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 IN OPPOSITION

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QUESTION PRESENTED

In this case, respondents won a verdict in their favor after a jury trial. The district court rejected part of that verdict, but the Ninth Circuit reinstated it, after which this Court denied certiorari and the full judgment against petitioner became final. *See Swisher Int'l, Inc. v. Trendsettah USA, Inc.*, 140 S. Ct. 443 (2019). Thereafter, petitioner sought—and the district court granted—a Rule 60 motion to set aside the judgment based on alleged fraud on the court. But instead of granting judgment outright for the petitioner at that point (as it could have), the district court ordered a new trial instead.

Lacking the funds to prosecute an entirely new trial to vindicate a claim on which it had already won a final judgment, respondents voluntarily conceded that they would lose the retrial so that they could instead immediately appeal the Rule 60 decision. The district court understood the terms on which respondents were abandoning their right to retry their claims and approved them.

On the ensuing appeal, the Ninth Circuit agreed that the trial court erred in disturbing part of the final judgment in respondents' favor and reinstated it. In so doing, it rejected petitioner's argument that respondents' decision to voluntarily abandon their right to retry their claims somehow eliminated the final judgment or the Article III controversy between the parties.

The question presented is: Can a party with a final judgment in its favor appeal a Rule 60 order disturbing that judgment after voluntarily foregoing its right to retry its claims?

RULE 29.6 STATEMENT

Respondents do not have a parent corporation, and no publicly held corporation owns 10% or more of their stock.

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INTRODUCTION

Swisher's petition for certiorari is plainly meritless. As the petition belatedly reveals, Pet. 31, this Court resolved the question that this case properly presents many years ago. To make it seem otherwise, petitioner must frame a question presented so wildly overbroad that nearly every circuit has decisions on both sides (based, unsurprisingly, on factbound aspects of individual cases). For similar reasons, the "circuit splits" that Swisher conjures are illusions—entirely dependent on mischaracterizing the decision below and thereby avoiding the reality that not one court has ever rejected appellate jurisdiction in a case like this one. Correctly understood, the decision below is both obviously correct under this Court's binding precedents and entirely free of controversy in the lower courts.

Indeed, stripped of the garish costume in which Swisher tries to garb it, the procedure respondents Trendsettah USA, Inc. and Trendsettah, Inc. (Trendsettah) followed in the district court here is wholly unremarkable. After winning a final judgment and then suffering an adverse Rule 60 order disturbing that judgment, Trendsettah simply decided to lay down its right to retry its claims—and elected to suffer a final judgment instead—so that it could immediately appeal the (erroneous) Rule 60 order. Parties do this kind of thing *all the time*: It is common for litigants to get an adverse ruling on a substantive issue in their case (like the definition of an antitrust market, the exclusion of expert testimony, or the construction of their patent claim), and then concede that they will lose on the merits and take only the adverse decision against them directly to the court of appeals instead of

prosecuting a pointless trial. Such a concession obviously results in an adverse final judgment, and the controversy between the parties obviously remains because the surrendering party is only laying down insofar as it has already lost a controlling merits question on which the appeals court might reverse and revive the merits claim. And yet petitioner does not even acknowledge that these practices exist, let alone attempt to distinguish them.

Meanwhile, petitioner identifies no court of appeals decisions that even discuss a similar fact pattern—that is, one in which the appellant already *won* a final judgment that the lower court disturbed—let alone produce cases endorsing its bizarre view that when a plaintiff takes this eminently reasonable approach, the defendant wins by default.

On the antepenultimate page of its petition, however, petitioner finally acknowledges that *this* Court has been here before. Just as here, the plaintiffs in *Thomsen v. Cayser*, 243 U.S. 66 (1917), had won a judgment in their favor, only to have a lower court overturn that judgment and order a new trial. The *Thomsen* plaintiffs did not want to go through a retrial, however, and so—just like respondents here—they instead "got the lower court to *dismiss the complaint* rather than remand for a new trial, so that [they] could get review in this Court." *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958) (citing and explaining *Thomsen*, 243 U.S. at 83) (emphasis added). Then, just like petitioner here, the *Thomsen* defendant argued that, because the "judgment of the Circuit Court was entered in the form finally adopted at the request of plaintiffs and by their consent," this Court should deny the plaintiffs their right to appeal. *Thomsen*, 243 U.S.

at 82. But this Court refused, recognizing the straightforward reality that—just like respondents here—"[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, so that they might come to this court without further delay." *Id.* at 83. One struggles to imagine a case that more closely parallels this one.

Petitioner's last-second attempts to distinguish this Court's binding precedent in *Thomsen* fail because the distinctions it offers are utterly illogical. But even (incorrectly) assuming that *Thomsen* does not completely control the result in this perfectly parallel case, it remains the *only* case petitioner has cited where the appellant had a final judgment in its favor and then voluntarily abandoned its right to retry its claims after that judgment was disturbed. And as to whether there is finality and appellate jurisdiction in such circumstances, this Court and the closest lower court parallels are in perfect agreement, and there is not a single court of appeals that has said otherwise. That is the opposite of a circuit split.

