No. _____

IN THE

Supreme Court of the United States

SWISHER INTERNATIONAL, INC.,
Petitioner,

v.

TRENDSETTAH USA, INC. AND TRENDSETTAH, INC.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Microsoft Corp. v. Baker*, this Court held that federal appellate courts do not "have jurisdiction under [28 U.S.C.] § 1291 . . . to review an order denying class certification . . . after the named plaintiffs have voluntarily dismissed their claims with prejudice." 137 S. Ct. 1702, 1712 (2017). The Court reasoned that this "dismissal tactic"—in which plaintiffs abandon their claims in order to manufacture immediate appellate review—impermissibly "undercut[ ]" a "discretionary regime" governing interlocutory appeals. *Id.* at 1714. Three Justices concurred in the judgment on the ground that appellate jurisdiction was lacking under Article III. *Id.* at 1715–17 (Thomas, J., concurring in the judgment).

In this case, the district court granted defendant relief from judgment under Federal Rule of Civil Procedure 60 and ordered a new trial. The district court certified that ruling for interlocutory review under 28 U.S.C. § 1292(b), but the Ninth Circuit declined to hear the appeal and also denied plaintiffs' subsequent petition for a writ of mandamus. Dissatisfied with the Ninth Circuit's refusal to permit an interlocutory appeal, plaintiffs then voluntarily dismissed their claims with prejudice for the express purpose of filing an immediate appeal under 28 U.S.C. § 1291.

Construing *Microsoft* as limited to appeals of orders concerning class certification, the Ninth Circuit held that it possessed jurisdiction over the appeal.

The question presented is:

Does an appellate court have jurisdiction under 28 U.S.C. § 1291 and Article III when a plaintiff voluntarily dismisses its claims with prejudice in order to obtain review of an interlocutory ruling?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceedings below.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Swisher International, Inc. is a wholly owned subsidiary of Swisher International Group Inc. and that no publicly held corporation owns 10% or more of its stock.

RULE 14.1(b)(iii) STATEMENT

The proceedings directly related to this case are:

Trendsettah USA, Inc. v. Swisher Int'l, Inc., No. 20-56016 (9th Cir.) (judgment entered Apr. 15, 2022);

Trendsettah USA, Inc. v. Swisher Int'l, Inc., No. 8:14-cv-01664-JVS-DFM (C.D. Cal.) (judgment entered Sept. 28, 2020);

Trendsettah USA, Inc. v. Swisher Int'l, Inc., No. 20-71247 (9th Cir.) (judgment entered July 21, 2020);

Trendsettah USA, Inc. v. Swisher Int'l, Inc., No. 20-80024 (9th Cir.) (judgment entered Apr. 23, 2020);

Swisher Int'l, Inc. v. Trendsettah USA Inc., No. 19-349 (U.S.) (cert. denied Oct. 21, 2019);

Trendsettah USA, Inc. v. Swisher Int'l, Inc., No. 1:20-mc-21049 (S.D. Fla.) (ongoing);

Trendsettah USA, Inc. v. Swisher Int'l, Inc., No. 1:20-mc-21050 (S.D. Fla.) (closed Sept. 8, 2020);

Trendsettah USA, Inc. v. Swisher Int'l, Inc., No. 1:16-mc-00006 (E.D. Cal.) (dismissed Apr. 16, 2017);

Trendsettah USA, Inc. v. Swisher Int'l, Inc., No. 3:15-mc-80315 (N.D. Cal.) (dismissed Apr. 22, 2016);

Trendsettah USA, Inc. v. Swisher Int'l, Inc., No. 1:16-cv-00956 (N.D. Ill.) (dismissed Apr. 19, 2016);

Swisher Int'l, Inc. v. Havana 59 Cigar Co., No. 1:15-mc-24692 (S.D. Fla.) (closed Jan. 28, 2016); and

Trendsettah USA, Inc. v. Swisher Int'l, Inc., No. 2:15-mc-00112-PRC (N.D. Ind.) (closed Jan. 25, 2016).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Swisher International, Inc. ("Swisher") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit is published at 31 F.4th 1124. Pet. App. 1a–29a. The order denying Swisher's petition for rehearing or rehearing en banc is unpublished. *Id.* at 85a–86a. The orders of the district court are unpublished but are available at 2019 WL 6837052 and 2020 WL 1224288. *Id.* at 30a–55a, 56a–73a.

JURISDICTION

The Ninth Circuit issued its opinion on April 15, 2022, and issued its order denying rehearing and rehearing en banc on May 25, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, 28 U.S.C. § 1291, and 28 U.S.C. § 1292 are reproduced, in relevant part, in the petition appendix. Pet. App. 87a–92a.

STATEMENT

Six years ago, this Court granted certiorari to review a Ninth Circuit decision holding that plaintiffs may obtain immediate review of an interlocutory order denying class certification by voluntarily dismissing their claims with prejudice. *See Microsoft Corp. v. Baker*, 136 S. Ct. 890 (2016). This Court reversed, reasoning that "the voluntary dismissal essayed by [plaintiffs] does not qualify as a 'final decision' within

the compass of [28 U.S.C.] § 1291" because the "tactic would undermine § 1291's firm finality principle, designed to guard against piecemeal appeals, and subvert the balanced solution Rule 23(f) put in place for immediate review of class-action orders." *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1707 (2017); *see also id.* at 1715–17 (Thomas, J., concurring in the judgment) (reaching same conclusion on Article III grounds). Nowhere did the Court even hint that its ruling was confined to class-certification orders. *See Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1414 n.2 (2019) ("[*Microsoft*] held that plaintiffs cannot generate a final appealable order by *voluntarily* dismissing their claim.").

The Ninth Circuit, however, has failed to heed this Court's teachings. In the face of *Microsoft*, the Ninth Circuit has continued to endorse the use of the voluntary-dismissal tactic to manufacture appellate jurisdiction over interlocutory orders—as long as those orders do not implicate class certification. In limiting *Microsoft* to the class-certification setting, the Ninth Circuit has exacerbated one circuit conflict, created another, and departed from multiple decisions of this Court.

In this case, the district court granted Swisher relief from judgment on the antitrust and breach-of-contract claims of Plaintiffs Trendsettah USA, Inc. and Trendsettah Inc. (together, "TSI") and ordered a new trial based on newly discovered evidence of criminal fraud by TSI that severely tainted the integrity of the proceedings. Just like the plaintiffs in *Microsoft*, TSI attempted to secure immediate review of the interlocutory new-trial order first by unsuccessfully invoking a discretionary appellate-review regime (the certification procedures of 28 U.S.C. § 1292(b)), and then by

voluntarily dismissing its claims with prejudice. The Ninth Circuit, in an opinion by the same judge who authored the overturned decision in *Microsoft*, held that it had jurisdiction under 28 U.S.C. § 1291, narrowly interpreting this Court's decision in *Microsoft* as limited to interlocutory orders regarding class certification. It then reinstated the jury's verdict on TSI's breach-of-contract claims—even though TSI had voluntarily dismissed those claims with prejudice.

