No. 22-172

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING PETITIONER

John M. Masslon II
Counsel of Record
Cory L. Andrews
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave. NW
Washington, DC 20036
(202) 588-0302
jmasslon@wlf.org

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QUESTION PRESENTED

Whether an appellate court has jurisdiction under Article III and 28 U.S.C. § 1291 when a plaintiff voluntarily dismisses its claims with prejudice to obtain immediate review of an interlocutory ruling.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION 1

STATEMENT 3

SUMMARY OF ARGUMENT.....................................4

ARGUMENT 6

I. FEDERAL COURTS LACK SUBJECT-MATTER JURISDICTION OVER THIS CASE 6

A. The Court Should Consider This Question, Which It Previously Agreed To Decide 6

B. A Case Or Controversy Between The Parties No Longer Exists...........................9

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH *BAKER* 11

A. *Baker* Does Not Turn On The Nature Of The Suit 12

B. The Ninth Circuit's Decision Undermines *Baker*'s Policy Foundations...15

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Cases

Allen v. McCurry,
449 U.S. 90 (1980)..9, 10

Arizonans for Off. Eng. v. Arizona,
520 U.S. 43 (1997)..10

Campbell-Ewald Co. v. Gomez,
577 U.S. 153 (2016)..11

Commonwealth Sch., Inc. v. Commonwealth Acad. Holdings LLC,
994 F.3d 77 (1st Cir. 2021)..................................16

Coopers & Lybrand v. Livesay,
437 U.S. 463 (1978)..16, 18

Cromwell v. Sac Cnty.,
94 U.S. 351 (1876)..10

Dart Cherokee Basin Operating Co. v. Owens,
574 U.S. 81 (2014)..1

Deakins v. Monaghan,
484 U.S. 193 (1988)..10

Druhan v. Am. Mut. Life,
166 F.3d 1324 (11th Cir. 1999)..............................8

Evans v. Phillips,
17 U.S. 73 (1819)..10

Forgay v. Conrad,
47 U.S. 201 (1848)..15

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Frank v. Crawley Petroleum Corp.,
992 F.3d 987 (10th Cir. 2021)................................7

Gomez v. U.S. Dist. Ct. for N. Dist. of Cal.,
503 U.S. 653 (1992)...2

James v. City of Boise, Idaho,
577 U.S. 306 (2016)...2

Levy v. W. Coast Life Ins. Co.,
44 F.4th 621 (7th Cir. 2022) 7, 8

Lewis v. Cont'l Bank Corp.,
494 U.S. 472 (1990)..9, 11

Mahanoy Area Sch. Dist. v. B. L.,
141 S. Ct. 2038 (2021)..2

Marshall v. Sielaff,
492 F.2d 917 (3d Cir. 1974) 16

McLish v. Roff,
141 U.S. 661 (1891)...15

Microsoft Corp. v. Baker,
577 U.S. 1099 (2016)..6

Microsoft Corp. v. Baker,
137 S. Ct. 1702 (2017)......1, 6, 7, 11, 13, 14, 15, 18

Preiser v. Newkirk,
422 U.S. 395 (1975)...10

Princeton Univ. v. Schmid,
455 U.S. 100 (1982)...10

TABLE OF AUTHORITIES
(*continued*)

Page(s)

RFF Fam. P'ship, LP v. Ross,
814 F.3d 520 (1st Cir. 2016) 9

U.S. Bancorp Mortg. Co. v.
Bonner Mall P'ship,
513 U.S. 18 (1994)..10

United States v. Babbitt,
104 U.S. 767 (1881)..10

United States v. Procter & Gamble Co.,
356 U.S. 677 (1958)..10, 16

Vasquez v. Harris,
503 U.S. 1000 (1992)...2

Vasquez v. Harris,
503 U.S. 1000 (1992)...3

Williams v. Seidenbach,
958 F.3d 341 (5th Cir. 2020)....................................9

