No. 15-457

IN THE

Supreme Court of the United States

MICROSOFT CORPORATION,

Petitioner,

v.

SETH BAKER, ET AL.,

Respondents.

On 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

Respondents' mantra is "final is final," and they argue the procedural posture here is different from *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), because the plaintiffs there did not dismiss their claims and secure a judgment before appealing. But respondents never come to grips with the import of the purportedly *conditional* nature of their dismissal. Specifically, respondents maintain that if the denial of class certification is reversed, they may resume pursuing their individual claims. Resp. Br. 15; *accord id.* at 45. But if a reversal on class certification would bring their dismissed claims back to life, even though class certification "in no way touch[es] on the merits" of the claims, *Gardner v. Westinghouse Broad. Co.*, 437 U.S. 478, 482 (1978), then the district court's judgment cannot be final. Indeed, if respondents may resume pursuing their claims simply because an appellate court renews the possibility of class certification, then this case is exactly like *Livesay* in every way that matters.

Respondents are also wrong about Article III. If respondents' dismissal of their individual claims created a final judgment—because the claims are truly "gone and beyond revival," Resp. Br. 57—it inescapably follows that this case is moot. Respondents seek refuge in *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), and *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980). But unlike the plaintiffs in those cases, respondents voluntarily abandoned their individual claims. Whatever precedential force the "flexible" mootness analysis in those cases might have when plaintiffs' claims evaporate through no

fault of their own, *Geraghty*, 445 U.S. at 400-01, there is no equitable or prudential reason to extend those cases to find an actual case or controversy here.

Finally, respondents' policy arguments fall flat. Respondents say foreclosing a right to manufacture appeals when class certification denials make it economically imprudent to litigate individual claims may force plaintiffs to "give up" on viable class actions. Resp. Br. 40. In reality, Microsoft seeks nothing more than the status quo. *Livesay* precludes a right to appeal on death knell grounds, and the drafters of Federal Rule of Civil Procedure 23(f) considered all of the arguments respondents make—along with countervailing concerns such as judicial efficiency—and settled on a system of discretionary review. No policy reason, much less legal principle, suggests this Court should upend that balanced response to these dynamics.

ARGUMENT

This case reduces to a simple either/or proposition: Either the voluntary dismissal lacks finality under 28 U.S.C. § 1291 because respondents could resume litigating their claims without any appellate decision relating to the merits of the claims, or the case is moot because respondents' claims cannot under any circumstances spring back to life. Either way, respondents have no appellate rights.

I. If Respondents Could Resume Litigating Their Individual Claims, Then The District Court's Judgment Is Not Final.

A. The Voluntary Dismissal Tactic Would Violate Section 1291.

Respondents do not challenge any ruling affecting the merits of their individual claims—nor do they assert any error in the dismissal of those claims. Yet they maintain that if they persuade an appellate court that the district court's denial of class certification was erroneous, they may resume "pursu[ing] their individual claims." Resp. Br. 15. In other words, respondents purport to have *conditionally* dismissed their claims, subject to revival upon reversal of a procedural order.

Contrary to respondents' arguments, the plain text of Section 1291 offers no support for appellate jurisdiction in these circumstances, and *Livesay* forecloses it.

1. A true "final decision" "ends the litigation on the merits and leaves nothing for the [district] court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). In that situation—both inside the class action realm and out—the lawsuit is over unless an appellate court identifies some district court error affecting the merits of the plaintiff's claims. *See, e.g., Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 967 (9th Cir. 2013) (leaving district court judgment intact because erroneous denial of peremptory challenge did not "affect[] the substance of the case as opposed to the procedural right"); *Sherman v. Westinghouse Savannah River Co.*, 263 F. App'x 357, 368 (4th Cir. 2008) (refusing to address "issue of whether the

district court abused its discretion in denying class certification" because it properly rejected claims on the merits); *Cohn v. United States*, 872 F.2d 533, 534 (2d Cir. 1989) (same); *Easton v. City of Boulder, Colo.*, 776 F.2d 1441, 1447 (10th Cir. 1985) (leaving district court judgment intact because erroneous decision to bifurcate trial did not affect merits).