The Ninth Circuit's jurisdictional ruling conflicts with other circuits' opinions in two respects. First, five federal courts of appeals—the Second, Fourth, Sixth, and Federal Circuits after *Microsoft* and the Third Circuit even before *Microsoft*—have held that an order granting a plaintiff's request to voluntarily dismiss its claims with prejudice is not a "final decision" within the meaning of 28 U.S.C. § 1291 irrespective of the nature of the interlocutory order at issue. By contrast, two courts of appeals—the Tenth Circuit and now the Ninth Circuit—have construed *Microsoft* as prohibiting the use of this voluntary-dismissal tactic *only* where the underlying interlocutory order pertains to class certification.

Second, five courts of appeals—the Third, Fourth, Seventh, Eleventh, and D.C. Circuits—have held that a plaintiff lacks the adversarial interest necessary to sustain Article III jurisdiction when it has consented to the dismissal of all of its claims with prejudice, a view endorsed by three Justices in *Microsoft*. *See* 137 S. Ct. at 1715–17 (Thomas, J., concurring in the judgment). By contrast, the Ninth Circuit found no Article III barrier to appellate jurisdiction in this case.

These conflicts are lopsided only because this Court has spoken so clearly on the issues. For example, *Microsoft* cited three reasons for concluding that

voluntary dismissals with prejudice do not yield an appealable final order—(1) a contrary rule would "invite[ ] protracted litigation and piecemeal appeals," 137 S. Ct. at 1713; (2) the "dismissal tactic undercuts" a "discretionary regime" governing interlocutory appeals, *id.* at 1714; and (3) allowing appeals in such a situation would be unfairly "one-sided[ ]" because only plaintiffs can dismiss their claims to obtain immediate review, *id.* at 1715. The same reasoning applies with equal force here. Meanwhile, a long line of Supreme Court cases stretching back more than 200 years makes clear that Article III jurisdiction will not lie when "the plaintiff ha[s] submitted to" dismissal of its claims. *Evans v. Phillips*, 17 U.S. (4 Wheat.) 73, 74 (1819).

The Court should grant certiorari to resolve these circuit conflicts, to bring the Ninth Circuit into alignment with *Microsoft* and this Court's longstanding Article III precedent, and to ensure that plaintiffs are not permitted to use the voluntary-dismissal gambit to systematically disadvantage defendants and "subvert[ ] the final-judgment rule." 137 S. Ct. at 1712.

1. Swisher is a manufacturer of short, narrow cigars called cigarillos. Pet. App. 6a. TSI, which lacked its own manufacturing capability, entered into a Private Label Agreement with Swisher in January 2011, under which Swisher agreed to produce cigarillos for sale by TSI under TSI's "Splitarillo" label. *Id.* TSI also subsequently engaged another supplier in the Dominican Republic to manufacture Splitarillos. *Id.* at 7a–8a, 34a.

The relationship between Swisher and TSI deteriorated until, in February 2014, the then-current Private Label Agreement expired. Pet. App. 32a. Shortly thereafter, TSI filed a complaint alleging contractual

breaches by Swisher, primarily through non-fulfillment of some of TSI's orders. *Id.* TSI also alleged violations of the Sherman Act based on the same conduct. *Id.*

TSI sought substantial lost profits on all of its claims. The jury returned a verdict for TSI, awarding $9,062,679 on the contract claims and $14,815,494 on the antitrust claims, which trebled to $44,446,482. Pet. App. 7a. In light of intervening Ninth Circuit case law, however, the district court held that Swisher should have been granted summary judgment before trial on TSI's antitrust claims. *Id.* It therefore entered judgment for TSI only on the jury's verdict with respect to the contract claims. *Id.*

The Ninth Circuit reversed the grant of summary judgment, holding that the district court failed to draw all reasonable inferences in favor of TSI on the antitrust claims. Pet. App. 7a. The Ninth Circuit remanded the case with instructions to reinstate the jury's treble-damages verdict in its entirety. *Id.* This Court denied certiorari. 140 S. Ct. 443 (2019).

2. Before the district court reinstated the jury's verdict, stunning new evidence came to light that revealed TSI's entire case to be a sham. On April 12, 2019, a federal criminal indictment was unsealed charging Akrum Alrahib, TSI's founder and CEO (and TSI's key trial witness), with conspiracy, wire fraud, and evasion of federal excise taxes on the Splitarillos TSI imported from its Dominican supplier—charges confirmed by Mr. Alrahib's own admissions in his interview by government agents. Pet. App. 34a–38a. Mr. Alrahib subsequently pled guilty to these charges and to obstruction of justice. Swisher Rule 28(j) Ltr. (Dkt. 67).

TSI's "fraudulent avoidance of federal excise taxes thwarted Swisher's ability to sufficiently defend" itself. Pet. App. 8a n.1. In particular, TSI introduced financial records at trial that did not reflect the fact that TSI had failed to pay federal excise taxes on imported Splitarillos. *Id.* at 8a–9a. Relying on these false records, TSI's expert opined that Swisher's alleged anticompetitive conduct caused TSI to suffer lost profits totaling $14,815,494—the exact amount awarded by the jury on TSI's antitrust claims. *Id.* at 45a–46a. But if the 52.75% federal excise tax on imported Splitarillos had been paid, TSI would have *lost* money—and, consequently, would have suffered *no* lost profits. *Id.* at 46a.

Mr. Alrahib's indictment was particularly relevant because Swisher had diligently pursued discovery that would have brought TSI's tax evasion to light, but was rebuffed at every turn by TSI and its counsel. For example, Swisher sought to obtain "TSI-related federal excise tax returns" and "documents showing or reflective of federal excise tax paid with respect to Splitarillos," but TSI stonewalled on the ground that such discovery was irrelevant and unduly burdensome because, between TSI's "financial records, sales orders, and invoices" and the "publicly available" excise tax rates, Swisher supposedly had all the information it needed to calculate TSI's federal excise taxes. Pet. App. 44a, 49a. And when TSI learned that Swisher intended to raise at trial a prior action against Mr. Alrahib for failing to pay excise taxes on tobacco products distributed by a predecessor business, TSI filed a motion in limine to bar such evidence as irrelevant and unduly prejudicial, which the district court granted. *Id.* at 49a–50a.

3. Based on these revelations, Swisher filed a motion for relief from judgment under Federal Rules of Civil Procedure 60(b)(2), (b)(3), and (d)(3). Pet. App. 31a. The district court granted the motion and ordered a new trial. *Id.* at 58a.

The district court first found that Swisher was entitled to relief from judgment with respect to both the antitrust and contract claims under Rule 60(d)(3), which empowers district courts to "set aside a judgment for fraud on the court." The court explained that by "present[ing] to the jury and the Court a theory of 'lost profits' premised on inaccurate data which was a product of a fraudulent tax evasion scheme," TSI had "tainted the integrity of the trial and interfered with the judicial process." Pet. App. 47a–48a.

