No. ________

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

With limited exceptions not relevant here, Congress vested the Courts of Appeals with jurisdiction "of appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291. The questions presented are:

1. Whether, contrary to the Eleventh Circuit's holding below, other circuits have correctly held that a Court of Appeals possesses appellate jurisdiction when a claimant whose principal claim has been involuntarily dismissed then voluntarily dismisses his or her remaining claims in order to seek appellate review of the involuntarily dismissed principal claim.

2. Whether, contrary to the Eleventh Circuit's approach below, other circuits have correctly held that there is a bright line rule that a judgment is final and thus appealable under 28 U.S.C. § 1291 when it dismisses all served defendants, leaving only unserved defendants in the case.

PARTIES TO THE PROCEEDING

Petitioner is Juan Perez, who was the Plaintiff and Appellant below.

Respondent is the City of Miami Beach, a municipality located in the State of Florida, which was a Defendant and Appellee below.

RULE 29.6 DISCLOSURE

Neither Petitioner nor Respondent is a nongovernmental corporation, and thus neither has a parent or publicly held company that owns ten percent or more of its stock.

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OPINIONS BELOW

All of the orders of the district court and the Eleventh Circuit are unpublished, including the district court's order granting Respondent's motion for summary judgment (App. 5-11); the district court's entry of Final Judgment (App. 12-13); the Eleventh Circuit's dismissal for lack of appellate jurisdiction after Petitioner voluntarily dismissed the unserved Defendants without prejudice (App. 14-15); the district court's re-entry of Final Judgment (App. 3-4); and the Eleventh Circuit's dismissal for lack of appellate jurisdiction after Petitioner voluntarily dismissed the unserved Defendants with prejudice (App. 1-2).

JURISDICTION

The order of the Eleventh Circuit dismissing Petitioner's appeal was entered on November 23, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

Title 28 United States Code § 1291 provides:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the

> District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Rule 54(b) of the Federal Rules of Civil Procedure provides:

> When an action presents more than one claim for relief – whether as a claim, counterclaim, crossclaim, or third-party claim – or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

STATEMENT OF THE CASE

1. In 2005, Petitioner Juan Perez, a former employee of the City of Miami Beach, filed this civil rights action against the City in Florida state court,

alleging various federal and state claims. App. 16-19. The City removed the case to federal court based on the federal questions involved. *Id.* Petitioner then amended his pleading to add claims against several individual Defendants – Patricia Walker (his supervisor), in her individual capacity; Jorge Gonzalez (the City Manager), in his individual capacity; and unnamed "John Doe" Defendants, who were alleged to be various City supervisors and agents. App. 20-23. Petitioner never attempted to serve any of the individual Defendants.

2. The City moved for summary judgment as to each of Petitioner's claims against the City, and in January 2007 the district court granted the motion in its entirety. The court's order concluded: "It is therefore ORDERED, ADJUDGED, and DECREED that the Motion for Summary Judgment of Defendants (D.E. # 33) be, and the same is hereby GRANTED. The above-styled case be, and is hereby DISMISSED WITH PREJUDICE." App. 11. In accordance with Rule 58, the district also issued a separate document entitled "Final Judgment" which stated:

> ORDERED AND ADJUDGED that judgment is entered in favor of Defendant City of Miami Beach's Motion for Summary Judgment and against Plaintiff Juan Perez. The case, namely the entire Complaint, is dismissed with prejudice. This case is CLOSED. If applicable, this Court retains jurisdiction of the above-styled action to determine fees, costs,

> and expenses incurred by Defendant in defending this action.

App. 12.

