No. 07-1092

In The Supreme Court of the United States

JUAN PEREZ,

Petitioner,

v.

CITY OF MIAMI BEACH,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

Respondent has presented a revisionist history, obscuring the troubling Circuit splits described in the Petition. It has misstated the basis of the Eleventh Circuit's ruling; inaccurately asserted that the Eleventh Circuit allows claimants to receive immediate appellate review by voluntarily dismissing all remaining claims with prejudice; and contrived the *post hoc* excuse that Petitioner's "tactical decisions" foreclosed review, notwithstanding Respondent's admission below that no improper tactics occurred.

The Eleventh Circuit's ruling conflicts with the approach of many other Circuits. Even Respondent, in its penultimate sentence (Br. in Opp. 12), can say only that the ruling below is consistent with "several other circuits" – an implicit concession that it is inconsistent with others. The division of authority is real and pronounced, and will continue to cause confusion in the federal system until resolved by this Court.

I. Respondent Has Not Accurately Characterized the Basis for the Eleventh Circuit's Ruling

There is nothing in the Eleventh Circuit's ruling or prior precedent to suggest that the reason the Eleventh Circuit found appellate jurisdiction lacking here was "because Petitioner's dismissal with prejudice had no legal effect since it was filed after the claims had already been dismissed and Petitioner did

not first seek to have the claims reinstated in the district court." Br. in Opp. 1. The basis for the ruling is stated in the Eleventh Circuit's order, and Respondent has not even attempted to dispute that it is in conflict with the rulings of virtually every other Circuit.[1]

The order states that Petitioner's "subsequent voluntary dismissal of his remaining claims with prejudice did not render the district court's August 8 order and judgment final or immediately appealable. *See Druhan v. Am. Mutual Life*, 166 F.3d 1324, 1326-27 (11th Cir. 1999); *Mesa v. United States*, 61 F.3d 20, 21-22 (11th Cir. 1995)." App. 2. Neither *Mesa* nor *Druhan* denied appellate jurisdiction on the ground that some kind of procedural oversight precluded the appeal. *Mesa* did so because the plaintiffs had not

[1] If, as Respondent argues, the basis for the Eleventh Circuit's ruling were truly that Petitioner had bungled the situation by filing his voluntary dismissal with prejudice after already having filed a voluntary dismissal without prejudice and then failing to formally reinstate those claims, the court's order dismissing Petitioner's second appeal would have said so. But the order says no such thing. In fact, the order dismissing Petitioner's second appeal, other than changing the applicable dates and changing the term "without prejudice" to "with prejudice," is identical to the order dismissing his first appeal – an order which predated Petitioner's allegedly improper procedural maneuvers. The language of the two orders is effectively identical precisely because the reasoning animating them is effectively identical: that a claimant's voluntary dismissal of his remaining claims, whether made with or without prejudice, does not render final an order dismissing his principal claim.

sought a Rule 54(b) certification after they voluntarily dismissed their remaining claims without prejudice. 61 F.3d at 22. The court expressly rejected the Third Circuit's rule, which holds that the "without prejudice" nature of a voluntary dismissal is not necessarily disqualifying, because some voluntarily dismissed claims cannot possibly be revived – for example, when the statute of limitations has expired. *Id.* at 22 & n.6. *Druhan* denied appellate jurisdiction because the plaintiff voluntarily dismissed her *entire complaint* with prejudice after the district court refused to remand it to state court, and the Eleventh Circuit ruled that "there is no case or controversy," and that the plaintiff had tried to transform an *inherently* interlocutory order (a denial of remand) into a final one. *Druhan*, 166 F.3d at 1326.

In the case at bar, the Eleventh Circuit's citation to *Mesa* and *Druhan* therefore reflected the court's holding that Petitioner's voluntary dismissal of his claims against the two unserved defendants, even though made expressly "with prejudice," did not render an adverse final order creating appellate jurisdiction. That holding conflicts with the view of many other Circuits, indeed all of them. *See* Pet. 7-9, 12-16. Respondent never even tries to dispute the existence of the conflict, nor to refute the systemic harms it has inflicted. *See* Pet. 7, 25, *quoting* R. Cochran, *Gaining Appellate Review By "Manufacturing" A Final Judgment Through Voluntary Dismissal of Peripheral Claims*, 48 MERCER L. REV., 979, 985 & 1021 (Spring 1997) (the Circuit split has "needlessly

plagued district and appellate courts[,]" leaving them "frustrated and uncertain").