The district court also found that Swisher was entitled to relief from judgment with respect to the antitrust claims under Rule 60(b)(2), which applies to newly discovered evidence, and Rule 60(b)(3), which applies to fraud and misrepresentation. Although a motion under Rules 60(b)(2) and (b)(3), unlike a motion under Rule 60(d), must be brought "no more than a year after the entry of the judgment," Fed. R. Civ. P. 60(c)(1), the district court reasoned that the Ninth Circuit's decision reinstating the verdict on TSI's antitrust claims "substantially altered the judgment" such that "the time for bringing a Rule 60(b) motion restarts," Pet. App. 52a. But because "[t]he Ninth Circuit's ruling did not alter anything with respect to the breach of contract claims," the district court concluded that the contract claims were "time barred from relief under Rules 60(b)(2) and (b)(3)." *Id.* at 53a n.2.

4. Faced with the prospect of a retrial, TSI embarked on a circuitous path to secure immediate appellate review of the district court's interlocutory Rule 60 order.

First, TSI moved the district court to certify the Rule 60 order for an interlocutory appeal under 28 U.S.C. § 1292(b). Pet. App. 11a. The district court initially denied this request but later changed course and certified the Rule 60 order. *Id.* at 58a, 73a, 75a. The Ninth Circuit, however, exercised its discretion to deny TSI's petition for permission to appeal under § 1292(b). *Id.* at 76a.[1]

A week later, TSI filed a petition for a writ of mandamus in the Ninth Circuit, again seeking immediate review of the Rule 60 order. Pet. App. 12a. The Ninth Circuit denied the petition. *Id.* at 77a–78a.

Now twice-rebuffed by the Ninth Circuit, TSI moved to voluntarily dismiss its claims with prejudice so that it could "directly appeal the Court's Rule 60 orders vacating the jury's verdict and ordering a new trial." Pet. App. 97a. The district court granted the motion, *id.* at 79a–84a, and TSI filed a notice of appeal, *id.* at 101a–03a. Although the notice of appeal stated that TSI "appeal[ed] . . . from the final judgment in this action," *id.* at 103a, TSI "challenged only the District Court's interlocutory [new trial] order . . . , not the dismissal order which [it] invited," *Microsoft*, 137 S. Ct. at 1711.

5. The Ninth Circuit affirmed in part and reversed in part.

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[1] The Ninth Circuit's opinion omits the fact that the district court eventually certified the Rule 60 order for appeal and that the Ninth Circuit denied TSI's petition. Pet. App. 11a–12a.

The court rejected Swisher's request to dismiss the appeal after concluding that it had jurisdiction under 28 U.S.C. § 1291. Although the Ninth Circuit acknowledged that TSI's voluntary dismissal with prejudice was simply a pretext to secure immediate review of the interlocutory Rule 60 order, it nevertheless concluded that TSI was appealing a "final decision" within the meaning of § 1291. Pet. App. 15a.

The Ninth Circuit did not dispute that its holding was in tension with *Microsoft*, which it acknowledged held "that, in the class action context, plaintiffs may not 'transform a tentative interlocutory order denying class certification into a final judgment' by simply dismissing those claims with prejudice while maintaining 'the right to revive those claims if the denial of class certification is reversed on appeal.'" Pet. App. 12a–13a (quoting *Microsoft*, 137 S. Ct. at 1715) (alteration omitted). But it held that *Microsoft* had no application beyond appeals of orders regarding class certification.

Specifically, the court ruled that *Microsoft* did not undermine a Ninth Circuit decision from 1995 that had "held in a case not involving a class action that a plaintiff may voluntarily dismiss claims with prejudice 'to secure[ ] review of an order that would not ordinarily be reviewable until after a trial on the merits.'" Pet. App. 13a (quoting *Concha v. London*, 62 F.3d 1493, 1508–09 (9th Cir. 1995)) (alteration in original). The Ninth Circuit further explained that, in its view, "the rule articulated in [that case] was not impacted by *Microsoft*, which involved an attempt to use the voluntary dismissal mechanism to obtain an appeal as of right in order to review an earlier *denial of class certification*." *Id.* (emphasis added; internal quo-

tation marks omitted). Thus, under the Ninth Circuit's interpretation of *Microsoft*, "a voluntary dismissal of remaining claims can render the earlier interlocutory order appealable, *so long as the discretionary regime of Rule 23(f) is not undermined*." *Id.* at 14a (emphasis added; internal quotation marks omitted).

The court acknowledged an earlier Ninth Circuit decision holding that the voluntary dismissal of claims with prejudice did not provide jurisdiction over an order compelling arbitration because the Federal Arbitration Act "'explicitly prohibit[s] the appeal of orders compelling arbitration.'" Pet. App. 14a (quoting *Langere v. Verizon Wireless Servs., LLC*, 983 F.3d 1115, 1118 (9th Cir. 2020)). But it deemed that case irrelevant because TSI's "appeal does not implicate any similar statutory restrictions that would be adversely affected by permitting voluntary dismissal of claims with prejudice." *Id.* at 15a.

The Ninth Circuit did not mention its Article III jurisdiction, even though Swisher dedicated an entire section of its brief to arguing—based in part on Justice Thomas's concurrence in *Microsoft*—that an Article III case or controversy no longer existed because TSI had consented to the dismissal of its claims with prejudice. *See* Swisher C.A. Br. 29–31 (Dkt. 50).

Proceeding to the merits, the Ninth Circuit affirmed the district court's order granting relief from judgment under Rules 60(b)(2) and (b)(3). Pet. App. 21a–29a. But it reversed the district court's order granting relief under Rule 60(d)(3) because "no clear and convincing evidence was presented that either [TSI] or its attorneys was responsible for an intentional, material misrepresentation directly aimed at the court." *Id.* at 19a (internal quotation marks omitted). Because the district court granted relief from

judgment on TSI's contract claims *only* under Rule 60(d)(3), the effect of the Ninth Circuit's decision was to reinstate the jury's $9,062,679 verdict on TSI's contract claims.

6. Swisher and TSI each petitioned for panel rehearing or rehearing en banc, which the Ninth Circuit denied. Pet. App. 85a–86a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW DEEPENS AN EXISTING CIRCUIT SPLIT REGARDING THE FINAL-JUDGMENT RULE AND CREATES A SECOND CIRCUIT SPLIT REGARDING ARTICLE III.

This is not the first time a plaintiff has attempted to manufacture appellate jurisdiction by voluntarily dismissing its claims with prejudice. But nearly every other federal court of appeals to encounter this ploy has rejected it, holding that either statutory or Article III jurisdiction was lacking. By exercising jurisdiction here, the Ninth Circuit entrenched one conflict and created another conflict on these jurisdictional questions.

A. The Ninth Circuit's Decision Deepens A Conflict Regarding The Scope Of The Final-Judgment Rule.

Under 28 U.S.C. § 1291, federal appellate courts have "jurisdiction of appeals from all final decisions of the district courts of the United States." Most courts of appeals to consider the question have held that a voluntary dismissal with prejudice does not result in a "final decision" authorizing review of an interlocutory order—a view that this Court adopted in *Microsoft*. *See* 137 S. Ct. at 1712–13 (holding that the "dismissal device subverts the final-judgment rule"

and thus "does not give rise to a 'final decisio[n]'") (alteration in original). By contrast, a minority of courts of appeals have limited *Microsoft*'s rejection of the dismissal-with-prejudice gambit to the class-certification context.