Constitutional Provisions

U.S. Const. art. III, § 1..19

U.S. Const. art. III, § 2..9

Statutes

28 U.S.C.
§ 1291 ....6, 12, 13, 15, 16, 17
§ 1292(b)...4, 12, 15
§ 1292(e) 14

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Rules

Fed. R. Civ. P.
23 ....5, 13
23(f) 12, 14
41 ....9, 11
41(a)...9
60 ....3, 4, 5, 11, 12, 13, 14, 15, 16, 17, 18
60(d)..18

Other Authorities

Bryan Lammon, *The Ninth Circuit Limits* Baker*, Preserves Manufactured Finality* (Apr. 19, 2022)..1

Rich Samp, *Ninth Circuit Endorses Gaming Of Class Action Fairness Act And Creates Circuit Split* (Sept. 26, 2013) 1

INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as *amicus* opposing procedural gamesmanship by the plaintiffs' bar in federal litigation. *See, e.g.*, *Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017); *Dart Cherokee Basin Operating Co. v. Owens*, 574 U.S. 81 (2014).

WLF's Legal Studies Division also regularly publishes pieces highlighting this procedural gamesmanship. *See, e.g.*, Rich Samp, *Ninth Circuit Endorses Gaming Of Class Action Fairness Act And Creates Circuit Split* (Sept. 26, 2013), https://bit.ly/3JG237H. WLF believes that some federal courts—particularly the Ninth Circuit—all too often allow gamesmanship, which hurts businesses and our nation's economy.

INTRODUCTION

Appellate-law experts reacted quickly to the Ninth Circuit's decision. Professor Bryan Lammon—a leading appellate-jurisdiction scholar—described the decision as a "specious" example of "manufactured finality." Bryan Lammon, *The Ninth Circuit Limits* Baker*, Preserves Manufactured Finality* (Apr. 19, 2022), https://bit.ly/3xJbOyh. As he explained, the decision conflicts with *Baker* and its progeny. This

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[*] No party's counsel authored any part of this brief. No person or entity, other than Washington Legal Foundation and its counsel, paid for the brief's preparation or submission. After timely notice, all parties consented to WLF's filing this brief.

Court should not allow the decision below to stand, especially when the Ninth Circuit essentially reinstated a decision this Court had reversed.

This Court rejected the plaintiffs' bar's attempts at gamesmanship in *Baker* and held that parties may not create appellate jurisdiction over an interlocutory order by manufacturing finality in a case. That decision fit with the Court's jurisprudence rejecting manufactured jurisdiction—subject-matter, personal, or appellate.

Baker should have been the end of the line for the plaintiffs' bar's attempts at manufacturing jurisdiction through voluntary dismissal of claims. But Judge Rawlinson, who wrote the opinion this Court reversed in *Baker*, apparently disagreed with this Court's decision. Of course, reasonable disagreements among jurists are common and healthy in our legal system. "Our representative democracy only works if we protect the 'marketplace of ideas.'" *Mahanoy Area Sch. Dist. v. B. L.*, 141 S. Ct. 2038, 2046 (2021).

Yet allowing judges to disagree on legal issues does not mean that lower court judges can ignore this Court's binding decisions. *See James v. City of Boise, Idaho*, 577 U.S. 306, 307 (2016) (*per curiam*) ("like any other state or federal court," the Ninth Circuit "is bound by this Court's interpretation of federal law"). When lower court judges refuse to follow this Court's directives, the Court is not afraid to act. The Court moved swiftly when the Ninth Circuit refused to follow this Court's decisions in *Gomez v. U.S. Dist. Ct. for N. Dist. of Cal.*, 503 U.S. 653 (1992) (*per curiam*), and *Vasquez v. Harris*, 503 U.S. 1000 (1992) (*per*

curiam). *That night*, the Court stripped the Ninth Circuit of the power to enter stays in the case. *Vasquez v. Harris*, 503 U.S. 1000, 1000 (1992) (*per curiam*).