But that is not the situation respondents maintain they have constructed here. Instead, respondents purport to have conditionally dismissed their claims—"reserv[ing] the right to press the[ir] claim[s] if an adverse order [having nothing to do with the merits] is overturned." Resp. Br. 30 n.17.

"A *conditional* dismissal by its nature does not meet the traditional test of finality—a litigation-ending decision that 'leaves nothing' for the district court 'to do but execute the judgment' on the merits." *Page Plus of Atlanta, Inc. v. Owl Wireless, LLC*, 733 F.3d 658, 660 (6th Cir. 2013) (quoting *Catlin*, 324 U.S. at 233). To the contrary, a conditional dismissal creates only the *possibility* of finality. It terminates the lawsuit only if an appellate court fails to reverse an interlocutory procedural order having nothing to do with the merits of the plaintiffs' individual claims.

Respondents protest that "[i]t is always the case that an otherwise 'final' judgment may be unwound by a successful appeal." Resp. Br. 23. Not so. This Court has never held that an appellate court has jurisdiction under Section 1291 to review a dismissal order where, as here, plaintiffs challenge only a procedural order *having nothing to do with the merits of their claims* while insisting upon "the right to . . . revive their claims should they prevail on appeal," Resp. Br. 45; *accord id.* at 15, 30 n.17.

The only case respondents offer in defense of such a proposition is *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958).[1] They describe that case as holding that a plaintiff may "appeal a prior adverse ruling that would otherwise be interlocutory" whenever it chooses to consent to entry of judgment against it. Resp. Br. 24. But respondents ignore the Court's critical qualification of its holding: "When the Government proposed dismissal for failure to obey, *it had lost on the merits* and was only seeking an expeditious review." 356 U.S. at 680-81 (emphasis added). The Court found nothing conditional about the dismissal in *Procter & Gamble*; according to the Court, the dismissal merely memorialized the district court's prior elimination of the Government's claims "on the merits."[2]

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[1] Respondents also repeatedly cite *Abney v. United States*, 431 U.S. 651 (1977). But that case merely holds that an order rejecting a double jeopardy claim satisfies the "collateral order" doctrine.

[2] Later in their brief, respondents fight the premise of *Procter & Gamble*, asserting it was "surely untrue" as a factual matter that the prior order affected the merits. Resp. Br. 49. But this Court expressly found otherwise, and its statement that the government "had lost on the merits," 356 U.S. at 680-81, formed the basis for the Court's decision.

Respondents also suggest this Court more recently "implicitly recognized" that appellate jurisdiction lies when a plaintiff voluntary dismisses a claim in response to a pretrial order limiting the remedies on that claim, simply because this Court decided a case in that procedural posture. Resp. Br. 50 (citing *Gabelli v. SEC*, 133 S. Ct. 1216 (2013)). But it is settled that "drive by jurisdictional rulings"—that is, assertions of this Court's jurisdiction without any reasoning—"should be accorded no precedential effect." *Arbaugh v. Y&H Corp.*, 546 U.S. 500,

Implicitly confronting the real holding of *Procter & Gamble*, respondents alternatively assert the district court's order striking their class allegations left them "with diminished rights that (as a matter of law and fact) were not the same rights asserted in the complaint." Resp. Br. 45 n.29. Put another way, respondents maintain that the class certification denial affects the merits of their claims because it left respondents with only an "*impaired* version" of their individual claims, not their "*original* claims." *Id.*; *accord id.* at 44, 49 n.33.