1. Five federal courts of appeals have found appellate jurisdiction lacking under 28 U.S.C. § 1291 where plaintiffs voluntarily dismissed their claims with prejudice in an effort to manufacture appellate jurisdiction over interlocutory rulings outside the class-certification context. Although one of these courts reached that conclusion before *Microsoft*, most have done so afterward—often expressly concluding that *Microsoft* applies beyond the class-certification setting.

a. The Fourth Circuit has held unequivocally that "the voluntary dismissal of [a] complaint is not an appealable final decision under 28 U.S.C. § 1291." *Keena v. Groupon, Inc.*, 886 F.3d 360, 361 (4th Cir. 2018). In *Keena*, the district court compelled arbitration of the plaintiff's claims and stayed further proceedings. *Id.* at 362. The plaintiff thereafter "sought the court's approval for an interlocutory appeal of the Arbitration Order" and, in the alternative, "request[ed] the district court to dismiss her complaint with prejudice." *Id.* The district court declined to certify the order but agreed to dismiss the complaint. *Id.*

On appeal, the Fourth Circuit found *Microsoft* directly on point because, "[l]ike the plaintiff in *Microsoft*," the plaintiff in *Keena* "secured a voluntary dismissal of her complaint in order to seek an immediate appeal from an otherwise interlocutory order." 886 F.3d at 364. Just as "the Supreme Court recognized that Baker had usurped the Ninth Circuit's authority to decide whether to authorize an appeal from

a class certification order" under Rule 23(f), the plaintiff in *Keena* "sought to preempt the denial of interlocutory review" under 28 U.S.C. § 1292(b). *Id.* The Fourth Circuit concluded that "[o]ur approval of such a tactic—by agreeing that final order § 1291 jurisdiction is present here—would thus contravene *Microsoft*." *Id.* at 365.

b. The Federal Circuit reached the same conclusion in *Princeton Digital Image Corp. v. Office Depot Inc.*, 913 F.3d 1342 (Fed. Cir. 2019). There, Adobe intervened to support the defendants in a patent-infringement action and assert a breach-of-contract claim against the plaintiff. *Id.* at 1344. The court issued an interlocutory order holding that Adobe could recover fees incurred defending against the plaintiff's patent-infringement claims but not fees incurred prosecuting its own claim. *Id.* at 1345. Adobe then "requested that the court enter judgment in favor of [the plaintiff]" on Adobe's breach-of-contract claim. *Id.* After the court did so, Adobe appealed under 28 U.S.C. § 1295, which "mirrors . . . 28 U.S.C. § 1291" for final decisions appealable to the Federal Circuit. *Id.* at 1346 (internal quotation marks omitted).

The Federal Circuit dismissed the appeal because "the judgment entered by the district court at Adobe's request" did not "constitute[ ] a final decision." *Princeton Digital Image Corp.*, 913 F.3d at 1346. In reaching this conclusion, the Federal Circuit rejected the contention that *Microsoft* was limited to cases involving class-certification orders: "[A]lthough the Supreme Court in *Microsoft* relied in part on the conflict between allowing the appeal and the limited appeal right in the class action context, we think that *Microsoft*'s reasoning extends beyond that context." *Id.* at 1347 (citation omitted). The Federal Circuit also

emphasized that, "[f]ollowing *Microsoft*, other courts of appeals have applied its holding in cases not involving a denial of class certification." *Id.* (discussing *Keena* and *Board of Trustees of Plumbers, Pipe Fitters & Mechanical Equipment Service, Local Union No. 392 v. Humbert*, 884 F.3d 624 (6th Cir. 2018)).

c. As the Federal Circuit recognized, the Sixth Circuit has also adopted this majority view. In *Humbert*, the district court entered summary judgment for the plaintiffs on liability. 884 F.3d at 625. Rather than try damages, the parties "agreed to entry of a 'Stipulated Judgment Order' by which [the defendants] would pay [the plaintiff] about $45,000 in damages." *Id.* The order expressly "recited that 'the parties agree to the entry of this judgment for the sole purpose of proceeding with the appeal.'" *Id.*

The Sixth Circuit held that the Stipulated Judgment Order was not a final decision under 28 U.S.C. § 1291. First, it reasoned that the order "leaves open the possibility of 'piecemeal appeals'" because "[i]f we reverse any of the district court's decisions as to liability, the parties (per the Order's terms) are then free to litigate 'any issues' on remand, and later to bring another appeal as to the court's decisions regarding those." *Humbert*, 884 F.3d at 626 (citation omitted). Second, the Sixth Circuit emphasized that a contrary holding would invite parties to evade the rules governing discretionary review of interlocutory orders, stating that, "as in *Microsoft* and *Page Plus*, the Order here, if deemed final, would allow the parties to circumvent the limitations that § 1292(b) and the Civil Rules place upon interlocutory appeals." *Id.*; *see also Page Plus of Atlanta, Inc. v. Owl Wireless, LLC*, 733 F.3d 658, 661 (6th Cir. 2013) (conditional dismissal of a counterclaim did not give rise to an appealable final

decision because "by home-brewing their own approach to obtaining appellate review, the parties sidestepped the prerequisites and safeguards built into" § 1292(b)) (alteration and internal quotation marks omitted).

d. The Second Circuit has also held, outside the class-certification setting, that federal courts lack appellate jurisdiction where a plaintiff "dismiss[es] the action . . . so that she might pursue an appeal" of an interlocutory ruling. *Bynum v. Maplebear Inc.*, 698 F. App'x 23, 23 (2d Cir. 2017). In *Bynum*, the plaintiff dismissed her claims to obtain immediate review of an order compelling arbitration. But, as the Second Circuit explained, "[t]he Federal Arbitration Act bars interlocutory appeals from the grant of a motion to compel arbitration," and "[p]laintiffs cannot circumvent that prohibition by agreeing to dismiss their claims rather than proceed to arbitration." *Id.* at 24. It further reasoned that *Microsoft* "also counsels against allowing this appeal to proceed." *Id.* Just as the plaintiffs' voluntary dismissal in *Microsoft* "'would undermine § 1291's firm finality principle,'" "allowing an immediate appeal here violates the finality rule." *Id.* (quoting *Microsoft*, 137 S. Ct. at 1707); *see also Busher v. Barry*, 2021 WL 5071871, at *5 (2d Cir. Nov. 2, 2021) (holding that "we lack jurisdiction to review the voluntarily dismissed claims" where the plaintiffs sought review of an interlocutory ruling denying summary judgment).