The Ninth Circuit's refusal to follow this Court's *Baker* decision is indistinguishable from its refusal to follow this Court's orders in *Harris*. Rather than faithfully apply this Court's decision, the Ninth Circuit issued an opinion essentially overruling *Baker* in that circuit. If stare decisis means anything, this Court should grant the Petition and reverse the Ninth Circuit's decision.

STATEMENT

Trendsettah contracted with Swisher to make Trendsettah's Splitarillo cigarillos. Pet. App. 6a. According to Trendsettah, things soon went downhill; Swisher would not fulfill Trendsettah's Splitarillo orders. *Id.* This allegedly helped Swisher maintain a monopoly for its own cigarillo brands. *Id.* at 6a-7a. Trendsettah sued Swisher asserting antitrust and contractual claims.

A jury found for Trendsettah and awarded it over $44 million. Pet. App. 7a. But the District Court then granted Swisher judgment on the antitrust claims. *Id.* This effectively reduced the judgment to about $10 million. The Ninth Circuit reversed that decision and ordered the full judgment reinstated. *Id.*

On remand, Swisher moved for relief under Federal Rule of Civil Procedure 60, contending that previously undisclosed criminal conduct by Trendsettah's CEO constituted fraud on the court.

Pet. App. 5a. Swisher also argued there was newly discovered evidence that Trendsettah's tax fraud allowed it to stay in business by selling cigarillos below cost. *Id.*

The District Court granted Swisher relief from the judgment and denied Trendsettah's motion for reconsideration and Rule 60 motion. Pet. App. 30a-73a. The Ninth Circuit then denied Trendsettah's petition seeking leave to appeal that decision and petition for a writ of mandamus. *Id.* at 76a-78a. (The Ninth Circuit panel here got the procedural history wrong; the District Court certified the order for immediate appellate review under 28 U.S.C. § 1292(b). Pet. App. 74a-75a.)

Not wanting a second jury to hear about its CEO's tax fraud, Trendsettah moved to voluntarily dismiss the case with prejudice. Pet. App. 93a-100a. The District Court granted the motion, but Trendsettah then appealed the dismissal. *Id.* at 101a-103a. Despite Trendsettah's voluntary dismissal of its own claims, the Ninth Circuit held that it could hear the appeal by limiting *Baker* to the class-action setting. It reversed the grant of relief on Swisher's Rule 60 motion as to the contractual claims and affirmed the grant of relief on Swisher's Rule 60 motion as to the antitrust claims. *Id.* at 1a-29a. This Petition followed after the *en banc* court declined review. *Id.* at 85a-86a.

SUMMARY OF ARGUMENT

I.A. Five years ago, this Court agreed to decide whether voluntary dismissal of all of a party's claims eliminates the case or controversy necessary for

Article III jurisdiction. The Court did not reach the issue because it decided the case on different grounds. But now is the time to answer that question.

The courts of appeals are irreconcilably split on the issue. The Ninth Circuit refuses to acknowledge that its sister circuits are correct in holding that federal courts lack subject-matter jurisdiction once a party voluntarily dismisses all of its claims. The split will not go away unless this Court intervenes, and this is a perfect vehicle for deciding the issue.

B. The courts of appeals are not alone in holding that federal courts lack jurisdiction after a party voluntarily dismisses all of its claims. Three justices joined an opinion five years ago that expressed that same view. The other five justices who participated in the decision declined to discuss the issue. The three-justice concurrence's views track this Court's other Article III precedent. Thus, the Ninth Circuit's decision rejecting the three-judge concurrence was wrong.

II.A. In refusing to apply this Court's *Baker* decision, the Ninth Circuit relied on a distinction without a difference. Because this is not a class action, the Ninth Circuit found *Baker* inapposite. But *Baker*'s reasoning applies with equal force in the Rule 60 context as it does in the Rule 23 context. Federal statutes and rules give parties the chance to appeal interlocutory orders only in narrow circumstances, none of which exists here. Yet the Ninth Circuit allowed this interlocutory appeal to proceed despite the Court's *Baker* decision.

