on two considerations. The first was that when each individual's claim is small, the denial of class certification can make it unlikely that the case will proceed to final judgment. *See id.* at 469-70 (noting the possibility that "the individual plaintiff may find it economically imprudent to pursue his lawsuit to a final judgment"). The second was that if the denial of class status led individual plaintiffs to abandon their claims, the underlying class certification decision would never be reviewed. As the Second Circuit explained at the time, "[i]f the appeal is dismissed, not only will [the individual plaintiff's] claims never be adjudicated, but no appellate court will be given the chance to decide if this class action was proper under . . . Rule 23." *Eisen v. Carlisle & Jacquelin*, 370 F.2d 119, 120 (2d Cir. 1966).

The death knell doctrine was not absolute. Instead, it turned on a determination of the impact of denying class certification in a particular case. If an appellate court concluded that the plaintiff retained an "adequate incentive to continue" pressing his individual claims even after class treatment was denied, the order denying class status was "considered interlocutory." *Livesay*, 437 U.S. at 471.

If, however, the court believed that the denial of class status "ma[de] further litigation improbable," a different result followed. *Id.* The order denying class certification was transformed into a "final decision" that was "appealable as a matter of right." *Id.*

B. Rejection of the Death Knell Doctrine

In *Livesay*, this Court squarely rejected the death knell doctrine. In doing so, the Court underscored that "refusal to certify a class is inherently interlocutory." 437 U.S. at 470. The Court acknowledged that the refusal to certify a class "may induce a party to abandon his claim before final judgment." *Id.* at 477. Nevertheless, it held that the risk of abandonment "is not a sufficient reason for considering it a 'final decision' within the meaning of § 1291." *Id.*

As this Court explained, the death knell doctrine ran afoul of § 1291 by authorizing "*indiscriminate* interlocutory review of decisions made by the trial judge." *Id.* at 474. Interlocutory review of nonfinal decisions could be sought under 28 U.S.C. § 1292(b). But although § 1292(b) allowed for the possibility of immediate appeals, it also set forth meaningful limits. Most importantly, appeals under § 1292(b) are not available as of right. By contrast, the death knell doctrine "thrust[] appellate courts indiscriminately into the trial process and thus defeat[ed] one vital purpose of the final judgment rule—that of maintaining the appropriate relationship between the respective courts." *Id.* at 476.

By circumventing the procedures for interlocutory review and distorting the meaning of "final decisions" under § 1291, the death knell doctrine invited protracted litigation and piecemeal appeals. Moreover, once an appellate court agreed to review a class certification ruling, there was "no assurance that the trial process will not again be disrupted by interlocutory review." *Id.* at 474. As *Livesay* explained, "even if a ruling that the plaintiff does not adequately represent the class is reversed on appeal, the district court may still refuse to certify the class" on some other ground, for instance that "common questions of law or fact do not predominate." *Id.* In that event, "plaintiff would again be entitled to an appeal as a matter of right pursuant to § 1291." *Id.* And so the cycle would continue, with the possibility of multiple appeals on the class action question alone, in addition to eventual challenges to an ultimate decision on the merits.

Livesay also criticized the one-sidedness of the death knell doctrine. The rule operated "only in favor of plaintiffs" despite the fact that "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. As this Court observed, "[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." *Id.*

C. Promulgation of Rule 23(f) to Govern Interlocutory Appeals of Class Certification Decisions

In the wake of *Livesay*'s rejection of the death knell doctrine and reaffirmation that class certification rulings are not appealable as of right, a party seeking interlocutory review of such an order had two main options. The first, as noted above, was a discretionary appeal under 28 U.S.C. § 1292(b), which effectively requires permission to appeal from both the district court and the court of appeals. Second, in an extreme case, the party could seek review by writ of mandamus.[4] And, of course, there was always the possibility of litigating the case to a final decision, at which point the class certification ruling—as well as other rulings and decisions—could be appealed under 28 U.S.C. § 1291.

That was the backdrop for Congress's twin grants of targeted rulemaking power in 28 U.S.C. §§ 2072(c) and 1292(e), the latter of which led to the drafting, consideration, and promulgation of Rule 23(f). Rule 23(f) arose out of concerns that the combination of § 1292(b) and mandamus was insufficient and ill-suited for appellate review of class certification rulings. The proponents of the Rule argued that those mechanisms "provide review in only a small fraction

---

[4] *See, e.g.*, *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1304 (7th Cir. 1995) (granting petition for writ of mandamus and directing district court to decertify class). *But see In re Alleghany Corp.*, 634 F.2d 1148, 1151 (8th Cir. 1980) ("Mandamus is not to be used as a substitute for interlocutory appeal of district court orders in complex civil cases.").