But this Court has explained time and again that an order denying class certification "d[oes] *not* affect the merits" of the named plaintiff's own claim. *Gardner v. Westinghouse Broad. Co.*, 437 U.S. 478, 480-81 (1978) (emphasis added); *see also id.* at 482 (denial of class certification "in no way touch[es] the merits of the claim but only relate[s] to pretrial procedures") (quoting *Switzerland Cheese Ass'n, Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966)); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 10 n.11 (1983) (class certification denial has "no *legal* effect on the named plaintiff's ability to proceed with his individual claim"); *United Airlines v. McDonald*, 432 U.S. 385, 390-91 & n.4 (1977) (same). That being so, a voluntary dismissal following class certification denial cannot create a final decision where, as here, plaintiffs insist they

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511 (2006) (internal quotation marks and citation omitted). And besides, the Solicitor General explained that an alternate basis for jurisdiction existed in *Gabelli*. Br. of SEC at 7 n.3, *Gabelli v. SEC*, No. 11-1274. The Court therefore had no reason to discuss appellate jurisdiction.

may resume pursuing their dismissed claims in the event of a reversal of the procedural class certification ruling.

As Microsoft has explained, what respondents really want is for this Court to create a procedure akin to the conditional plea authorized by Fed. R. Crim. P. 11(a)(2). *See* Petr. Br. 20. Respondents suggest in a footnote that conditionally pleading guilty is somehow different from conditionally dismissing a civil lawsuit. Resp. Br. 29-30 n.17. But as they must acknowledge, both actions end a case *unless* "a party reserves the right to press [its case] if an adverse order is overturned." *Id.* That acknowledgment is fatal, for there is no civil counterpart to Criminal Rule 11(a)(2)—and if respondents' view of Section 1291 were correct, there would have been no need for that rule on the criminal side.

In short, plaintiffs cannot "convert an interlocutory order" having nothing to do with the merits of their claims into a final decision by dismissing their claims while reserving the ability to pursue the claims in the event of a successful appeal of the interlocutory procedural order. *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 245 (3d Cir. 2013). "If the possibility of finality alone establishes finality, the word has no meaning, and § 1291 serves little purpose." *Page Plus,* 733 F.3d at 662.

2. Respondents also defend their voluntary dismissal tactic by offering arguments grounded in supposedly pragmatic considerations. But respondents do little more than catalog the

arguments the plaintiffs in *Livesay* unsuccessfully advanced in support of the death knell doctrine.

First, respondents contend that if plaintiffs with small individual claims have no right to appeal, "parties with legitimate claims who (as a class) have suffered significant aggregate harm will simply throw in the towel and walk away." Resp. Br. at 20. The plaintiffs made exactly this argument in *Livesay*, explaining that, absent immediate review, "they would not pursue their claims individually." 437 U.S. at 466. But the Court unanimously deemed this a necessary cost of preserving "the judicial system's overall capacity to administer justice" through "maintaining the appropriate relationship between" trial and appellate courts. *Id.* at 473, 476 (citation omitted); *see also* Petr. Br. 17-18. This Court reaffirmed that choice when promulgating Rule 23(f), allowing appellate courts to consider whether plaintiffs face a death knell situation but refusing to create an appeal as of right in that circumstance. *See* Petr. Br. 31-33.

Besides, respondents ignore that plaintiffs sometimes exaggerate their supposed inability to continue litigating absent class certification—for example, where, as here, prevailing parties may recover attorneys' fees and penalties. *See* Petr. Br. 26-27; J.A. 75 (requesting fees). The Court, therefore, should take respondents' economic arguments with a grain of salt. *See* Pet. for Cert. at 23, *Milberg LLC v. Bobbitt*, *cert. pending*, No. 15-734.

Second, respondents assert that "an appeal from a voluntary dismissal will give adequate notice to all sides of the true scope of the controversy," allowing both sides "to calibrate their efforts to the true

amount at stake." Resp. Br. 20. Once again, the plaintiffs in *Livesay* made the same argument. The Court rejected it, explaining that while immediate appellate review might *sometimes* clarify the stakes in putative class actions, it often would not, leaving the parties in much the same position as before the appeal. 437 U.S. at 474.