3. Petitioner then filed a Notice of Appeal seeking review of the Final Judgment. App. 60-61. He also filed a notice of voluntary dismissal under Rule 41(a), by which he dismissed each of the individual Defendants without prejudice. App. 24-25. The Eleventh Circuit directed both sides to brief the question of its appellate jurisdiction. Petitioner contended that jurisdiction was proper and represented that he had no intention of serving the unserved Defendants; that he had voluntarily dismissed the unserved Defendants; that any claims against the unserved Defendants were likely time-barred anyway; and in any event, he would stipulate to dismissing the unserved Defendants should his earlier dismissal be deemed inoperative. App. 26-29. The City agreed that "[i]n light of the Plaintiff's Voluntary Dismissal of the other putative Defendants, and his stipulation that he would not pursue any claims against them in this action . . . the order appealed from is final and appealable." App. 30-31. But the Eleventh Circuit disagreed and dismissed the appeal for lack of jurisdiction. The court's order stated in its entirety:

> This appeal is DISMISSED for lack of jurisdiction. The January 26, 2007 order and the January 29, 2007, judgment, granting summary judgment in favor of Defendant City of Miami Beach, are not final or immediately appealable. *See* 28 U.S.C. § 1291; Fed. R. Civ.

> P. 54(b); *Vann v. Citicorp Sav. of Ill.*, 891 F.2d 1507, 1509-12 (11th Cir. 1990); *Insinga v. LaBella*, 817 F.2d 1469, 1470 and n.2 (11th Cir. 1987); *Czeremcha v. Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO*, 724 F.2d 1552, 1554-55 (11th Cir. 1984). Appellant's voluntary dismissal of his remaining claims without prejudice did not render the district court's 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. 14-15.

4. Petitioner returned to the district court and requested that it renew its entry of final judgment to state explicitly that Petitioner had voluntarily dismissed the unserved Defendants. App. 32-38. The City consented to Petitioner's motion because "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. The district court granted the motion, entering a renewed Final Judgment under Rule 58 that explicitly recognized that Petitioner had "voluntarily dismissed the remaining Defendants . . . " App. 3-4. Lest there be any remaining uncertainty, Petitioner then filed a Notice of Appeal from the new Final Judgment, App. 62-63, and voluntarily

dismissed the unserved Defendants *with* prejudice. App. 41.

The Eleventh Circuit again directed the parties to brief the question of appellate jurisdiction. App. 48. Petitioner asserted that his dismissal of the unserved Defendants with prejudice forever precluded him from reviving his claims against them, and thus definitively established the finality of the district court's judgment. App. 43-57. The City agreed, advising the court "that it believes the dismissal with prejudice cures the jurisdictional defect identified by the Court and renders this case final and proper for appeal." App. 58-59.

5. The Eleventh Circuit again disagreed and dismissed the appeal for lack of jurisdiction. The order was virtually identical to its earlier dismissal order:

> This appeal is DISMISSED for lack of jurisdiction. The August 8, 2007, judgment, granting summary judgment in favor of Defendant City of Miami Beach, is not final or immediately appealable. *See* 28 U.S.C. § 1291; Fed. R. Civ. P. 54(b); *Vann v. Citicorp Sav. of Ill.*, 891 F.2d 1507, 1509-12 (11th Cir. 1990); *Insinga v. LaBella*, 817 F.2d 1469, 1470 and n.2 (11th Cir. 1987); *Czeremcha v. Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO*, 724 F.2d 1552, 1554-55 (11th Cir. 1984). Appellant'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. 1-2.

REASONS FOR GRANTING THE WRIT

The Circuits are deeply divided over an important question of federal appellate jurisdiction that potentially affects every federal litigant's right to appellate review. The question is whether appellate jurisdiction exists under 28 U.S.C. § 1291 when a claimant whose principal claim has been involuntarily dismissed then voluntarily dismisses his or her remaining claims in order to seek appellate review of the involuntarily dismissed principal claim. As the Courts of Appeals have acknowledged, their various answers to this question conflict and are sometimes internally inconsistent. *See Chappelle v. Beacon Communications Corp.*, 84 F.3d 652, 654 (2d Cir. 1996) ("The other courts of appeals are in disagreement over this question, with several of them displaying intracircuit conflicts."); *West v. Macht*, 197 F.3d 1185, 1188 (7th Cir. 1999) ("It would be an understatement to say that our precedents on this issue are difficult to harmonize."). The result is 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, *Gaining Appellate Review By "Manufacturing" A Final Judgment Through Voluntary Dismissal of Peripheral Claims*, 48 MERCER L. REV. 979, 985 (Spring 1997).