B. The Ninth Circuit's decision also conflicts with *Baker*'s policy rationale. As this Court explained, federal courts disfavor piecemeal appeals. Yet that is what the Ninth Circuit's decision here encourages. Plaintiffs can take an unlimited number of interlocutory appeals simply by dismissing their claims with prejudice and then appealing.

The Ninth Circuit's rule is also one-sided. Defendants cannot voluntarily dismiss claims to receive immediate review of an adverse ruling. But plaintiffs, as masters of their claims, can do so under the Ninth Circuit's decision. Thus, there is no way to reconcile this Court's *Baker* decision with the decision below.

ARGUMENT

I. FEDERAL COURTS LACK SUBJECT-MATTER JURISDICTION OVER THIS CASE.

A. The Court Should Consider This Question, Which It Previously Agreed To Decide.

In *Baker*, the Court granted certiorari, in part, to decide "[w]hether a federal court of appeals has jurisdiction under [] Article III" after a plaintiff voluntarily dismisses the case. *Microsoft Corp. v. Baker*, 577 U.S. 1099, 1099 (2016) (*per curiam*). The Court, however, never reached that question. Because it held that the Ninth Circuit lacked appellate jurisdiction under 28 U.S.C. § 1291, it declined to reach the constitutional issue. *Baker*, 137 S. Ct. at 1712. As described more fully in § I.B., *infra*, three justices reached the Article III question in a

concurring opinion and explained why the voluntary dismissal of claims deprives federal courts of Article III jurisdiction.

Now is the time to decide the issue. There is a sharp circuit split on the question presented which needs no further percolation. The lower courts are entrenched in their positions about whether voluntary dismissals extinguish the concrete controversy between parties.

Last year, the Tenth Circuit explained that "if a party moves for a judgment against it on all claims, it cannot appeal the judgment entered." *Frank v. Crawley Petroleum Corp.*, 992 F.3d 987, 996 (10th Cir. 2021). This is "because there is no longer a case or controversy" under Article III. *Id.* (citing *Baker*, 137 S. Ct. at 1716-17 (Thomas, J., concurring)).

The Tenth Circuit's adoption of the three-justice concurrence's views on Article III standing contrasts with the Ninth Circuit's decision here. In the Ninth Circuit's view, federal courts maintained subject-matter jurisdiction over the proceeding even though Trendsettah had voluntarily dismissed its claims with prejudice. That, of course, conflicts with this Court's longstanding jurisprudence requiring a case or controversy to sustain Article III jurisdiction.

Last month, the Seventh Circuit held that voluntarily dismissing claims implicates an appellate court's subject-matter jurisdiction. As it said, "voluntary dismissals present" a problem because "litigants aren't aggrieved when the judge does what they want." *Levy v. W. Coast Life Ins. Co.*, 44 F.4th

621, 626 (7th Cir. 2022) (quotation omitted). That "implicates Article III jurisdiction." *Id.*

It did not take *Baker* for the courts of appeals to realize that federal courts lack jurisdiction under these circumstances. Eighteen years earlier, the Eleventh Circuit was presented with a similar fact pattern in *Druhan v. Am. Mut. Life*, 166 F.3d 1324 (11th Cir. 1999). There, an employee sued an insurance company in state court and the case was removed to federal court. The district court denied a motion to remand and so the plaintiff voluntarily dismissed the case and then appealed the order denying her remand motion.

The Eleventh Circuit held that "it [wa]s clear that [it] ha[d] no jurisdiction to review the final judgment in th[e] case, because there [wa]s no case or controversy." *Druhan*, 166 F.3d at 1326. On appeal, "the required adverseness [wa]s lacking. The final judgment was entered in response to the plaintiff's motion for a dismissal with prejudice; she [then tried] to appeal the judgment that she requested." *Id.* So there was "no adverseness as to the final judgment, and thus no case or controversy." *Id.*

The Ninth Circuit didn't cite or discuss why *Druhan* was wrongly decided. Indeed, it is hard to argue with Judge Tjoflat's reasoning. He outlined well-settled principles of Article III standing and explained how a voluntary dismissal does not meet the case-or-controversy requirement.