of cases," and that a new rule was necessary. 1 Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23 at 411 (Rules Comm. Support Office, Admin. Office of the U.S. Courts, May 1, 1997); *see also* Judicial Conference of the United States, *Minutes of the Civil Rules Advisory Committee* at 18, June 19-20 (1997) ("[T]he advisory committee believed that appellate review of class action determinations was very beneficial and should not be impeded by the restraints imposed by mandamus and 28 U.S.C. § 1292(b)."); 2 McLaughlin on Class Actions § 7.1 (12th ed. 2015) ("While in the 1990s a growing number of circuit courts were willing in exceptional circumstances to review class certification rulings … , in the great majority of cases courts required review of class certification decisions to await final judgment.") (footnotes omitted). Others, however, cautioned that expanding the availability of interlocutory review would "run[] counter to the federal policy against piecemeal appeals." 1 Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23 at 407 (Rules Comm. Support Office, Admin. Office of the U.S. Courts, May 1, 1997).

Rule 23(f) reflects a compromise between these competing positions. The provision, which has undergone only minor revisions since 1998, states in its current form:

> A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered.

> An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.[5]

The provision establishes a process for the immediate review of class certification rulings, potentially facilitating the review of more cases and spurring the refinement of certification standards among the appellate courts. But the Advisory Committee rejected the idea that such appeals should be available as a matter of right. *See* Judicial Conference of the United States, *Minutes of the Civil Rules Advisory Committee* at 4, November 9 (1995) (Advisory Committee considered the argument that "there should be an opportunity to appeal as of right, even broader than the former 'death-knell' theory," but rejected that argument based on concerns that "a right to appeal would lead to abuse").

Rule 23(f) thus reaffirms the understanding that class certification rulings are not final and appealable as of right, even if they make it economically imprudent (or impossible) for the plaintiffs in a particular case to proceed on an individual basis. Heeding this Court's warnings in *Livesay* about excessive appeals of class certification rulings, those who fashioned Rule 23(f) rejected any notion of an automatic right to appeal. They left the matter

---

[5] The provision's phrasing was slightly altered, in a manner that was intended to be "stylistic only," in 2007, *see* Fed. R. Civ. P. 23(f) advisory committee's note to 2007 amendment, and the time limit for an appeal was changed from ten days to fourteen days in 2009, *see* Fed. R. Civ. P. 23(f) advisory committee's note to 2009 amendment.

instead to the discretion of the appellate courts. *See* Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment ("Appeal from an order granting or denying class certification is permitted in the sole discretion of the court of appeals.").

II. Using Voluntary Dismissals With Prejudice to Force Immediate Review of Class Certification Denials Would Circumvent Rule 23(f).

Rule 23(f) reflects the understanding that class certification rulings are not final decisions appealable as of right under § 1291, irrespective of whether a case is likely to proceed on an individual basis. As the Advisory Committee noted, "[a]n order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation." Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment. The Rule balances the value of allowing interlocutory review of class certification rulings in certain circumstances against the concerns about erosion of the finality requirement that led this Court to reject the death knell doctrine in *Livesay*. Endorsing respondents' dismissal theory for forcing appellate review would undermine this balance and revive the death knell doctrine.

A. Rule 23(f) does not allow appeals from class certification decisions as a matter of right. On the contrary, the appeals process it creates is permissive; the courts of appeals have "unfettered discretion

whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari." Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment. The Rule accordingly forestalls what this Court in *Livesay* identified as the "principal vice" of the death knell doctrine: the practice of authorizing appeals of class certification decisions "as a matter of right." 437 U.S. at 474.

Endorsing the dismissal vehicle would erase the discretion Rule 23(f) confers. Any plaintiff who did not seek appellate review under Rule 23(f) or whose petition for permission to appeal was denied could move to dismiss with prejudice under Fed. R. Civ. P. 41. Because trial courts generally lack discretion to deny a plaintiff's motion for a voluntary dismissal with prejudice,[6] the tactic would empower plaintiffs to force an immediate appeal from a class certification decision as a matter of right.

The voluntary dismissal option would not merely resuscitate the death knell doctrine; it would supercharge it. Under the death knell doctrine, courts of appeals had the power to decline an appeal if the death knell had not in fact sounded—which is to say,

---

[6] *See* 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2364 (3d ed. 2008). In this respect, voluntary dismissals with prejudice differ from voluntary dismissals without prejudice. Outside the narrow window established by Fed. R. Civ. P. 41(a)(1), and in the absence of an agreement among the parties, district courts have broad discretion to determine whether to grant a motion for a voluntary dismissal without prejudice. *See, e.g.*, *Arias v. Cameron*, 776 F.3d 1262, 1268 (11th Cir. 2015).

if the litigation was likely to proceed without certification of a class. *See, e.g.*, *Gosa v. Sec. Inv. Co.*, 449 F.2d 1330, 1332 (5th Cir. 1971). Under respondents' theory, appellate courts lack that authority. Respondents' argument, if accepted, would mean that the true power always resides with the plaintiff, who—either after the Rule 23(f) option does not work out, or without bothering to request permission to appeal under Rule 23(f)—can seek to force the issue by moving for a voluntary dismissal with prejudice. Far from the extensive discretion they are granted under Rule 23(f), appellate courts would be left with no discretion at all.