Respondent also cites *State Treasurer of the State of Michigan v. Barry*, 168 F.3d 8 (11th Cir. 1999), for the same proposition – that the Eleventh Circuit is "consistent with several other circuits" because it allegedly shares the view that "jurisdiction will lie where the remaining claims are dismissed with prejudice" (Br. in Opp. 8, 12). Respondent quotes *Barry*'s statement that "[a]ll that defendant must do to appeal the partial summary judgment is have its remaining claims dismissed with prejudice." 168 F.3d at 12. But this passive voice construction – "where the remaining claims are dismissed" and "have its claims dismissed" – is purposeful. The court in *Barry* did not say that it would accept jurisdiction if a claimant *voluntarily* dismissed the remaining claims with prejudice. It said that jurisdiction would lie if the claimant would "have its remaining claims dismissed." *Barry*, 168 F.3d at 12, *quoting Construction Aggregates, Ltd. v. Forest Commodities Corp.*, 147 F.3d 1334, 1337 (11th Cir. 1998). The court's authority for this statement was a case where the dismissal of the remaining claims was *involuntary*, because the claimant had failed to prosecute his claim. *Morewitz v. West of England Ship Owners Mut. Protection and Indem. Ass'n*, 62 F.3d 1356, 1361 (11th Cir. 1995). There is no case in which the Eleventh Circuit accepted appellate jurisdiction where the claimant tried to create finality by voluntarily dismissing his or her

remaining claims with prejudice; and in the case at bar, it denied jurisdiction.[2]

It is also incorrect for Respondent to assert (Br. in Opp. 1-2, 7) that the Eleventh Circuit would have accepted jurisdiction over Petitioner's appeal if he had made no effort to voluntarily dismiss the unserved defendants. The mere fact that the Eleventh Circuit posited its first jurisdictional question to the parties, Res. App. at 2-3, disproves this assertion. In posing that jurisdictional question, the court stated its awareness of the fact that the two individual defendants had not been served. *Id.* If, as Respondent asserts, the Eleventh Circuit adheres to the bright-line rule that unserved defendants automatically do not count for finality purposes, there would have been no reason for the court to raise a jurisdictional question in the first place.

But the court not only asked the question. It actually did dismiss the appeal the first time, citing footnote 2 of *Insinga v. LaBella*, 817 F.2d 1469 (11th Cir. 1987), where the court eschewed other Circuits' bright-line rule discounting unserved defendants, and

[2] Forcing a claimant to induce a "with prejudice" dismissal via lack of prosecution is precisely the sort of wasteful litigation that the final judgment rule seeks to avoid. *See* Pet. 17-21. The Eleventh Circuit recognizes appellate jurisdiction where the "with prejudice" dismissal results from a claimant's refusal to prosecute his or her remaining claims, but arbitrarily denies jurisdiction where the "with prejudice" dismissal results from the claimant's effort to expedite matters by voluntarily dismissing such claims.

instead adopted an *ad hoc* exception that discounts unserved defendants only where it is not "premature to assume that service will not be made." *Id.* at 1470 n.2. Respondent misconstrues the import of this footnote by emphasizing (Br. in Opp. 6) that it is the district court, rather than the appellate court, that will make this *ad hoc* determination. For purposes of this Petition, that is irrelevant. The relevant point is that, when deciding whether finality exists over an involuntarily dismissed claim, the Eleventh Circuit, unlike most other Circuits, does not automatically discount claims that remain against unserved defendants. The most Petitioner could have hoped for here was to have the Eleventh Circuit speculate about whether service was likely to be accomplished – speculation that creates a haze of uncertainty in an area where clarity is a virtue. *See* Pet. 24-25. And none of Respondent's arguments disclaims a Circuit split on this question, a reality that is beyond dispute. *See* Pet. 11 n.1 (citing cases explicitly recognizing the Circuit split).[3]

[3] *Accord Brown v. Fisher*, No. 06-3207, 2007 WL 3011051, *4 (10th Cir., Oct. 16, 2007) (unpublished) ("declin[ing] to adopt the bright line rule" of the Fifth Circuit).