This case exemplifies the point. Far from giving "notice to all sides of the true scope of the controversy," Resp. Br. 20, the Ninth Circuit "express[ed] no opinion" on whether the case should proceed as an individual or class action. Pet App. 19a. The parties still have no idea how much is at stake and would not be likely to find out for years—potentially after multiple trips to the court of appeals. And this protracted uncertainty is typical. When plaintiffs secure interlocutory review and reversals of class certification denials, appellate courts commonly remand for further class certification proceedings, without resolving the scope of the case.[3]

Third, respondents repeatedly stress they made "a risky choice" in voluntarily dismissing their claims, in that they "had to stake their entire case on the outcome of an appeal." Resp. Br. 15, 18; *accord id.* at 37. But plaintiffs who invoked the death knell doctrine took the same step. A prerequisite for

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[3] *See, e.g.*, *Reyes v. NetDeposit, LLC*, 802 F.3d 469, 487-88, 494 (3d Cir. 2015); *Madden v. Midland Funding, LLC*, 786 F.3d 246, 255 (2d Cir. 2015); *In re IKO Roofing Shingle Prods. Liab. Litig.*, 757 F.3d 599, 604 (7th Cir. 2014); *see also Edwards v. First Am. Corp.*, 798 F.3d 1172, 1181-82 (9th Cir. 2015) (vacating and remanding for a second time).

invoking the death knell doctrine was to show that, absent class certification, the plaintiffs "would not pursue their claims individually." *Livesay*, 437 U.S. at 466; *see also id.* at 473 ("[T]he named plaintiff is required to prove that no member of the purported class has a claim that warrants individual litigation."). So once plaintiffs invoked the death knell doctrine, they were estopped from any further litigation on the individual claims absent a renewed opportunity to represent a class. Petr. Br. 21-22.

Respondents dispute this parallelism between the voluntary dismissal tactic and the death knell doctrine. They note *Livesay* never mentioned estoppel and suggest the judicial estoppel doctrine did not even exist in 1978. Resp. 30-31. But *Livesay*'s silence regarding estoppel proves nothing; the Court took it as a given that plaintiffs who invoked the death knell doctrine would not resume litigating individually if their appeals proved unsuccessful. *See* 437 U.S. at 466, 469-70. And if anyone had suggested otherwise, this Court, long before 1978, "laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position." *Davis v. Wakelee*, 156 U.S. 680, 689 (1895).

That leaves respondents' assertion that "lower courts" nevertheless "permitted some 'death knell' appeals even where plaintiffs *would continue litigating their individual claims*." Resp. 30. Respondents cite nothing for this assertion, and Microsoft knows of no authority supporting it. This is not surprising. If any plaintiff during the death

knell era had the audacity to pursue his individual claim after persuading the district judge that the denial of class certification made further litigation impossible, judicial estoppel would have been the least of plaintiff's (and his lawyer's) troubles.

Fourth and finally, respondents trumpet the desirability of the class action device "where claims have only minimal value," arguing there is "an obvious interest in reading Section 1291 to . . . preserve the practical ability of litigants to assert their rights." Resp. Br. 42. This is nothing new either. The plaintiffs in *Livesay* devoted much of their brief to arguing that "the small-claim class action . . . serves a vital public interest." 437 U.S. at 470. Yet this Court deemed that argument "irrelevant." *Id.* The jurisdictional rules governing appellate litigation do not turn on "[s]uch policy arguments." *Id.* It is for Congress and the rulemaking process, not this Court in the context of litigation, to determine whether particular types of lawsuits warrant an exception from the usual finality requirements. *See id.*

3. Despite the practical equivalence between the voluntary dismissal tactic and the death knell doctrine, respondents insist that their new tactic "implicates none of *Livesay*'s core concerns." Resp. Br. 28. In fact, the voluntary dismissal tactic threatens precisely the same dysfunction as the death knell doctrine.