e. The Third Circuit reached the same conclusion even before *Microsoft* was decided. In *Camesi v. University of Pittsburgh Medical Center*, 729 F.3d 239 (3d Cir. 2013), the plaintiffs obtained preliminary certification of a collective action under the Fair Labor Standards Act ("FLSA"), but the district court later

decertified the collective action. *Id.* at 243. The plaintiffs "did not ask the District Court to certify its interlocutory . . . order for appeal" and, unlike in the class-action setting, could not seek immediate review of the decertification under Rule 23(f). *Id.* They instead "moved under Federal Rule of Civil Procedure 41(a) for voluntary dismissal of their claims with prejudice in order to secure a final judgment for purposes of appeal." *Id.* (internal quotation marks omitted). The district court granted the motion. *Id.*

The Third Circuit dismissed the appeal because the "plaintiffs lack final orders appealable under 28 U.S.C. § 1291." *Camesi*, 729 F.3d at 242. The plaintiffs "could have asked the District Court[ ] to certify their interlocutory orders for appeal" under § 1292(b), but "instead sought to convert an interlocutory order into a final appealable order by obtaining dismissal under Rule 41." *Id.* at 245. That stratagem, the Third Circuit held, "constitute[s] [an] impermissible attempt[ ] to manufacture finality." *Id.* And the court worried that "[i]f we were to allow such a procedural sleight-of-hand to bring about finality here, there is nothing to prevent litigants from employing such a tactic to obtain review of discovery orders, evidentiary rulings, or any of the myriad decisions a district court makes before it reaches the merits of an action." *Id.* at 245–46.

2. In contrast with the five courts of appeals discussed above, two courts of appeals have interpreted *Microsoft* as a narrow decision that forecloses appellate jurisdiction only where a plaintiff voluntarily dismisses its claims to obtain review of an interlocutory order regarding class certification.

a. The Ninth Circuit in the decision below held that it had jurisdiction over the district court's interlocutory Rule 60 order, reasoning that TSI's voluntary dismissal of its claims with prejudice gave rise to an appealable final decision under 28 U.S.C. § 1291. The court stated that "[o]ver twenty years ago, we held in a case not involving a class action that a plaintiff may voluntarily dismiss claims with prejudice 'to secure[ ] review of an order that would not ordinarily be reviewable until after a trial on the merits.'" Pet. App. 13a (quoting *Concha v. London*, 62 F.3d 1493, 1508–09 (9th Cir. 1995)) (alteration in original). It then explained that this "rule . . . was not impacted by *Microsoft*, which 'involved an attempt to use the voluntary dismissal mechanism to obtain an appeal as of right in order to review an earlier denial of class certification.'" *Id.* (quoting *Rodriguez v. Taco Bell Corp.*, 896 F.3d 952, 955 (9th Cir. 2018)).

Purporting to harmonize these decisions, the Ninth Circuit held that "'a voluntary dismissal of remaining claims can render the earlier interlocutory order appealable, *so long as the discretionary regime of Rule 23(f) is not undermined*.'" Pet. App. 14a (emphasis added). The Ninth Circuit concluded that *Microsoft* did not foreclose TSI's appeal because TSI could not have taken an interlocutory appeal of the Rule 60 order under the discretionary regime of Rule 23(f), *id.* at 15a–16a, but would instead have needed to invoke the separate discretionary regime found in 28 U.S.C. § 1292(b).

b. The Tenth Circuit has also construed *Microsoft* as limited to appeals seeking review of interlocutory class-certification orders. In *Xlear, Inc. v. Focus Nutrition, LLC*, 893 F.3d 1227 (10th Cir. 2018), the parties reached a settlement and stipulated to a dismissal

under Federal Rule of Civil Procedure 41(a)(1)(A)(ii). *Id.* at 1232. Thereafter, the defendant sought attorney's fees under Rule 54. *Id.* But as the Tenth Circuit explained, "entry of *a judgment* is a prerequisite for a Rule 54 motion for attorneys' fees," *id.* at 1234, and, after *Microsoft*, there was a question whether a stipulated dismissal constitutes a judgment. The Tenth Circuit ultimately held that it did. In so doing, it "read *Microsoft* as addressing the narrow situation where a hopeful *class action* plaintiff uses a stipulation of dismissal as a tactic to overcome the limitations placed on appellate jurisdiction by 28 U.S.C. § 1291." *Id.* at 1236 (emphasis added). Although *Xlear* did not involve appellate jurisdiction, the Tenth Circuit's constricted reading of *Microsoft* is impossible to reconcile with the views of the majority of courts.

B. The Ninth Circuit's Decision Creates A Conflict Regarding Whether Article III Jurisdiction Exists After Claims Are Voluntarily Dismissed With Prejudice.

Even where a statute purports to confer appellate jurisdiction, Article III still requires a live "case" or "controversy." "This requirement limits the jurisdiction of the federal courts to issues presented 'in an adversary context.'" *Microsoft*, 137 S. Ct. at 1716–17 (Thomas, J., concurring in the judgment) (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968)). Every court of appeals to consider the question expressly has held that a party that voluntarily dismisses its claims with prejudice no longer has an adversarial interest for purposes of Article III. Although the Ninth Circuit did not expressly address this issue below, its exercise of jurisdiction—in the face of Swisher's extensive argu-

ments that doing so would violate Article III—has created a conflict with those courts that have dismissed appeals in identical circumstances.

1. Five courts of appeals have held that when a plaintiff voluntarily dismisses its claims with prejudice, it consents to the district court's dismissal order and thereby loses the adversarial interest necessary to support Article III jurisdiction in a subsequent appeal.

a. The Third Circuit held that a voluntary dismissal with prejudice destroys Article III jurisdiction in *Camesi*, the case discussed above in which the plaintiffs dismissed their FLSA claims so they could immediately appeal an interlocutory order decertifying their collective action. *See supra* at 15–16. Although the plaintiffs argued that they maintained an adversarial interest in the litigation because a "reversal of the District Courts' decertification orders on appeal would resurrect their individual claims," the Third Circuit concluded that "this reflects a fundamental misunderstanding of the nature of a dismissal with prejudice." *Camesi*, 729 F.3d at 247. As the court explained, "[t]he claims that [the plaintiffs] dismissed with prejudice are gone forever—they are not reviewable by this Court and may not be recaptured at the district court level." *Id.* The Third Circuit therefore held that "even if we were to find finality [under 28 U.S.C. § 1291], [the plaintiffs'] voluntary relinquishment of their individual claims has rendered the cases moot." *Id.*

b. The Fourth Circuit echoed this conclusion in *Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88 (4th Cir. 2011). There, the plaintiffs "filed a stipulation of voluntary dismissal" of their individual claims so they could "appeal immediately [an] adverse . . .