II. Because Petitioner Did Not Employ Any Improper "Tactical Decisions" That Would Have Precluded Appellate Jurisdiction, This Petition Presents An Ideal Vehicle to Resolve the Division of Authority

There is no merit to Respondent's assertions (Br. in Opp. 11) that Petitioner's conduct "smacked of manufacturing jurisdiction" and that Petitioner's voluntary dismissal of his remaining claims with prejudice "had no legal effect since it was filed after the claims had already been dismissed and Petitioner did not first seek to have the claims reinstated in the district court." Of course, the avowed purpose of Petitioner's voluntary dismissals was to "manufactur[e]" jurisdiction – or, dispensing with the pejorative label, to create finality. But the sequence of Petitioner's voluntary dismissals was not the rationale for the Eleventh Circuit's ruling.

There was nothing untoward about Petitioner's initial refusal to make a "with prejudice" dismissal of his remaining claims. Indeed, several Circuits accept immediate appellate jurisdiction even if the dismissal is made without prejudice. *See* Pet. 8. Moreover, Respondent repeatedly represented to the lower courts that it saw nothing improper about Petitioner's conduct. When the Eleventh Circuit posed its first jurisdictional question (after the "without prejudice" voluntary dismissal), Respondent explicitly approved of Petitioner's steps to create finality. App. 30-31. Then, after the Eleventh Circuit nevertheless dismissed the

appeal and Petitioner returned to the district court, Respondent stated:

> Because of the representations by the Plaintiff's counsel regarding the dismissal of the two unserved Defendants . . . , including his written representation to undersigned counsel that if the Eleventh Circuit remands the case that he will file the appropriate dismissals, the Defendant . . . does not oppose the entry of Final Summary Judgment against the Plaintiff since the unserved Defendants can never be brought into this action in light of the running of the statutes of limitation, the 120 day limit to serve parties, and the stipulation of counsel that the Plaintiff will not be pursuing this action against the two unserved Defendants.

App. 39-40.[4]

Equally incorrect is Respondent's assertion (Br. in Opp. 11) that Petitioner's "with prejudice" dismissal of his remaining claims "had no legal effect since it was filed after the claims had already been

[4] The parties of course could not confer jurisdiction where it is otherwise lacking. *E.g., Beck v. Alabama*, 447 U.S. 625, 630 n.6 (1980). But it is remarkable that a litigant which wholeheartedly endorsed certain procedural steps has suddenly – once the possibility of Supreme Court review looms – reversed course and decried those steps as improper efforts to "manufactur[e] jurisdiction." We respectfully submit this is merely a distraction technique, designed to obscure the Eleventh Circuit's actual holding and the Circuit splits that exist.

dismissed and Petitioner did not first seek to have the claims reinstated in the district court." As stated previously, the Eleventh Circuit's order does not say a word about this – and with good reason. There is no requirement that a claimant formally reinstate his or her claims after voluntarily dismissing them without prejudice, all so that immediately upon reinstatement he or she can then voluntarily dismiss them with prejudice. Respondent's only asserted authority for such a non-existent rule is an off-point line from *Barry*, in which the Eleventh Circuit stated that "the parties *may* seek to reopen the case and to reinstate the claim dismissed without prejudice." 168 F.3d at 16 (emphasis supplied). This is far from imposing a requirement that the claimant *must* reinstate the claims to achieve finality, especially where, as here, the claimant's unconditionally-expressed intention was immediately to voluntarily dismiss those claims with prejudice – not to prosecute them further.[5] Indeed, *Barry* itself suggests that the Eleventh Circuit rejects the formalistic reinstatement requirement that Respondent claims it espouses. *Cf. id.* at 13 n.8 (distinguishing cases permitting immediate appeals where "the parties have renounced their ability to

[5] *Cf. Wynn v. Nat'l Broadcasting Co., Inc.*, 2002 WL 31681865, *1 (C.D. Cal., Mar. 6, 2002) (accepting plaintiff's notice of voluntary dismissal without prejudice of certain claims, even though those claims "have already been dismissed" by virtue of court order).

proceed on their remaining claims after the appeal is decided").[6]

Moreover, the extra procedural step that Respondent would impose – a motion in the district court to reinstate the voluntarily dismissed claims, presumably to be brought under Federal Rule of Civil Procedure 60(b) – would be anything but a *fait accompli*. The granting of such a motion is inherently discretionary, *e.g., Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 233-34 (1995), meaning that Petitioner's right to appeal would be diminished to a roll of the dice. And even if a claimant could be certain that the motion to reinstate would be granted, a rule requiring this extra step would run counter to the final judgment rule, which after all is designed to avoid wasteful litigation. In short, Respondent's *post hoc* argument that Petitioner's voluntary dismissal with prejudice "had no legal effect" is baseless.