a. The *Livesay* Court rejected the death knell doctrine partly because it would have increased the likelihood that courts would "waste [] judicial resources" in complex class actions. 437 U.S. at 473. Respondents contend no such threat exists here

because a voluntary dismissal ensures the case will end unless "the voluntary-dismissal plaintiff wins" on appeal. Resp. Br. 38-39. But, as explained above, exactly the same was true under the death knell doctrine. *See supra* at 9-11. Yet this Court correctly perceived that "the potential for multiple appeals in every complex case [was] apparent and serious," disrupting the balance between trial and appellate courts. *Livesay*, 437 U.S. at 474. So too here. *See supra* at 9.

Even if the bet-the-case dynamic respondents describe were more pronounced in a voluntary dismissal regime, it would not matter. Respondents assert "[f]ew parties with legitimate claims will risk their entire case on [appeal from the denial of class certification] unless it is truly devastating to their lawsuit." Resp. Br. 19. But while plaintiffs with "legitimate" claims may indeed pause before staking "*everything* on the outcome of an appeal" (especially when armed with a fee-shifting regime), *id.*, the same cannot be said of plaintiffs with weak claims. For those plaintiffs, the threat of class certification is the best—often the only—leverage they have over defendants. Those plaintiffs will almost always prefer to litigate class certification issues instead of the merits, no matter how much delay it causes. *See* Petr. Br. 25-26. Meanwhile, appellate courts will be forced to expend significant resources sorting through intricate procedural issues that would disappear if

plaintiffs had to try proving their claims on the merits.[4]

Affording plaintiffs this tactical weapon would implicate *Livesay*'s related concern that the death knell doctrine "operate[d] only in favor of plaintiffs even though the class action issue . . . will often be of critical importance to defendants as well." 437 U.S. at 476. Respondents say the voluntary dismissal tactic "will also benefit defendants, who should value certainty about the class issue just as much as plaintiffs." Resp. Br. 43. But this misses the point. This Court's concern in *Livesay* was that the death

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[4] This case illustrates the problem. This case is now entering its sixth year (its tenth year, if one counts the predecessor litigation by the same lawyers for the same putative class), and respondents have never tested their claims on the merits. Instead, they restrict themselves to misleading renditions of the "facts." Respondents, for instance, claim the Xbox 360 console scratched discs "when subject even to the smallest of movements." Resp. Br. 12. But their own expert conceded that he had to tilt a console quickly by 30 degrees to induce a scratch. D. Ct. Dkt. 24, Ex. J ¶ 38. Respondents also tout that Microsoft received "approximately 55,000 complaints about scratched discs," Resp. Br. 12, but omit to mention that only 28,000 people—"0.4% of Xbox users" Pet. App. 6a—accounted for these calls, and many callers reported scratched-disc issues other than alleged here. Contrary to respondents' suggestion (Resp. Br. 14), these factual deficiencies are not due to a lack of discovery. The same lawyers who represent respondents represented the plaintiffs in the prior case involving the same allegations, and they conducted *16 months* of discovery, including fact and expert depositions. Petr. Br. 6. For that reason, the parties stipulated here to litigate class certification on the basis of the prior, comprehensive record. D. Ct. Dkt. 50 ¶ 5.

knell doctrine gave plaintiffs a path to appellate review whose equivalent was off-limits to defendants. That is, if a district court *granted* class certification so as to render it "economically prudent to settle and to abandon a meritorious defense," defendants had no means of immediate appellate review. *See Livesay*, 476 U.S. at 476. Likewise here, no matter how misguided defendants perceive an order granting class certification to be, they cannot compel review by simply filing a document conditionally disposing of the case—as respondents say they have done.