[class] certification ruling[ ]." *Id.* at 94. The Fourth Circuit concluded that it lacked Article III jurisdiction over the appeal because "when a putative class plaintiff voluntarily dismisses the individual claims underlying a request for class certification, . . . there is no longer a 'self-interested party advocating' for class treatment in the manner necessary to satisfy Article III standing requirements." *Id.* at 100.

c. The Seventh Circuit is in accord. In *Lush v. Board of Trustees of Northern Illinois University*, 29 F.4th 377 (7th Cir. 2022), the plaintiff voluntarily dismissed his claims after the district court issued an order to show cause why he should not be sanctioned for filing a meritless action. *Id.* at 379. The plaintiff then appealed two interlocutory orders denying requests for counsel and to seal the case file. *Id.* The Seventh Circuit dismissed the appeal for lack of Article III jurisdiction because "the voluntary dismissal did not result in an adverse final judgment from which [the plaintiff] may appeal the interlocutory rulings he now wishes to challenge." *Id.* at 380. The court explained that because the plaintiff "received the precise relief he requested—dismissal—he cannot now challenge the district court's non-dispositive interlocutory rulings." *Id.*

d. The Eleventh Circuit reached the same conclusion in *Druhan v. American Mutual Life*, 166 F.3d 1324 (11th Cir. 1999), where it considered "whether an appeal from a final judgment that resulted from a voluntary dismissal with prejudice is within this court's jurisdiction." *Id.* at 1325. The court found the "required adverseness is lacking" because the plaintiff "is now attempting to appeal the judgment that she requested." *Id.* at 1326. As a result, the court held

that it "ha[s] no jurisdiction to review the final judgment in this case, because there is no case or controversy." *Id.*

e. Finally, the D.C. Circuit endorsed this same understanding of Article III jurisdiction in *Brewer v. Sessions*, 863 F.3d 861 (D.C. Cir. 2017). There, the district court denied class certification, and, while the plaintiff's petition to appeal under Rule 23(f) was pending, the parties settled the plaintiff's individual claims and stipulated to their dismissal. *Id.* at 864. In assessing its jurisdiction to consider a motion to intervene by other potential plaintiffs, the D.C. Circuit held that "a stipulated dismissal . . . is no different in jurisdictional effect from a dismissal by court order: Each resolves all claims before the court, leaving it without a live Article III case or controversy between the plaintiff and the defendant." *Id.* at 869; *see also Mikkilineni v. City of Houston*, 2003 WL 22480030, at *1 (D.C. Cir. Nov. 3, 2003) (per curiam) ("A plaintiff who voluntarily dismisses his complaint with prejudice generally may not appeal the judgment of dismissal.").

2. The Ninth Circuit departed from the decisions of these five circuits by exercising jurisdiction here. Although the court's opinion did not discuss Article III jurisdiction, Swisher thoroughly briefed the issue on appeal, arguing that "TSI's voluntary dismissal of all of its claims with prejudice mooted any controversy that once existed in this case." Swisher C.A. Br. 29 (Dkt. 50); *see also* Swisher Mot. to Dismiss Appeal 9–14 (Dkt. 6). And because the Ninth Circuit had an independent "obligation to assure [itself] of jurisdiction under Article III" before proceeding to the merits, *Trump v. Hawaii*, 138 S. Ct. 2392, 2415 (2018), the fact that the Ninth Circuit reviewed the Rule 60 order

on the merits necessarily means that it found Article III jurisdiction to be present. Whatever the basis for this conclusion—which the Ninth Circuit cannot shield from review through *sub silentio* reasoning—it is clear that TSI's appeal would have been dismissed had it been brought in any of the five courts of appeals that have held that a voluntary dismissal with prejudice eliminates jurisdiction under Article III.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT.

That the circuit conflicts outlined above are so lopsided should not come as a surprise. This Court has already addressed the final-judgment rule's application under nearly identical circumstances in *Microsoft*, holding that an order granting a motion to voluntarily dismiss a party's claims with prejudice did not constitute a "final decision" within the meaning of 28 U.S.C. § 1291. And a string of cases stretching back more than two centuries has consistently held that Article III jurisdiction does not lie where a plaintiff has voluntarily abandoned its claims—a view shared by the concurring Justices in *Microsoft*. By exercising jurisdiction in this case, the Ninth Circuit contravened those binding authorities.

A. The Ninth Circuit's Decision Is Irreconcilable With *Microsoft*.

In *Microsoft*, plaintiffs brought a putative class action alleging that the Xbox video-game console had a design defect. 137 S. Ct. at 1710. The district court struck the complaint's class allegations, and the plaintiffs filed a petition for interlocutory review under Federal Rule of Civil Procedure 23(f). *Id.* at 1711. After the Ninth Circuit denied the petition, the plaintiffs "moved to dismiss their case with prejudice" and filed

an appeal in which they "challenged only the District Court's interlocutory order striking their class allegations, not the dismissal order which they invited." *Id.* The Ninth Circuit exercised jurisdiction under 28 U.S.C. § 1291. *Id.*

This Court reversed. Although there was technically a final order dismissing the action in its entirety, the Court emphasized "that 'finality is to be given a practical rather than a technical construction.'" *Microsoft*, 137 S. Ct. at 1712 (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 171 (1974)). The Court cited three reasons for giving finality a practical construction under which the plaintiffs' voluntary-dismissal "tactic does not give rise to a 'final decisio[n]' under § 1291," *id.* at 1713 (alteration in original)—each of which applies with equal force here.

1. First, the Court explained that the "voluntary-dismissal tactic . . . invites protracted litigation and piecemeal appeals" because "the decision whether an immediate appeal will lie resides exclusively with the plaintiff; she need only dismiss her claims with prejudice, whereupon she may appeal the district court's order denying class certification." *Microsoft*, 137 S. Ct. at 1713. And a plaintiff "may exercise that option more than once, stopping and starting the district court proceedings with repeated interlocutory appeals." *Id.* The same is true outside the class-action context.

According to the Ninth Circuit, this concern was not implicated here because TSI's "claims have already been litigated and a final decision on those claims has been reached," such that "however we decide this appeal, the case will be over—either the jury's prior verdict will be reinstated or the district court's dismissal of [TSI's] claims with prejudice will

stand." Pet. App. 15a. But the question is not whether piecemeal appeals are likely under the facts of a particular case. Rather, the question is whether the disputed theory of appellate jurisdiction, applied across all classes of cases, is likely to yield piecemeal appeals. The Court made this clear in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), where it rejected a case-by-case approach to assessing appellate jurisdiction in the course of disapproving the death-knell doctrine, which provided that "an order denying class certification [was] appealable" if the plaintiffs could demonstrate, based on the particular circumstances of their claims, that it was "likely to sound the 'death knell' of the litigation." *Id.* at 469. The Court explained that, although "[a] threshold inquiry of this kind may . . . identify some orders" in which "allowing an immediate appeal . . . may enhance the quality of justice afforded a few litigants," the "incremental benefit is outweighed by the impact of such an individualized jurisdictional inquiry on the judicial system's overall capacity to administer justice." *Id.* at 473.

In any event, the Ninth Circuit was simply wrong that TSI's appeal did not present the possibility of piecemeal appeals. Because the district court granted Swisher relief from judgment, it did not consider Swisher's alternative request for discovery "to the extent the Court finds that Swisher has not yet met its burden." Swisher Mot. for Relief from Judgment 23 (Dkt. 377). Thus, one possible outcome of TSI's appeal was a remand for discovery, followed, perhaps, by another appeal from a subsequent Rule 60 ruling. *See*, *e.g.*, *Pearson v. First NH Mortg. Corp.*, 200 F.3d 30, 42 (1st Cir. 1999) (remanding for further factual development of a colorable claim of fraud on the court).