Except for the Eleventh Circuit, the Circuits are divided into two camps. The first group holds that finality has been achieved – and thus appellate jurisdiction exists under § 1291 – where a claimant voluntarily dismisses the remainder of his or her claims after court-ordered dismissal of his principal claim, even when the claimant's voluntary dismissal is without prejudice. *E.g., James v. Price Stern Sloan*, 283 F.3d 1064 (9th Cir. 2002); *Chrysler Motors Corp. v. Thomas Auto Co.*, 939 F.2d 538 (8th Cir. 1990); *Division 241, Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir. 1976). The second group – believing that a "without prejudice" voluntary dismissal presents the unacceptable risk that a claimant is manufacturing immediate appellate jurisdiction simply by warehousing his or her peripheral claims for another day – holds that finality exists only where the claimant's voluntary dismissal is with prejudice, or where the voluntarily dismissed claims cannot be resuscitated (for example, because the applicable statute of limitations had run). *E.g., Rabbi Jacob Joseph School v. Province of Mendoza*, 425 F.3d 207 (2d Cir. 2005); *John's Insulation, Inc. v. L. Addison & Assocs., Inc.*, 156 F.3d 101 (1st Cir. 1998); *Trevino-Barton v. Pittsburgh Nat'l Bank*, 919 F.2d 874 (3d Cir. 1990). Some Circuits have zigzagged back-and-forth between the two camps (and sometimes back again),

creating intra-Circuit conflicts, and compounding the inter-Circuit conflicts.

Amidst this splintered array, the Eleventh Circuit Court stands alone, occupying a space where no other Circuit has ventured. *See* 15A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3914.8, at 358 n.16.5 (Supp. 2007) (describing the Eleventh Circuit's rule as "[t]he strictest approach yet taken"). The Eleventh Circuit holds that appellate jurisdiction is wanting even when the claimant has forever jettisoned his or her remaining claims by voluntarily dismissing them with prejudice, or in other like circumstances where there is no possibility of ever bringing them again. App. 1-2; *Druhan v. American Mut. Life*, 166 F.3d 1324 (11th Cir. 1999). Put bluntly, a claimant who voluntarily dismisses the remaining peripheral claims – even with prejudice – has no right to appeal. He or she cannot be certain that the Eleventh Circuit will review *any* of the claims. Instead of receiving a right to appeal, the most a claimant can hope to receive from the Eleventh Circuit's unyielding approach is the chance to convince the district court to certify the judgment as appealable under Federal Rule of Civil Procedure 54(b). However, the decision whether to grant such a request is discretionary, not a matter of right, *see Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956), and "an appeal under Rule 54(b) is permitted relatively rarely." Cochran, *supra*, at 993.

The Eleventh Circuit's approach is troubling not merely because it degrades a claimant's right to

appeal. It also hampers the lower courts' efficient administration of justice by forcing a claimant to engage in additional, unnecessary litigation in the district court while his or her appellate review is delayed, and in some circumstances foreclosed altogether. And it trades a bright line rule of jurisdiction for hazy uncertainty. At a systemic level, there are of course competing benefits and costs of allowing immediate appellate review of various orders, *see Johnson v. Jones*, 515 U.S. 304 (1995), but the rule applied by the Eleventh Circuit below manages to capture nearly all of the costs and none of the benefits.

In the case at bar, these problems might have been minimized – or at least temporarily avoided – if the Eleventh Circuit had adhered to the rule that a named defendant who has not been served does not count as a "party" when a court assesses whether a judgment is final under § 1291, thus rendering such judgment appealable without need for a Rule 54(b) certification. That is the rule in many circuits. *See, e.g., FSLIC v. Tullos-Pierremont*, 894 F.2d 1469 (5th Cir. 1990); *Bristol v. Fibreboard Corp.*, 789 F.2d 846 (10th Cir. 1986); *De Tore v. Local No. 245*, 615 F.2d 980 (3d Cir. 1980). *Cf.* Wright, Miller & Cooper, *supra*, § 3914.7 at 553-54 ("It is widely agreed that defendants who have not been served with process are not counted; a disposition as to all those who have been served is final.").