Finally, *Livesay* rejected the death knell doctrine because "it would apply equally to the many interlocutory orders in ordinary litigation—rulings on discovery, on venue, on summary judgment—that may have such tactical economic significance that a defeat is tantamount to a 'death knell' for the entire case." 437 U.S. at 470. Respondents try to reassure the Court that plaintiffs would deploy the voluntary dismissal tactic only following "critical" pretrial orders that are "truly devastating to their lawsuit[s]." Resp. Br. 2, 19. But the translation of this assertion is that the voluntary dismissal tactic, just like the death knell doctrine, would apply equally to any pretrial order in ordinary litigation that a plaintiff deems sufficiently damaging to his case.

b. All told, the *only* difference between the voluntary dismissal tactic and the death knell doctrine is that respondents' new tactic avoids the judicial fact-finding that preceded application of the death knell doctrine. Under respondents' tactic, plaintiffs would not have to *prove* that their claims are economically untenable absent class certification. Resp. Br. 27. They would simply stipulate (in the

form of a conditional dismissal) that they would not continue to pursue their individual claims absent a renewed possibility of class certification.

The *Livesay* Court did criticize the potentially burdensome fact-finding necessary to administer the death knell doctrine. *See* 437 U.S. at 473-74. But given the many legal and practical concerns this Court expressed regarding the death knell doctrine, it verges on the absurd to suggest the Court thought the solution was for plaintiffs simply to *stipulate* that they would not pursue their individual claims absent class certification, without requiring district courts to make a finding.

Indeed, even respondents' stipulation procedure would be a double-edged sword. Whatever benefits the procedure might offer would be more than offset by the costs of putting the keys to appellate review of class certification denials exclusively in plaintiffs' hands. Spared the obligation to "prove" to judges that a case is untenable absent class certification, *Livesay*, 437 U.S. at 473, plaintiffs could force immediate appellate review of orders denying class certification much more frequently than under the death knell doctrine. This would increase the caseload of appellate courts and place enhanced "pressure on the defendant[s] 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)—if only to avoid the financial expense and delay of such appeals. This is not a recipe for "achieving a healthy legal system," *Cobbledick v. United States*, 309 U.S. 323, 326 (1940).

B. The Voluntary Dismissal Tactic Would Upend Fed. R. Civ. P. 23(f).

Faced with a rule of civil procedure tailored to the situation respondents claim to face—Rule 23(f)—respondents try to marginalize the "particular solicitude" this Court has expressed for the rulemaking process to the arena of interlocutory appeals. Resp. Br. 43. Respondents also suggest the committee that drafted Rule 23(f) condoned the voluntary dismissal tactic. Resp. Br. 33-34. None of this is correct.

For starters, this Court's preference for rulemaking over judicial decision making covers not just concededly interlocutory appeals but also controversies over "when a ruling of a district court is final for purposes of appeal under section 1291." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 113-14 (2009) (quoting 28 U.S.C. § 2072(c)); *accord Swint v. Chambers County Comm'n*, 514 U.S. 35, 48 (1995). This case, therefore, falls squarely within the class of procedural disputes where a rule addressing the situation has "special force." *Mohawk*, 558 U.S. at 113.

Furthermore, the drafters of Rule 23(f) did not approve the voluntary dismissal tactic. Respondents cite one footnote in a 200-page report given to the committee two years before Rule 23(f)'s promulgation, in which the authors noted the Second Circuit had tolerated the voluntary dismissal tactic. Resp. Br. 34 (citing Thomas E. Willging, et al., *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* 80 n.310 (Fed. Judicial Ctr. 1996)). But even that footnote is telling. It cites

Livesay for the proposition that "[u]nder the final judgment rule," orders denying class certification are "not appealable until the entry of a final judgment" absent "interlocutory appeal under the limited exceptions of 28 U.S.C. § 1292(a) and (b)." Willging, *supra*, at 80 & n.310. The footnote contains only a "but see" reference to the Second Circuit's decision in *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176 (2d Cir. 1990). Thus, far from endorsing the voluntary dismissal tactic, this report indicates the Second Circuit's tolerance for it is inconsistent with *Livesay*.