The circuit split on this important and recurring question will not disappear without this Court's intervention. Having granted review to

resolve the issue in *Baker* before deciding that case on a different ground, the Court should consider this issue now.

B. A Case Or Controversy Between The Parties No Longer Exists.

The Constitution extends the "judicial Power" of the United States to only "Cases" and "Controversies." U.S. Const. art. III, § 2. Trendsettah's claims against Swisher stopped being a case or controversy when it voluntarily dismissed those claims, with prejudice. Because "Article III denies federal courts the power to decide questions that cannot affect the rights of litigants in the case before them," *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990) (cleaned up), Trendsettah's abandonment of its claims deprived federal courts of jurisdiction over the case. Since Trendsettah invited dismissal, Article III's adversity requirement is lacking, and a live dispute no longer supports federal jurisdiction.

Voluntary dismissals are governed by Rule 41, which provides for the "voluntary dismissal" of an "action." Fed. R. Civ. P. 41(a). A voluntary dismissal "with prejudice" amounts to a merits adjudication, which is usually subject to res judicata. *See Williams v. Seidenbach*, 958 F.3d 341, 371 (5th Cir. 2020) (*en banc*) (citation omitted); *RFF Fam. P'ship, LP v. Ross*, 814 F.3d 520, 532 (1st Cir. 2016) (citation omitted).

And "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 90, 94

(1980) (citing *Cromwell v. Sac Cnty.*, 94 U.S. 351, 352 (1876)). "Once that litigation is dismissed with prejudice, it cannot be resumed in this or any subsequent action." *Deakins v. Monaghan*, 484 U.S. 193, 201 n.4 (1988). Because Trendsettah cannot resurrect its claims against Swisher, no "speculative contingency" exists that is "sufficiently real and immediate to show an existing controversy." *Id.* (cleaned up). This case has "therefore lost its character as a present, live controversy of the kind that must exist if [this Court is] to avoid advisory opinions." *Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982) (*per curiam*) (citation omitted).

The Court's long-standing precedent confirms that plaintiffs cannot appeal the propriety of a dismissal with prejudice to which they consented. *See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24-25 (1994); *United States v. Procter & Gamble Co.*, 356 U.S. 677, 680 (1958) (citing *United States v. Babbitt*, 104 U.S. 767, 768 (1881); *Evans v. Phillips*, 17 U.S. 73, 73 (1819) (*per curiam*)). In each of those cases, the Court held that a party could not appeal because it voluntarily dismissed its claims.

Trendsettah voluntarily dismissed its entire action with prejudice. "[T]o qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review." *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 67 (1997) (citing *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)). Since there was no case or controversy between the parties after Trendsettah voluntarily dismissed its claims, the case is not fit for federal-court adjudication. This is a straightforward application of this Court's precedent.

At least three justices have explicitly recognized the subject-matter jurisdiction problems with appeals after voluntary dismissals. In *Baker*, Justice Thomas, joined by the Chief Justice and Justice Alito, explained that an appeal from a voluntary dismissal does not satisfy Article III's case-or-controversy requirement. 137 S. Ct. at 1717 (Thomas, J., concurring). When plaintiffs move for a voluntary dismissal under Rule 41, "they consent[] to the judgment against them and disavow[] any right to relief from" defendants. *Id.* When this happens, the parties are "no longer adverse to each other on any claims" and appellate courts cannot "'affect their rights' in any legally cognizable manner." *Id.* (quoting *Lewis*, 494 U.S. at 477 (cleaned up)).