Moreover, TSI has indicated that it plans to seek attorney's fees on its contract claims, and the district court's ruling on that motion almost certainly will generate another appeal.

2. Second, the Court in *Microsoft* reasoned that the plaintiffs' "dismissal tactic undercuts Rule 23(f)'s discretionary regime." 137 S. Ct. at 1714. Permitting circumvention of Rule 23(f), the Court explained, violates the Rules Enabling Act, 28 U.S.C. § 2071 *et seq.*, by which "Congress authorized this Court to determine when a decision is final for purposes of § 1291, and to provide for appellate review of interlocutory orders not covered by statute," *Microsoft*, 137 S. Ct. at 1714.

Of course, this case does not implicate Rule 23(f). But it does implicate a different discretionary regime for interlocutory review: 28 U.S.C. § 1292(b). That statute, like Rule 23(f), creates a "'measured, practical solutio[n]' to the questions whether and when adverse [interlocutory] orders may be immediately appealed." *Microsoft*, 137 S. Ct. at 1714 (first alteration in original). Under § 1292(b), an interlocutory appeal may be taken if (1) the district court certifies that the "order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation," and (2) the court of appeals, "in its discretion, permit[s] an appeal to be taken from such order." 28 U.S.C. § 1292(b).

Just as the *Microsoft* plaintiffs unsuccessfully sought discretionary review under Rule 23(f) before dismissing their claims, TSI unsuccessfully sought discretionary review under § 1292(b) before dismiss-

ing its claims. Pet. App. 76a. And just as the *Microsoft* plaintiffs' pursuit of an appeal of right would override courts' discretion under Rule 23(f), "[i]f [TSI's] voluntary-dismissal tactic could yield an appeal of right, [§ 1292(b)]'s careful calibration . . . 'would be severely undermined.'" 137 S. Ct. at 1714–15 (quoting *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 47 (1995)). Yet that is exactly what happened below, where the Ninth Circuit permitted TSI to use a voluntary dismissal with prejudice to manufacture an appeal of right after the court had exercised its discretion to deny TSI's request to appeal under § 1292(b). And by allowing TSI to undermine § 1292(b)'s "careful calibration" in this way, the Ninth Circuit violated the Rules Enabling Act's command that expansions to the scope of "appellate review of interlocutory orders" must "come from rulemaking . . . , not judicial decisions in particular controversies or inventive litigation ploys." *Id.* at 1714.

This Court has repeatedly rejected similar efforts to evade § 1292(b). In *Coopers & Lybrand*, the Court determined that "the principal vice of the 'death knell' doctrine is that it authorizes *indiscriminate* interlocutory review" and thus "circumvents the[ ] restrictions" that Congress imposed in § 1292(b), where Congress "carefully confined the availability" of interlocutory review. 437 U.S. at 474–75. The Court emphasized that under § 1292(b), "[n]onfinal orders could never be appealed as a matter of right," that the "discretionary power to permit an interlocutory appeal" rests first with the district judge, and that "even if the district judge certifies the order under § 1292(b), . . . [t]he appellate court may deny the appeal for any reason, including docket congestion." *Id.* None of these features of § 1292(b)'s discretionary framework was compatible with an interlocutory appeal of a

class-certification denial under the death-knell doctrine. *Id.* at 475.

The Court again expressed concerns about attempts to override § 1292(b) in *Swint v. Chambers County Commission*. The court of appeals in that case had jurisdiction under the collateral-order doctrine to review the denial of summary judgment to individual defendants who claimed qualified immunity, but lacked collateral-order jurisdiction to review the denial of summary judgment to a county defendant. *Swint*, 514 U.S. at 44. It nevertheless heard the county defendant's appeal under the doctrine of "pendent appellate jurisdiction" because "'[i]f the [county defendant] is correct about the merits in its appeal, . . . reviewing the district court's order would put an end to the entire case.'" *Id.* at 43–44.

The Court held that the court of appeals had erred in exercising jurisdiction over the county defendant's appeal. *Swint*, 514 U.S. at 51. The Court reasoned that, by enacting § 1292(b), Congress "chose to confer on district courts first line discretion to allow interlocutory appeals." *Id.* at 47. But "[i]f courts of appeals had discretion to append to a" properly taken appeal "further rulings of a kind neither independently appealable nor certified by the district court, then the two-tiered arrangement § 1292(b) mandates would be severely undermined." *Id.* And while Congress empowered the Court "to expand the list of orders appealable on an interlocutory basis," the "procedure Congress ordered for such changes . . . is not expansion by court decision, but by rulemaking under" the Rules Enabling Act. *Id.* at 48.

The voluntary-dismissal device endorsed by the Ninth Circuit here is even more disruptive than the

discretionary approach to pendent appellate jurisdiction disapproved in *Swint*, as it does not require the appellate court to agree to hear the interlocutory appeal. Rather, a plaintiff can *compel* a court to do so simply by dismissing its claims with prejudice. This plainly violates "Congress' designation of the rulemaking process as the way to define or refine when a district court ruling is 'final' and when an interlocutory order is appealable." *Swint*, 514 U.S. at 48.

3. Third, the Court in *Microsoft* emphasized that the voluntary-dismissal tactic was unfairly one-sided because it "permits plaintiffs only, never defendants, to force an immediate appeal." 137 S. Ct. at 1715. In so doing, the Court echoed concerns that it had expressed in *Coopers & Lybrand*, where it rejected the death-knell doctrine because the doctrine "operates only in favor of plaintiffs even though the class issue . . . will often be of critical importance to defendants as well." 437 U.S. at 476.

The same is true here, where plaintiffs alone can invoke the voluntary-dismissal tactic because defendants have no claims to dismiss. This one-sided procedure is particularly unfair in the setting of orders granting a new trial because it would enable plaintiffs, like TSI, to take an immediate appeal from an order overturning a verdict in their favor while leaving defendants to incur the cost and delay of litigating a new trial to judgment before securing an appeal of an order overturning a defense verdict. There is nothing in the text or history of § 1291 that suggests that Congress intended to establish such an inequitable approach to finality.

* * *

In sum, even if *Microsoft* by its own terms applies only to orders regarding class certification, its reasoning—as well as that of *Coopers & Lybrand* and *Swint*—is plainly irreconcilable with the Ninth Circuit's holding that TSI's appeal was within its jurisdiction under § 1291. As one academic commentator has observed: *Microsoft* "seemed to shut down the tactic of voluntarily dismissing all claims with prejudice to secure an appeal of an adverse interlocutory order, at least when that interlocutory order did not effectively determine those claims. But in *Trendsettah*, the Ninth Circuit held that litigants can still use this tactic in some—indeed, most—contexts." Bryan Lammon, *The Ninth Circuit Limits* Baker*, Preserves Manufactured Finality*, Final Decisions (Apr. 19, 2022), https://tinyurl.com/2akxj5af. Review is warranted to put an end to this clear-cut evasion of *Microsoft*.