Lest there be any doubt as to what the advisory committee itself thought, its notes to Rule 23(f) state that "[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 cost of litigation." Fed. R. Civ. P. 23(f) advisory committee's notes to 1998 amendment (emphasis added). The committee assumed, in other words, that even plaintiffs in true death knell situations could not force appellate review without litigating their claims to conclusion on the merits.

Against this backdrop, the committee could have responded by proposing a class-action-specific counterpart to Criminal Rule 11(a)(2). It did not. Instead, the committee decided the fairest and most administratively sensible approach was to create a system of *discretionary* review. *See* Br. of Civil Procedure Scholars 11-14. This Court promulgated the proposal as Rule 23(f). The existence of that carefully considered rule counsels against

sanctioning a tactic calculated to circumvent it. *See Swint*, 514 U.S. at 48.

II. If Respondents Could Not Resume Litigating Their Individual Claims, This Case Is Moot.

Given the absence of any rule or precedent allowing plaintiffs to dismiss claims *conditionally* to facilitate a civil appeal, this Court may conclude that respondents unequivocally and forever abandoned their claims when they dismissed them with prejudice. *See, e.g.*, *Deakins v. Monaghan*, 484 U.S. 193, 200 & n.4 (1988) (dismissal at plaintiffs' request "prevented [them] from reviving their claims"). In that event, nothing about respondents' individual claims or their putative relationship to the class they wished to represent prevents this case from being moot.

A. Individual Claims

Respondents first contend this case cannot be moot because they "reserv[ed] the right" to resume pressing their individual claims "should they prevail on appeal." Resp. Br. 44-45; *see also id.* at 46 n.29. But even setting aside the fact that their dismissal contains no such reservation, *see* Pet. App. 36a, respondents' contention just assumes away the premise of the mootness problem. Microsoft's argument is in the alternative: either a reversal on class certification brings respondents' dismissed claims back to life, in which case (for the reasons explained above) there is no final judgment, *or* a reversal would not bring these claims back to life, in which case this lawsuit is moot. Respondents' discussion of their supposed reservation of rights is

therefore irrelevant to Microsoft's mootness argument. Microsoft does not argue that respondents *waived* some right to have their claims reinstated after a successful appeal on class certification. Instead, Microsoft's mootness argument assumes respondents have no reinstatement right at all. And litigants cannot waive, much less reserve, rights they do not have in the first place.

Respondents also maintain that even if their individual claims cannot be revived after a successful appeal, their stake in those claims precludes this lawsuit from being moot because the final judgment here "was entered *with* prejudice"—in contrast to the dismissals without prejudice that gave rise to common law cases precluding plaintiffs from appealing after dismissing their claims. Resp. Br. 48 (emphasis in original); *see also* Petr. Br. 35-36 (discussing common law cases). This argument is puzzling. That the order here dismissed respondents' claims with (instead of without) prejudice only makes this case *more* clearly moot.

Perhaps respondents mean to suggest that common law cases refusing to find appellate jurisdiction after voluntary nonsuits are not Article III cases at all, but instead rest on a perceived lack of finality. If so, respondents are wrong. These appellate courts deemed a voluntary nonsuit to be "a *final* determination of the action." *Kelly v. Great Atl. & Pac. Tea Co.*, 86 F.2d 296, 297 (4th Cir. 1936) (emphasis added). But because such orders were "entered at the request of the plaintiff," these courts held he "may not, after causing it to be entered, complain of it on appeal." *Id.* That reasoning

bespeaks the lack of an adverse judgment—that is, the lack of a case or controversy.

Moreover, courts in the modern era addressing voluntary dismissals with prejudice have expressly invoked Article III as the basis for dismissing appeals. *See* Petr. Br. 36 (discussing these cases). Respondents offer no response to these cases.