But the Eleventh Circuit, like the Second Circuit, refuses to disregard unserved defendants "if the district court is given reason to believe it is premature to

assume that service will not be made on the currently unserved parties[.]" *Insinga v. LaBella*, 817 F.2d 1469, 1470 n.2 (11th Cir. 1987) (citing *Leonhart v. United States*, 633 F.2d 599, 608 n.9 (2d Cir. 1980)).[1] Without elaboration, the Eleventh Circuit relied on the *Insinga* exception in its order dismissing Petitioner's appeal. App. 2. Even though the permissible time for serving the unserved Defendants had long since expired (Petitioner filed the suit in 2005 and his first Notice of Appeal was not filed until 2007), the Eleventh Circuit denied his right to appeal. This incorrect and unjust result could not have obtained if Petitioner's suit had originated in virtually any other Circuit.

This case presents the optimal vehicle for harmonizing the Courts of Appeals' cacophony regarding these crucial areas of federal jurisdiction, and for effectuating the proper balance of interests sought by § 1291. The Court should issue a writ of certiorari and vacate the Eleventh Circuit's dismissal of Petitioner's appeal.

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[1] Over the past two decades, the Seventh Circuit has repeatedly noted the Circuit split on this question but has not committed to either side. *See Ordower v. Feldman*, 826 F.2d 1569, 1573 (7th Cir. 1987) ("This problem has received differing treatment among the circuits. . . . We need not decide which of the differing approaches to take because the district court's decision would be considered final under either approach."); *Jones v. United States*, 112 F.3d 299, 300-01 (7th Cir. 1997) (following *Ordower*); *United States v. 8136 S. Dobson Street*, 125 F.3d 1076, 1081-82 (7th Cir. 1997) (following *Ordower* and *Jones*).

I. The Decision Below Conflicts with Decisions of Other Circuits

A. The Rule in Other Circuits. When the Eleventh Circuit dismissed Petitioner's first appeal, he attempted to cure the perceived jurisdictional flaw by returning to the district court, making his voluntary dismissal of the unserved Defendants explicitly a dismissal with prejudice, and inviting a renewed final judgment from which to take an appeal. These are the very steps that other Circuits have endorsed as a means to create finality.[2] The First Circuit's endorsement is explicit: "[C]urrently the proper way to appeal an interlocutory order is to move for a voluntary dismissal with prejudice, instead of delaying the case until the district court is forced to dismiss the case for failure to prosecute." *John's Insulation, Inc.*, 156 F.3d at 107. The Ninth Circuit actually chided a litigant who did not take this approach:

> Finally, we note that Cheng could easily have avoided the finality problem by simply dismissing his remaining claim and defenses without the option to pursue them should this court reverse. A plaintiff may voluntarily dismiss the remainder of his claim(s) after a partial summary judgment has been entered

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[2] It is inconsequential that Petitioner voluntarily dismissed with prejudice the unserved Defendants shortly *after* he filed his renewed Notice of Appeal, as opposed to beforehand. *See The Three Friends*, 166 U.S. 1 (1897) (discussing the doctrine of springing finality); *Otis v. City of Chicago*, 29 F.3d 1159, 1164 (7th Cir. 1994) (en banc).

> against him and then appeal the partial summary judgment. *See* 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3914, at 230 (Supp.1988) (a final judgment can be manufactured by dismissing all of the remaining claims).

Cheng v. Comm'r Internal Rev. Serv., 878 F.2d 306, 311 (9th Cir. 1989). *Accord Rabbi Jacob Joseph School*, 425 F.3d at 210 ("Immediate appeal is available to a party willing to suffer voluntarily the district court's dismissal of the whole action *with prejudice*") (emphasis in original); *Dannenberg v. Software Toolworks Inc.*, 16 F.3d 1073, 1076 (9th Cir. 1994) ("dismissal [by the appellate court] is not fatal to the plaintiffs' 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.").