B. Moreover, accepting the voluntary dismissal option for forcing interlocutory review of a class certification decision would create a loophole available only to plaintiffs. In *Livesay*, this Court rejected the death knell doctrine in part because it "operate[d] 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." 437 U.S. at 476.

In both design and application, Rule 23(f) dovetails with *Livesay*'s teaching that the mechanisms for immediate appeal should be evenhanded. Rule 23(f) permits appeals from both denials and grants of class certification. This neutrality reflects the Advisory Committee's observation that just as a denial of class certification may make it economically imprudent to continue to press individual claims and thus cause the named plaintiffs to dismiss their claims, "[a]n order granting certification … may force a defendant to settle rather

than incur the costs of defending a class action and run the risk of potentially ruinous liability." Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment.

Under respondents' theory, however, plaintiffs—but not defendants—may be able in effect to obtain automatic appellate review of a class certification ruling. The one-sidedness of this approach is at odds with Rule 23(f).

C. Finally, Rule 23(f) is designed to avoid the death knell doctrine's propensity to "thrust[] appellate courts indiscriminately into the trial process," upsetting "the appropriate relationship between the respective courts" and wasting judicial resources. *Livesay*, 437 U.S. at 476 (internal citations and quotation marks omitted). To that end, the Rule established a ten-day (later changed to fourteen-day) time limit within which a party desiring interlocutory review must seek permission to appeal. Fed. R. Civ. P. 23(f) advisory committee's note to 2009 amendment. That time limit "is designed to reduce the risk that attempted appeals will disrupt continuing proceedings." Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment.

The Rule's stay provision is to the same effect. Rule 23(f) directs that "[a]n appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders." Fed. R. Civ. P. 23(f). The Advisory Committee observed, moreover, that "[a] stay should be sought first from the trial court," and admonished that "[i]f the trial court refuses a stay, its action and any explanation of its

views should weigh heavily with the court of appeals." Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment. As Judge Easterbrook observed: "Rule 23(f) is drafted to avoid delay. Filing a request for permission to appeal does not stop the litigation unless the district court or the court of appeals issues a stay—and a stay would depend on a demonstration that the probability of error in the class certification decision is high enough that the costs of pressing ahead in the district court exceed the costs of waiting." *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 835 (7th Cir. 1999).

The dismissal option would nullify these procedural gains. It would permit a plaintiff to disregard the Rule's time limits and would operate effectively as an automatic stay. The timeline of the present case is illustrative. The decision striking the class allegations that respondents seek to challenge was rendered in March 2012. Respondents moved to dismiss in September 2012, and filed their notice of appeal in November 2012. The Ninth Circuit did not issue its decision on the class certification question until nearly three years after the district court's decision striking the class allegations. Nothing happened in the district court between October 2012 and August 2015, when the district court vacated its prior order striking the class allegations. *See* Stipulation and Order, *Baker v. Microsoft Corp.*, No. 2:11cv722 (W.D. Wash. Oct. 16, 2012), ECF No. 37; Notice of Appeal, *Baker v. Microsoft Corp.*, No. 2:11cv722 (W.D. Wash. Nov. 15, 2012), ECF No. 38; Order Vacating Prior Order Striking Class Allegations, *Baker v. Microsoft Corp.*, No. 2:11cv722 (W.D. Wash. Aug. 10, 2015), ECF No. 45. If this Court

validates respondents' dismissal theory, such delays are likely to become routine, with putative class actions regularly entering periods of protracted dormancy while certification rulings are appealed.

The contrast with the system created by Rule 23(f) is stark. Respondents would supplant a system that emphasizes appellate court control, evenhanded treatment of parties, and minimization of disruption and delay in the trial process with an approach that allows every plaintiff (but no defendant) to demand immediate appellate review and halt proceedings in the district court. The doctrine would subvert Rule 23(f) and therefore should be rejected. *See* 2 McLaughlin on Class Actions § 7.1 (12th ed. 2015) ("[P]ermitting a party to short-circuit available procedures for discretionary interlocutory review of certification decisions would render those procedures largely obsolete.").

III. Respondents' Voluntary Dismissal With Prejudice Following Denial of Class Certification Is Not a Final Decision Under 28 U.S.C. § 1291.