It's no answer to say that, if the appellate court reverses the grant of a Rule 60 motion on appeal, plaintiffs could then resurrect their claim before the district court. "This Court has interpreted Article III 'to demand that an actual controversy be extant at all stages of review, not merely at the time the complaint is filed.'" *Baker*, 137 S. Ct. at 1702 (Thomas, J., concurring) (quoting *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 160 (2016)). Once the plaintiff dismisses all its claims with prejudice, there is no actual controversy for the appellate court to adjudicate. Thus, there is no subject-matter jurisdiction. The Ninth Circuit's contrary conclusion is glaringly wrong.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH *BAKER*.

Generally, courts of appeals "have jurisdiction of appeals from * * * [only] final decisions of the

district courts of the United States." 28 U.S.C. § 1291. There are two main exceptions to this general rule. First, courts of appeals may, "in [their] discretion, permit an appeal to be taken from" an order the district court believes "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." *Id.* § 1292(b). Second, courts of appeals may also allow appeals from orders granting or denying class certification. *See* Fed. R. Civ. P. 23(f).

Here, Trendsettah could not appeal under Section 1292(b) or Rule 23(f). Still, the Ninth Circuit found that Trendsettah could appeal the order granting relief under Rule 60 because that order was made "final" by the voluntary dismissal. That holding distorted this Court's precedent, which bars such appeals.

A. *Baker* Does Not Turn On The Nature Of The Suit.

Baker was a straightforward case. Consumers brought a putative class action against Microsoft arguing that the Xbox 360 game console was defective. The claims were not worth much individually. So after the district court denied the plaintiffs class certification and the Ninth Circuit denied Rule 23(f) review, they agreed to dismiss their claims with prejudice. After the dismissal, the plaintiffs then appealed the denial of class certification.

Judge Rawlinson, who authored the decision here, wrote an opinion in *Baker* holding that the Ninth Circuit had appellate jurisdiction. That decision created a circuit split. So this Court granted certiorari to resolve the split in authority. *See Baker*, 137 S. Ct. at 1712.

Justice Ginsburg, writing for five justices, soundly rejected the *Baker* panel's reasoning. First, she explained that the final-judgment rule is key to maintaining the proper balance between the district courts and the courts of appeals. *Baker*, 137 S. Ct. at 1712-13. As she explained, the Court has "resisted efforts to stretch § 1291 to permit appeals of right that would erode the finality principle and disserve its objectives." *Id.* at 1712 (collecting cases).

Although *Baker* was decided in the Rule 23 context, nothing about its reasoning limits it to class-certification orders. Rather, the reasoning applies equally in other contexts—including rulings on post-judgment motions. The Federal Rules of Civil Procedure give district courts the power to decide Rule 60 motions. Courts of appeals, on the other hand, have the power to review those decisions. Allowing immediate interlocutory appeals of those orders, however, would give the courts of appeals de facto power to decide the motions. This would erode the balance of power and undermine the rules' objectives.

Baker also held that the voluntary-dismissal tactic would lead to protracted litigation and piecemeal appeals. *Baker*, 137 S. Ct. at 1713-14. As Justice Ginsburg explained, there is no limit to the number of times plaintiffs may "exercise [their]

option" of voluntarily dismissing a case to appeal an interlocutory order. *Id.* at 1713.

This concern is also not unique to appeals from class-certification orders. In fact, it is a bigger problem here. Realistically, there are very few class-certification orders in one case. But there are hundreds of decisions made by a trial judge in complex cases. Did plaintiffs plead a viable claim for punitive damages? Did experts use reliable methods to reach their conclusions? Under the Ninth Circuit's rationale, nothing stops plaintiffs from appealing each of these decisions after voluntarily dismissing the case.

Finally, *Baker* held that allowing appeals as of right using the voluntary-dismissal tactic undermined the discretionary nature of Rule 23(f). *Baker*, 137 S. Ct. at 1714-15. Congress, through 28 U.S.C. § 1292(e), and this Court through Rule 23(f), decided that courts of appeals should have discretion to deny appeals from class-certification orders. Allowing putative class plaintiffs to take away that discretion by voluntarily dismissing a case after class certification denial conflicted with that statutory and rules-based scheme.