Other Circuits, such as the Third and Fifth, have treated even a voluntary dismissal nominally taken "without prejudice" to be effectively with prejudice, therefore creating finality for immediate appeal, if the applicable statute of limitations had lapsed, thus ensuring that the voluntarily dismissed claims can never be resuscitated. *See Fassett v. Delta Kappa Epsilon*, 807 F.2d 1150, 1155 (3d Cir. 1986) ("Because Fassett and Buckley retained no viable cause of action against Troy, we conclude that the dismissal, which was nominally without prejudice, was for our purposes, a final dismissal."), *cert. denied sub nom.*

Turgiss v. Fassett, 481 U.S. 1070 (1987); *Carr v. Grace*, 516 F.2d 502 (5th Cir. 1975) (holding that the running of the statute of limitations made a "without prejudice" dismissal final for purposes of § 1291). Still other Circuits, including the Seventh and Eighth, have created intra-Circuit splits by occasionally requiring a formal "with prejudice" dismissal to create finality, but on other occasions tolerating something less than a formal "with prejudice" dismissal.[3]

B. The Rule in the Eleventh Circuit. Even when the voluntarily dismissed claims can never be revived – a "with prejudice" dismissal or a time-barred dismissal – the Eleventh Circuit alone has refused to permit the appeal. In *Mesa v. United States*, 61 F.3d 20, 22 n.6 (11th Cir. 1995), the Eleventh Circuit acknowledged conflict with Third Circuit's rule from *Fassett*. Four years later in *Druhan*, 166 F.3d at 1327 n.7, it acknowledged the ongoing conflict between its own holdings and those of the Second, Third, and Sixth Circuits.

In the case at bar, the court relied on *Mesa* and *Druhan* in dismissing Petitioner's appeal. App. 2.

[3] *Compare Boland v. Engle*, 113 F.3d 706 (7th Cir. 1997) (dismissing appeal) *and Horwitz v. Alloy Automotive Co.*, 957 F.2d 1431 (7th Cir. 1992) (same) *with Division 241, Amalgamated Transit Union v. Suscy*, 538 F.3d 1264 (7th Cir. 1976) (allowing appeal) *and United States v. Kaufmann*, 985 F.2d 884 (7th Cir. 1993) (same). *Compare also DuBose v. Minnesota*, 893 F.2d 169 (8th Cir. 1990) (dismissing appeal) *with Chrysler Motors Corp. v. Thomas Auto Co.*, 939 F.2d 538 (8th Cir. 1991) (allowing appeal).

But in reality, the present case is not merely an application of *Mesa* and *Druhan*; it expands those holdings, creating an even narrower scope of appellate jurisdiction.

The court in *Mesa* was concerned that the plaintiffs' voluntarily dismissed claims might be resuscitated at a later date, effectively allowing piecemeal appellate review: "Statute of limitations matters often need much thought. And, an appellate court, such as this one is poorly situated to litigate and to decide, in the first instance, whether a statute of limitation has run to the point of barring an action[.]" 61 F.3d at 22 n.6. But no such concern is appropriate in the case at bar, because Petitioner forever waived his claims against the individual Defendants by stating explicitly that their dismissal was "with prejudice." App. 41.[4]

In *Druhan* the plaintiff was attempting to secure immediate appellate review of an order denying her motion to remand the case back to state court, by voluntarily dismissing her entire complaint and then appealing. 166 F.3d at 1325-26. The Eleventh Circuit

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[4] *Cf. Gulf States Mfrs., Inc. v. NLRB*, 579 F.2d 1298, 1306 (5th Cir. 1978) ("It will be recalled that the Union withdrew the charges with prejudice, the effect of which was to forever bar it from reinstating such charges."); *Choice Hotels Intern., Inc. v. Goodwin and Boone*, 11 F.3d 469, 471 (4th Cir. 1993) ("When a plaintiff fails to satisfy the district court's stated conditions and his action is dismissed with prejudice, the consequence is draconian – his claims, however meritorious, are forever barred from being heard on their merits.").