* * *

[6] Even assuming, *arguendo*, that the Eleventh Circuit did impose a requirement of formal reinstatement, that would create yet another Circuit split. *See Dannenberg v. Software Toolworks, Inc.*, 16 F.3d 1073, 1076 (9th Cir. 1994) (plaintiff's "without prejudice" dismissal was insufficient to create finality but "dismissal [by the appellate court] is not fatal to the plaintiff's desire for quick review; they can return immediately to this court either by dismissing the § 11 claim with prejudice (and thus 'finalizing' the partial summary judgment) or by persuading the district court to issue a Rule 54(b) certificate").

Respondent summarizes (Br. in Opp. 11-12) by listing five ways in which it asserts Petitioner could have obtained appellate review. None of these points survives scrutiny.

First, Respondent posits that Petitioner could have sought a Rule 54(b) certification of the district court's first final judgment. But this does not answer our point that doing so would have diminished Petitioner's right to appeal into something much less than that. As Respondent concedes (Br. in Opp. 12 n.6), certification is left to the district court's discretion. *See* Pet. 22.

Second, Respondent repeats the fiction that the Eleventh Circuit would have accepted jurisdiction if Petitioner had answered the court's jurisdictional question by merely repeating what the court indicated in its question it already knew – that the remaining defendants were unserved. We have already addressed this point. *See supra* 5.

Third, Respondent asserts that Petitioner could have, from the very outset, made his voluntary dismissal explicitly with prejudice. That is true but irrelevant. As previously explained, *see supra* 7-9, there is no logical or doctrinal reason why Petitioner's "with prejudice" voluntary dismissal, entered only after the Eleventh Circuit denied jurisdiction the first time, would have been any less effective than a "with prejudice" voluntary dismissal made at the outset. The other Circuits would accept either one, but the

ruling below indicates that the Eleventh Circuit would accept neither.

Fourth, Respondent repeats that Petitioner could have sought a Rule 54(b) certification, this time after the district court entered its second final judgment. This argument fares no better than Respondent's first argument about a possible Rule 54(b) certification. In either circumstance, what Petitioner would have received is considerably less than the ironclad right to appeal.

Fifth and finally, Respondent posits that Petitioner could have sought to reinstate the claims he dismissed without prejudice before he attempted to dismiss them with prejudice. As previously explained, there is simply no requirement for such a step, it would not have provided Petitioner an absolute right of appeal, and imposing such a requirement would be contrary to the animating thrust of the final judgment rule.

In a sense, this list of five possibilities only serves to highlight Petitioner's predicament and belie Respondent's mis-characterization of the Eleventh Circuit's ruling. Petitioner has been stripped of the right to appeal, a result which would not have obtained if his suit had originated in virtually any other Circuit. There is nothing in Respondent's brief that controverts the existence of wide and profound Circuit splits in this area – splits of authority that are harming both the lower courts and litigants.

III. The Questions Presented Warrant Review By This Court

Respondent makes no effort to dispute that the Eleventh Circuit's ruling undermines, rather than furthers, the important values served by the final judgment rule. *See* Pet. 17-24. Nor does it refute the reality in this area that "splits and intracircuit inconsistencies leave district court litigants and judges frustrated and uncertain about which procedure will satisfy the appellate courts and permit an appeal to go forward." R. Cochran, *supra*, at 985. Here, Petitioner did everything he reasonably could to secure his right to appeal, and each step of the way, Respondent consented and the district court endorsed the procedure. Nevertheless, twice the Eleventh Circuit found such steps inadequate and denied jurisdiction. Petitioner has now been stripped of his right to appeal.

There are compelling reasons to address the questions presented now, not later in a different case. The lower courts have been struggling with these questions for several decades now, and along the way, countless legitimate appeals have been squandered and countless more have forced appellate courts to navigate thorny and time-consuming jurisdictional issues. The solution is a uniform and clear answer, something only this Court can provide. This case presents an ideal vehicle because there are no procedural impediments to this Court's review, and the ruling below has staked out an extreme position that

is at odds with that of every other Circuit to confront the question.

CONCLUSION

For the reasons stated, the Court should grant the Petition.

Respectfully submitted,

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