Again, the same is true here. The only thing that changes is how Congress has given courts discretion to decide whether to hear an appeal from an interlocutory order granting a Rule 60 motion. Section 1292(b) gives both the district courts and the courts of appeals discretion to permit such appeals. But if plaintiffs can bypass that mechanism by dismissing the case after an adverse ruling, that discretion disappears.

This case proves the point. After the District Court granted Swisher's Rule 60 motion and denied Trendsettah's motion for reconsideration, Trendsettah moved for leave to appeal the decision under Section 1292(b). The District Court granted that motion. Pet. App. 74a-75a. The Ninth Circuit, however, denied the petition. *Id.* at 76a-77a. Only then did Trendsettah voluntarily dismiss its case and appeal the District Court's Rule 60 order.

So every reason the Court gave in *Baker* for not allowing the voluntary-dismissal tactic for class-certification orders applies with equal force in the post-judgment context. In fact, there are more problems with the Ninth Circuit's decision here. This Court should not allow the same court that was reversed in *Baker* to resurrect its decision by reading this Court's holding so narrowly.

B. The Ninth Circuit's Decision Undermines *Baker*'s Policy Foundations.

1. Congress has a longstanding policy against piecemeal appeals. *See Baker*, 137 S. Ct. at 1707; *see also McLish v. Roff*, 141 U.S. 661, 665-66 (1891) ("[T]he whole case and every matter in controversy in it [must be] decided in a single appeal." (citing *Forgay v. Conrad*, 47 U.S. 201, 204 (1848))). So under Section 1291, a party may generally appeal from only final orders. If Section 1291 were interpreted to permit plaintiffs to obtain immediate review of every order granting a new trial by voluntarily dismissing their claims with prejudice, it would render Congress's policy against piecemeal appellate review a dead letter.

The Ninth Circuit's approach to appellate jurisdiction would cause serious mischief if left undisturbed. As the First Circuit has warned, "if a litigant could refuse to proceed whenever a trial judge ruled against him * * *, and then obtain review of the judge's interlocutory decision, the policy against piecemeal litigation and review would be severely weakened." *Commonwealth Sch., Inc. v. Commonwealth Acad. Holdings LLC*, 994 F.3d 77, 83 (1st Cir. 2021) (quoting *Marshall v. Sielaff*, 492 F.2d 917, 919 (3d Cir. 1974)). But that is what the Ninth Circuit's decision here allows. If plaintiffs lose on any issue throughout the litigation, from a motion to dismiss only one of multiple claims to a motion in limine, they may then appeal that decision.

Baker is also grounded in this Court's decisions. It is not as if plaintiffs previously "lost on the merits" and now "only seek" an "expeditious review." *Procter & Gamble Co.*, 356 U.S. at 681. In fact, the District Court's order did the opposite; it ordered a merits adjudication that was untainted by fraud. Without a merits determination, the Ninth Circuit's opinion fails to explain how an interlocutory order granting a Rule 60 motion can be suddenly transformed into a "final decision" under Section 1291 by a stipulated order dismissing the entire case with prejudice.

Simply put, "the fact that an interlocutory order may induce a party to abandon his claim before final judgment is not a sufficient reason for considering it a 'final decision' within the meaning of § 1291." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). The Ninth Circuit's contrary reading of Section 1291 conflicts with the very purpose of that

statute. As this Court recognized in *Livesay*, Congress adopted Section 1291's "final decision" rule to ensure that controversies are not reviewed by appellate courts in a piecemeal fashion as issues arise. The decision below undermines Section 1291 by effectively granting plaintiffs (but not defendants) an absolute right to immediate review of orders granting Rule 60 motions.