recognized this as a transparent end-run around 28 U.S.C. § 1292, which excludes remand orders from the categories of appealable interlocutory orders. *Id.*[5] No such concern applies here, because Petitioner did not voluntarily dismiss his entire complaint and then seek appellate review of an inherently interlocutory ruling. Rather, he sought review of an order which is indisputably final as to one Defendant, by voluntarily dismissing with prejudice the remaining Defendants, who had never been served and never appeared in the case.[6]

Thus, properly viewed, the Eleventh Circuit in the present case has staked the outer limit ever reached by a federal appellate court. *Mesa* and *Druhan* conceivably could be limited to their own facts. The present case cannot. The court's ruling is squarely at odds with that of every other Circuit to confront the question. And as we explain below, it is wrong.

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[5] *See also Huey v. Teledyne, Inc.*, 608 F.2d 1234 (9th Cir. 1979); *Marshall v. Sielaff*, 492 F.2d 917 (3d Cir. 1974).

[6] It is irrelevant that the district court's final judgment reserved jurisdiction to adjudicate possible entitlement to attorneys' fees and costs, App. 12, because those are collateral issues which do not deprive a merits judgment of its finality. *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199 (1988); 19 Moore's Federal Practice § 202.02 at p. 202-11 (3d ed. 2006).

II. The Ruling Below Significantly Imperils Petitioner's Right to Appeal and Undermines, Rather than Furthers, the Important Values Served by the Final Judgment Rule

"Finality as a condition of review is an historic characteristic of federal appellate procedure." *Cobbledick v. United States*, 309 U.S. 323, 324 (1940). "From the very foundation of our judicial system the object and policy of the acts of Congress in relation to appeals and writs of error . . . have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal." *McLish v. Roff*, 141 U.S. 661, 665-66 (1891).

As the Court has explained, the final judgment rule reflects a balance of competing considerations:

> Restricting appellate review to "final decisions" prevents the debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequence, but a single controversy. While the application of § 1291 in most cases is plain enough, determining the finality of a particular judicial order may pose a close question. No verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future. We know, of course, that § 1291 does not limit appellate review to "those final judgments which terminate an action . . . ," *Cohen v. Beneficial Indus. Loan*

> *Corp.*, 337 U.S., at 545, 69 S.Ct., at 1225, but rather that the requirement of finality is to be given a "practical rather than a technical construction." *Id.*, at 546, 69 S.Ct., at 1226. The inquiry requires some evaluation of the competing considerations underlying all questions of finality – "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511, 70 S.Ct. 322, 324, 94 L.Ed. 299 (1950) (footnote omitted).

Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170-71 (1974) (footnote omitted).

The Eleventh Circuit's ruling below frustrates, rather than furthers, these important values. When Petitioner voluntarily dismissed with prejudice his claims against the unserved Defendants, that dismissal ensured that the claims could not be resuscitated, meaning there was no chance of piecemeal appellate review. On the contrary, the Eleventh Circuit at that moment possessed everything that remained of the case. Denying jurisdiction under these circumstances turns the principle of finality on its head. In essence, there is *never* finality because there is never a final appealable order. The Eleventh Circuit's dismissal of Petitioner's appeal was not merely "denying [him] justice by delay," *Dickinson*,

338 U.S. at 311, it denied him the right to appeal altogether.[7]

Had the Eleventh Circuit accepted jurisdiction, this would have *vindicated* the final judgment rule:

> A peripheral claim dismissal with prejudice, however, forces the litigant to make difficult choices and to live with the consequences, while furthering the underlying purposes of the final judgment rule. The litigant can accept the adverse ruling on the central claims, take the time and money to pursue the remaining claims to trial or other completion, and then appeal. But, if the peripheral or remaining claims are judged to be weaker or ultimately less fruitful, they can be dismissed with prejudice and sacrificed to pursue an appeal on the claims that are most central to recovery for the litigant. If the case is going nowhere after a partial summary judgment or dismissal decision, then dismissal with prejudice of the peripheral claims efficiently and fairly permits an appeal that will not beget another later appeal and, thus, undermine the final judgment rule embodied in section 1291. Voluntary dismissal with prejudice followed by an appeal of the earlier adjudicated claims furthers the goal of

[7] The time for Petitioner to seek appeal by way of certification under Rule 54(b) has long since expired, *see* Fed. R. App. P. 5(a)(2), and the wasteful option of prosecuting the peripheral claims to an adverse conclusion is unavailable because those claims were voluntarily dismissed with prejudice.