B. Claims Related To The Putative Class

Respondents alternatively argue this lawsuit is not moot because (1) respondents might recover an "incentive award" for bringing this case on behalf of a class, Resp. Br. 53-55; and (2) respondents have a continuing interest in representing the proposed class, *id.* at 55-57. As Microsoft has noted, respondents forfeited these arguments. *See* Petr. Br. 39. They had every opportunity to argue to the Ninth Circuit and in their Brief in Opposition that their putative relationship to the proposed class created appellate jurisdiction. They never did. It is too late to refashion their appeal. *Id.*

In any event, respondents' arguments lack merit.

1. If respondents' claims are "gone and beyond revival," Resp. Br. 57, they have no continuing interest in obtaining any incentive award. According to case law from the lower courts, named plaintiffs may recover incentive awards—just as they may recover attorneys' fees and costs—when they settle their claims and secure benefits for a class. *See, e.g.*, *Berry v. Schulman*, 807 F.3d 600, 613-14 (4th Cir. 2015); *In re Sw. Airlines Voucher Litig.,* 799 F.3d 701, 715-16 (7th Cir. 2015); *Staton v. Boeing Co.*, 327 F.3d 938, 976-78 (9th Cir. 2003); *see also* Petr. Br. 40 (same rule for attorneys' fees and costs). But

respondents cite no cases—and Microsoft knows of none—holding that plaintiffs who *lose and therefore recover nothing* on their own claims may recover an incentive award. The reason is simple. Incentive awards reward "a *successful* [c]lass action plaintiff" for the special burden of "becoming *and continuing* as a litigant" through settlement. *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 200 (S.D.N.Y. 1997) (emphasis added); *see also Shane Group, Inc. v. Blue Cross Blue Shield*, ___ F.3d ___, 2016 WL 3163073, at*8 (6th Cir. June 7, 2016) (requiring plaintiffs seeking incentive award to supply "specific documentation—in the manner of attorney time sheets—of the time actually spent on the case by each recipient of an award"). Where named plaintiffs abandon their claims, they do not achieve success or even bear the burden of litigating on behalf of others.[5]

2. Respondents' purported continuing interest in pursuing relief for the proposed class fares no better. In a world in which abandoned claims cannot be revived, respondents never say how they might continue, after abandoning their own claims, to serve as proper class representatives. *See* Fed. R. Civ. P. 23(a)(3) & (4) (class representative's claims must be "typical of the claims . . . of the class"; representative must "fairly and adequately protect the interests of the class"). But even if respondents could overcome

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[5] Respondents' suggestion that they might qualify for an incentive award on the facts of *this* case is particularly unfounded. Respondents dismissed their claims before any discovery even occurred. *See* Resp. Br. 14. They have incurred no litigation burdens whatsoever, and will incur none if their claims are gone and beyond revival.

this obstacle, it would not matter. As their own amicus recognizes, the rule of *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), and *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980), applies only to situations in which "the named plaintiffs' claims were resolved against their will, either though defendants' actions, or through the passage of time." Amicus Br. of Public Justice 16.[6] Absent such events beyond the plaintiffs' control, no "jurisdictional gap" arises that requires application of the equitable doctrine under which certain legal rulings "relate back" to an earlier date. *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1536 (2013) (Kagan, J., dissenting). That being so, Microsoft agrees with Public Justice that this Court can "reverse . . . without calling the rule articulated in *Roper* and *Geraghty* into question." Amicus Br. of Public Justice 16; *see also id.* 3.

CONCLUSION

For these reasons, the Court should reverse and remand with instructions to dismiss the appeal.

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[6] Respondents cite one D.C. Circuit case applying *Roper* and *Geraghty* where the named plaintiffs settled their claims while reserving the ability to spread their attorneys' fees and costs to the rest of the class. Resp. Br. 55 (citing *Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 529 (D.C. Cir. 2006)). But even if this holding is correct, respondents implicitly disclaim any continuing interest in spreading attorneys' fees or costs, *see* Resp. Br. 55—and, as explained above, they lack any right to seek an incentive award.

Respectfully submitted,

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June 15, 2016