Orders granting Rule 60 motions do not merge into the judgment (and thus become reviewable in an appeal under Section 1291 from the final order of dismissal) when the final order of dismissal results from the plaintiffs' dropping their claims. A contrary view would allow plaintiffs to use the dismissal order they procured as a vehicle to circumvent finality principles and secure piecemeal review of an interlocutory procedural ruling. By not addressing that issue, the Ninth Circuit implicitly adopted an expansive view of federal appellate jurisdiction inconsistent with longstanding notions of finality.

There is no limit to the number of appeals that could be taken in a single case. From the denial of a motion to permit service by publication to a motion for new trial, complex commercial disputes like this one have hundreds of rulings. Under the Ninth Circuit's decision, plaintiffs may appeal every adverse decision if they are willing to dismiss their case with prejudice and then appeal the adverse decision.

If the Ninth Circuit's holding strove to limit the number of interlocutory appeals a party may take, the rationale is nonsensical. Either there is no case or controversy, depriving federal courts of subject-matter jurisdiction (*see* § I, *supra*), or there is no limit

to the number of interlocutory appeals that plaintiffs can take.

The Ninth Circuit's disposition of the appeal shows that it recognized the nonsensical nature of its attempt at limiting piecemeal appeals. The Ninth Circuit found that the District Court applied the wrong Rule 60(d) standard. It could (and should) have remanded for proper application of that standard in the first instance rather than sit as factfinder itself. Yet it likely deprived the District Court of the ability to exercise discretion under Rule 60 because it didn't want to expose the flaws in the rest of its analysis. One flaw is that because the Ninth Circuit held, implicitly, that federal courts continue to have subject-matter jurisdiction over the case, plaintiffs can use the voluntary-dismissal tactic to gain piecemeal appellate review of interlocutory orders. That conflicts with *Baker*.

2. The Ninth Circuit's rule is also "one sided" because "[i]t operate[s] only in favor of plaintiffs." *Baker*, 137 S. Ct. at 1708 (cleaned up). By adopting a one-sided rule that favors plaintiffs over defendants, the decision conflicts with *Livesay*, which cautioned that rules governing appellate review ought to treat plaintiffs and defendants even-handedly. 437 U.S. at 476.

Again, the concern about the one-sided nature of the voluntary-dismissal tactic is not limited to the class-certification context. Under the Ninth Circuit's rationale, plaintiffs who receive an adverse ruling on a partial motion to dismiss can voluntarily dismiss the case and receive immediate appellate review of that decision. It is unfair to allow the plaintiffs to

obtain immediate appellate review of that ruling while defendants have no recourse to an adverse ruling until after final judgment.

Defendants cannot dismiss a case. The most analogous tactic is to settle a case. But when a case is settled, defendants forfeit their right to appeal that decision. So defendants must wait until a final judgment issues before appealing any interlocutory orders. This means that plaintiffs and defendants are playing under different rules. Plaintiffs can manufacture appellate jurisdiction by voluntarily dismissing a case and then appealing the adverse ruling. Defendants, meanwhile, must either settle or continue with costly litigation before having the chance to appeal an adverse ruling after entry of final judgment.

This Court rejected the Ninth Circuit's flawed policy analysis in *Baker*. Yet the Ninth Circuit revived that analysis here in an opinion that will have long-lasting effects. This Court should not allow that to happen, lest it encourage the Ninth Circuit to ignore the Court's decisions.

* * *

There is but "one supreme Court." U.S. Const. art. III, § 1. Other courts, including the Ninth Circuit, are "inferior." *Id.* Yet the decision below acts as though the inferior Ninth Circuit has the power to overturn this Court's decisions. The Court should not allow such a decision to stand. Rather, it should grant the Petition and reaffirm that *Baker* binds even courts in the Pacific time zone.

CONCLUSION

This Court should grant the Petition.

Respectfully submitted,

John M. Masslon II
Counsel of Record
Cory L. Andrews
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave. NW
Washington, DC 20036
(202) 588-0302
jmasslon@wlf.org

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