B. The Ninth Circuit's Decision Departs From A Long Line Of This Court's Cases Regarding Article III Jurisdiction.

The Ninth Circuit's decision to exercise jurisdiction over TSI's appeal is also at odds with this Court's Article III jurisprudence.

In *Microsoft*, three Justices concurred in the judgment on Article III grounds, emphasizing that "it has long been the rule that a party may not appeal from the voluntary dismissal of a claim, since the party consented to the judgment against it." 137 S. Ct. at 1717 (Thomas, J., concurring in the judgment). In fact, this Court dismissed an appeal under similar circumstances to those presented here more than two centuries ago. *See Evans v. Phillips*, 17 U.S. (4 Wheat.) 73, 74 (1819) ("[I]t is adjudged and ordered, that the writ

of error be, and the same is, hereby dismissed, with costs, the plaintiff having submitted to a nonsuit in the circuit court."). And it has consistently reaffirmed the continued viability of this rule in the intervening years. *See*, *e.g.*, *United States v. Babbit*, 104 U.S. 767, 768 (1881) ("[W]hen a decree was rendered by consent, no errors would be considered here on appeal which were in law waived by such a consent."); *United States v. Procter & Gamble Co.*, 356 U.S. 677, 680 (1958) (noting the "familiar rule that a plaintiff who has voluntarily dismissed his complaint may not sue out a writ of error"); *Deakins v. Monaghan*, 484 U.S. 193, 200 (1988) ("this case was rendered moot in part by respondents' willingness permanently to withdraw their equitable claims").

That the Court in *Microsoft* declined to resolve that case on Article III grounds does not cast doubt on the continuing force of these decisions. *See* 137 S. Ct. at 1712 ("we do not reach the constitutional question"). On the contrary, *Microsoft* presented an additional wrinkle to the Article III inquiry insofar as the plaintiffs maintained that their continued interest in the absent putative class members' claims was "sufficient to satisfy Article III's case-or-controversy requirement" even after they dismissed their individual claims. *Id.* at 1717 (Thomas, J., concurring in the judgment). That additional consideration is not presented here.

In its briefing below, TSI sought support for the existence of Article III jurisdiction from *Thomsen v. Cayser*, 243 U.S. 66 (1917), but that case is easily distinguished. There, a jury verdict for the plaintiffs was reversed on appeal. *Id.* at 74. The court of appeals noted that "it was impossible to hold that the record"

could support a judgment for the plaintiffs, but concluded that "it would be unjust to them to dismiss the complaint because their proof did not conform to another standard." *Id.* at 75. The court of appeals therefore "remanded the case for a new trial" at which "the plaintiffs might be able to 'produce additional testimony'" to support their claims. *Id.* Rather than attempt to do so, the plaintiffs "waived any right to a new trial and consented that the case should be disposed of one way or the other." *Id.* This Court held that it had jurisdiction because "[t]he plaintiffs did not consent to a judgment against them, but only that, if there was to be such a judgment, it should be final in form instead of interlocutory." *Id.* at 83.

Here, by contrast, TSI *did* consent to a judgment against it. Moreover, unlike the court of appeals' decision in *Thomsen*, the district court's Rule 60 order did not hold that the case TSI had presented to the jury failed as a matter of law. And unlike the court of appeals' decision in *Thomsen*, the district court's Rule 60 order did not require a new trial simply to allow TSI to produce additional evidence under a newly articulated legal standard. *Thomsen* is therefore wholly inapposite.

This Court's cases therefore make clear that TSI's decision to dismiss its claims with prejudice extinguished the case or controversy that is essential to appellate jurisdiction under Article III. The Court should grant review to definitively reject the constitutionally infirm voluntary-dismissal gambit.

III. THIS CASE IS AN IDEAL VEHICLE TO DECIDE A QUESTION OF IMMENSE PRACTICAL SIGNIFICANCE.

If left uncorrected, the Ninth Circuit's decision will impair the administration of justice in the Nation's largest federal circuit and systematically disadvantage defendants by affording plaintiffs—and plaintiffs alone—the ability to secure immediate appellate review of interlocutory rulings.

This Court has already decided that the question presented is sufficiently important to warrant review. The Court granted certiorari in *Microsoft* in response to the Ninth Circuit's expansion of appellate jurisdiction beyond the boundaries contemplated by the Constitution and Congress. 137 S. Ct. at 1712. Despite *Microsoft*'s broad and unambiguous reasoning, the opinion did not put the issue to rest because, in the decision below, the Ninth Circuit held that all of its pre-*Microsoft* case law survived this Court's decision except to the extent that it was expressly rejected by *Microsoft*. *See* Pet. App. 13a–14a. Thus, the voluntary-dismissal tactic remains available today to Ninth Circuit plaintiffs in virtually all of the same circumstances as before this Court decided *Microsoft*.

This is not merely an academic concern. On the contrary, "[r]estricting appellate review to 'final decisions' prevents the debilitating effect on judicial administration caused by piecemeal appeal disposition of what is, at practical consequence, but a single controversy." *Eisen*, 417 U.S. at 170. The decision below invites just such a proliferation of premature appeals. And it does so in a manner that affords plaintiffs a built-in litigation advantage over defendants, who

must wait until a final disposition of the case on the merits to secure review of interlocutory rulings. If the Court believes such a one-sided expansion of appellate jurisdiction is appropriate, it has a ready method for making this clear—namely, by rulemaking under the Rules Enabling Act. But the Court should not countenance the "expansion by court decision" of federal courts' appellate jurisdiction. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 115 (2009) (internal quotation marks omitted).

This case presents an ideal opportunity to determine whether and when a plaintiff's voluntary dismissal of its claims with prejudice will generate appellate jurisdiction. That question is now the subject of two circuit conflicts, and it is presented here on a record unclouded by any relevant factual disputes. Thus, a decision either affirming or reversing the Ninth Circuit will not only be dispositive in this case, but will also clarify the scope of federal appellate courts' jurisdiction—and the scope of this Court's decision in *Microsoft*—nationwide.

That the Ninth Circuit did not expressly address Article III jurisdiction is no barrier to this Court's review. Swisher thoroughly contested the existence of Article III jurisdiction in its briefing. *See* Swisher C.A. Br. 29–31 (Dkt. 50); Swisher Mot. to Dismiss Appeal 9–14 (Dkt. 6). And because Article III jurisdiction is a question of law reviewed de novo, the presence or absence of any analysis from the Ninth Circuit will not affect the outcome. In short, a court of appeals may not insulate its decision from review by simply ignoring a constitutional question fully pressed before it.

CONCLUSION

This Court has repeatedly rejected "tactic[s]" that "undercut[ ]" § 1292(b) and other "discretionary regime[s]" for securing review of interlocutory rulings. *Microsoft*, 137 S. Ct. at 1714. Yet the Ninth Circuit continues to permit plaintiffs to utilize a voluntary dismissal with prejudice to evade the requirements of § 1292(b), the strictures of the final-judgment rule, and the jurisdictional limits of Article III. The Court should grant review to put a decisive end to this ploy.

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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