> judicial economy by permitting a plaintiff to forgo litigation on the dismissed claims while accepting the risk that if the appeal is unsuccessful, the litigation will end. Thus, the practice promotes judicial economy and preserves, rather than manipulates, the finality requirement of section 1291.

Cochran, *supra*, at 1006-07 (footnotes and quotation marks omitted).

Professors Wright, Miller and Cooper agree:

> The threat to finality posed by voluntary or invited dismissals depends on the question whether a plaintiff who loses the subsequent appeal is permitted to recapture the matters relinquished to establish finality. There is much to be said for a rule that routinely permits a plaintiff to manufacture finality by abandoning all remaining parts of a case but forbids any attempt at recapture. A good illustration is provided by *Empire Volkswagen Inc. v. World-Wide Volkswagen Corp.* [814 F.2d 90 (2d Cir. 1987)]. Summary judgment was granted against some of the plaintiff's theories, in an order that also resolved some of the issues bearing on the theories that remained open for trial. The plaintiff concluded that the remaining theories had been so limited by the order than there was no sufficient evidence to proceed to trial, and successfully moved for an order dismissing all of the remaining claims and granting the defendant's counterclaims. The court permitted this strategy as a means of securing review of

> the matters actually decided on the motion for summary judgment; the matters that had remained open for trial and were reached only by the voluntary dismissal were held abandoned in exchange for the right of immediate appeal from the summary judgment order. This course furthers all of the important values served by the final judgment rule. It provides a clear rule. Should the interlocutory rulings of the district court be affirmed, all parties and the district court are spared the burden of a trial the plaintiffs were willing to forgo for the advantage of immediate appeal. Should the rulings be reversed, the result almost surely would prove more efficient than reversal following trial on the remaining theories. Trial on the remaining theories is not likely to moot the interlocutory orders – a plaintiff who has a plausible prospect that the matters remaining open will provide the full relief sought by the matters dismissed is not likely to abandon the remaining matters to secure an immediate appeal. Other opinions have adopted this theory, and it deserves general acceptance.

Wright, Miller & Cooper, *supra*, at 623-24.

Instead the Eleventh Circuit adopted a rigid rule under which Petitioner, having failed to seek certification under Rule 54(b), forever forfeited his right to appeal.[8] But the right to ask a district court to certify

[8] We use the term "certification" to describe Rule 54(b) process because that is how most appellate rulings describe it,

(Continued on following page)

is plainly no substitute for the right to appeal. Whether to certify under Rule 54(b) is committed to a district court's discretion, *see Sears, Roebuck & Co.*, 351 U.S. at 900-01, and "[n]ot all final judgments on individual claims should be immediately appealable, even if they are in some sense separable from the remaining unresolved claims." *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 8 (1980). "Because of the policy against piecemeal appeals, such certifications are rarely granted." *Hanlin v. Mitchelson*, 794 F.2d 834, 838 (2d Cir. 1986). *Accord* Cochran, *supra*, at 993 ("Rule 54(b) is an exception to 1291 finality, and an appeal under Rule 54(b) is permitted relatively rarely.") (quotation marks and citation omitted).