Respondents' position threatens to undermine more than just the effectiveness and ongoing viability of Rule 23(f). The Ninth Circuit concluded that, notwithstanding the interlocutory nature of class certification decisions, the district court's ruling was reviewable under 28 U.S.C. § 1291 following respondents' voluntary dismissal with prejudice. *Baker v. Microsoft Corp.*, 797 F.3d 607, 612 (9th Cir. 2015). The Second Circuit—the one other court of appeals that has held that a plaintiff may force

appellate review of a class certification decision by precipitating a dismissal with prejudice—likewise based its conclusion on § 1291. *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 178-79 (2d Cir. 1990). As these cases demonstrate, accepting the voluntary dismissal option would not only subvert the balance this Court established when it promulgated Rule 23(f); it would also erode § 1291's finality principle and the underlying policy against piecemeal appeals.

Section 1291 provides for appellate jurisdiction over "final decisions" of the district courts. The Court has long held that a final decision "is not a technical concept of temporal or physical termination." *Cobbledick v. United States*, 309 U.S. 323, 326 (1940). The inquiry into finality is informed by practical considerations aimed at "achieving a healthy legal system." *Id*. In determining whether an order is final under § 1291, this Court looks to the underlying goals of "prevent[ing] the debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequence, but a single controversy." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974).

For example, when the Court has allowed appeals of certain "collateral orders," it has described that practice "not as an exception to the 'final decision' rule laid down by Congress in § 1291, but as a 'practical construction' of it." *Dig. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). And it has limited the "small category" of appealable collateral orders to "only decisions that are

conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action"—a high bar that the denial of class certification does not meet. *Swint*, 514 U.S. at 42; *Mohawk Indus.*, 558 U.S. at 105. All the while, the Court has reiterated the need to enforce § 1291's finality requirement to promote "efficient judicial administration" and to avoid "encroach[ing] upon the prerogatives of district court judges." *Id.* at 106.

Consistent with the Court's "practical construction" of § 1291, it has examined assertions of finality in the context of existing avenues for interlocutory review. In rejecting the argument that class certification rulings are final decisions in *Livesay*, this Court recognized the availability of 28 U.S.C. § 1292(b) as an avenue for (permissive) interlocutory appeals. It explained that § 1292(b) "was enacted to meet the recognized need for prompt review of certain nonfinal orders." 437 U.S. at 474. The Court refused to allow the established procedures for interlocutory appeal to be "circumvent[ed]." *Id.* at 475. The availability of interlocutory review thus informed the Court's application of § 1291.

More recently, *Swint v. Chambers County Commission* underscored that § 1291's finality requirement may not be interpreted in a way that allows parties to circumvent the existing procedures for interlocutory appeal. 514 U.S. at 43-51. In *Swint*, the Eleventh Circuit had exercised pendent appellate jurisdiction over certain nonfinal decisions. *Id.* at 43-44. This Court vacated for lack of jurisdiction. *Id.* at 51. In doing so, it noted that the procedures for

interlocutory review set forth in § 1292 were "[o]f *prime significance to the jurisdictional issue before*" the Court. *Id*. at 46 (emphasis added). To allow the Eleventh Circuit's expansion of appellate jurisdiction would be to "drift away from the statutory instructions Congress has given to control the timing of appellate proceedings." *Id*. at 45.

The procedures for interlocutory review established by Rule 23(f) are entitled to the same weight in resolving the jurisdictional issue presented here. As noted, Rule 23(f) was promulgated under § 1292(e), which authorizes this Court to "prescribe rules … to provide for an appeal of an interlocutory decision" not otherwise appealable under § 1292. Through § 1292(e), Congress designated "the rulemaking process as the way to define or refine when a district court ruling is 'final' and when an interlocutory order is appealable." *Swint*, 514 U.S. at 48. As this Court has explained, "the rulemaking process has important virtues. It draws on the collective experience of bench and bar, and it facilitates the adoption of measured, practical solutions." *Mohawk Indus.,* 558 U.S. at 114 (citation omitted).

Rule 23(f) is emblematic of the measured, practical solutions that can emerge from the rulemaking process. The provision balances the value of interlocutory review of class certification decisions against the costs of indiscriminate interlocutory appeals. That balance "warrants the Judiciary's full respect," *Swint*, 514 U.S. at 48, and any further expansion of a party's right to appeal a class

certification decision should occur through the rulemaking process, not through a court decision.

CONCLUSION

This Court should vacate the judgment of the Court of Appeals for lack of appellate jurisdiction.

Respectfully submitted,

Robert M. Loeb
Thomas M. Bondy
Randy J. Kozel
Randall C. Smith
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005

E. Joshua Rosenkranz
Counsel of Record
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5380
jrosenkranz@orrick.com

March 18, 2016