The counterproductive effect of the Eleventh Circuit's rule is that a claimant whose central claim has been involuntarily dismissed but whose peripheral claims are still alive must continue to litigate the weaker claims – wasting the litigants' resources and the district court's time – simply in order to secure appellate review of the only claim he or she may truly value anyway. *See* Wright, Miller & Cooper, *supra*, at 614 ("The party who has lost a vital part of the case [by summary judgment] may believe that the matters remaining open are not worth pursuing through to final judgment, or even that the case is effectively

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but we acknowledge that label may be a misnomer. *See James,* 283 F.3d at 1067 n.6.

dead even though some part remains formally alive. Voluntary dismissal of the remaining parts of the case provides an obvious means of achieving final disposition."). The claimant's only other option is to try to convince the district court that the peripheral claims are wholly distinct from the involuntarily dismissed claims, because certification under Rule 54(b) is typically denied "[i]f there is a great deal of factual or legal overlap between counts." *Horwitz*, 957 F.2d at 1434. In short, the Eleventh Circuit's holding diminishes the right to appeal to a roll of the dice, while undermining the very purposes of the final judgment rule.

Similarly misguided is the Eleventh Circuit's approach to unserved defendants. As stated previously, many Circuits apply a bright line rule that claims against unserved defendants are disregarded for purposes of assessing finality. But the Eleventh Circuit's *ad hoc* approach conditions finality on whether the court deems it likely that service on the unserved defendants will eventually be perfected. *Insinga*, 817 F.2d at 1470 n.2. The Fifth Circuit cogently identified the problems with this approach:

> *Nagle* [*v. Lee*, 807 F.2d 435, 438 (5th Cir. 1987)] articulates a generally brightline principle – where a judgment of dismissal is rendered as to all served defendants and only unserved, nonappearing defendants remain, the judgment is final and, therefore, appealable under section 1291, without a Rule 54(b) certificate. The status of all remaining

> defendants as unserved and nonappearing is dispositive of the issue. They are not parties. *Nagle* does not suggest a "quasi-party" or likelihood of further adjudication test. Rather, *Nagle* flatly states that because one of the named defendants was never served and it did not appear, it "never became a party". . . .
>
> Moreover, where no disposition has been made as to an unserved defendant, in nearly every case it is almost certain that at some time some further district court action will be taken in the case respecting the claim against that defendant, *viz*.: either the case will be dismissed prior to service, whether voluntarily or failure to prosecute or under Fed.R.Civ.P. 4(j) for failure to serve, or service will be effected and there will then be some district court disposition. A "further adjudication" exception to the rule of *Nagle*, that unserved defendants are not parties and thus need not be disposed of for a judgment dismissing all other defendants to be final, would hence be an "exception" which would necessarily swallow the rule. And, if the "further adjudication" exception has some substantially narrower meaning, it becomes so imprecise and incapable of reliable ascertainment at the relevant time as to create an almost crippling uncertainty in an area where certainty is of critical importance.

FSLIC, 894 F.2d at 1473-74 (internal citation and footnote omitted).

III. This Case Presents an Ideal Vehicle to Provide Needed Guidance to the Lower Courts

"On the Supreme Court rests the prime responsibility for the proper functioning of the federal judiciary. The grant of certiorari in cases involving federal jurisdiction, practice, and procedure reflects that responsibility. Such cases qualify for review by reason of their importance, novelty, or difficulty, with a conflict of decisions also playing a significant role." R. Stern, E. Gressman, S. Shapiro, & K. Geller, SUPREME COURT PRACTICE at 191-92 (7th ed. 1993). This Petition presents an archetypal case for exercise of this Court's supervisory authority over the lower federal courts. As previously noted, the Circuits recognize their deep division over the question, and several have candidly acknowledged that their own precedents are internally contradictory and incoherent. The situation also is negatively affecting the interaction between the federal trial and appellate courts:

> The on-going conflict within and among the circuits as to whether a voluntary dismissal is made with or without prejudice and whether such a dismissal finalizes earlier decisions has needlessly plagued district and appellate courts. The lack of precision in use of language at both levels has cost circuit and district courts considerable time and trouble. The language issue has been caused by growing mistrust, fear of manipulation, and bad motives between the courts brought

> on by the sheer number of cases passing through the federal court system.

Cochran, *supra*, at 1021.

There are no procedural flaws or other impediments to this Court's review. The Petition presents a clean, stark question of federal law that has vexed the lower courts and needs to be resolved. Until it is resolved, any federal litigant could find himself or herself in the same predicament as Petitioner – stripped of the right to appeal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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