The lack of any real authority to support petitioner's view is understandable, of course, because the result below is dictated not only by *Thomsen*, but also common sense. Notably, a case like this one is far *more* final than an ordinary final judgment on appeal: In a typical case, a successful appeal will often result in a new trial; in a case like this one (where an appellant has a pre-existing final judgment and has dismissed its right to retry the claims with prejudice), the district court's work is done no matter who wins.

Meanwhile, the circuits are in perfect agreement about the kinds of cases where a voluntarily dismissal

does defeat appellate jurisdiction—in particular, cases involving interlocutory decisions that "in no way touch the merits," *see Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1717 (2017) (Thomas, J., concurring in the judgment) (cleaned up), like orders denying class certification or compelling arbitration. Nevertheless, petitioner places these arbitration cases in its "circuit split" without candidly disclosing that *the Ninth Circuit has the exact same rule*. Accordingly, there is no argument that the Ninth Circuit is flouting *Microsoft* or limiting it to its facts, or that any other circuit would have treated this case differently. The petition should be denied without hesitation.

STATEMENT OF THE CASE

I. Background Facts

Much of petitioner's statement of the case is irrelevant to the question presented and appears intended to besmirch Trendsettah and its counsel. It suffices to note, however, that the Ninth Circuit's ultimate holding in this case—which petitioner does not challenge—was that petitioner did *not* present evidence that Trendsettah or its counsel engaged in a fraud on the court, because there was no evidence of any "'*intentional*, material misrepresentation' in support of 'an unconscionable plan or scheme which [was] designed to improperly influence the court in its decision." Pet. App. 17a (quoting *United States v. Sierra Pac. Indus., Inc.*, 862 F.3d 1157, 1168 (9th Cir. 2017)) (court's alterations). At very most, there was evidence that one of Trendsettah's principals engaged in a secret scheme to evade excise taxes, and that this scheme impacted evidence that was innocently presented at trial. It was for precisely this reason that the Ninth Circuit refused

to uphold the district court's determination that there was fraud on the court under Fed. R. Civ. P. 60(d), even though it agreed that a certain portion of the judgment could be reopened under Fed. R. Civ. P. 60(b)(2) and 60(b)(3) after Mr. Alrahib's tax-evasion indictment was unsealed. *See* Pet. App. 20a-21a.

One aspect of petitioner's presentation bears special emphasis, however, as it exemplifies Swisher's willingness to use artful phrasing to obscure reality. Petitioner gives the impression that "TSI *and its counsel*" had "stonewalled" efforts to bring "TSI's tax evasion to light," and that those same lawyers knowingly attempted to bury this fraud by filing "a motion in limine to bar such evidence as irrelevant and unduly prejudicial" after they "learned that Swisher intended to raise at trial a prior action against Mr. Alrahib for failing to pay excise taxes on tobacco products." Pet. 6 (emphasis added). This implication could not be further from the truth.

As the district court unambiguously found and the Ninth Circuit repeated, Trendsettah's "counsel acted in good faith and was not a party to the other activities of the Trendsettah principal." Pet. App. 20a n.3. And, accordingly, the "stonewall[ing]" Swisher now attributes (at 6) to "[Trendsettah] and its counsel" was in fact nothing more than a workaday discovery objection asserting that a Swisher document request was "burdensome" and "irrelevant"—one that almost any lawyer would have made, and that the district court again found was asserted in "good faith." Pet. App. 20a & n.3. Worse, it is just plain lying for Swisher to say that it was "rebuffed *at every turn* by TSI and its counsel" in its efforts to get discovery into Trendsettah's excise taxes. Pet. 6 (emphasis added). Although the Ninth

Circuit did not discuss this fact, Trendsettah's counsel had ultimately *agreed* during discovery to search all its electronically stored information for excise-tax related terms and to turn over all responsive documents to Swisher. It was Swisher who declined that offer on its own initiative for reasons it has never explained. *See* Resp. C.A. Br. 12-13 (quoting hyperlinked record documents).

Similarly, the effort to paint counsel's motion in limine as some kind of cover-up is farcical. The motion in limine that was sought and granted did not prohibit Swisher from inquiring into Trendsettah's excise tax payments or anything else about Trendsettah's business; it very narrowly prohibited Swisher from inquiring into a facially unrelated, previous incident where Alrahib had been sanctioned for avoiding state tobacco taxes. *See* C.A. E.R. 471-73. Again, Trendsettah's counsel brought that motion to exclude evidence of unrelated, prior bad acts because *any* lawyer would have, and with no knowledge whatsoever of Alrahib's wrongdoing at Trendsettah. In fact, had Trendsettah or its counsel intended to "stonewall" Swisher's efforts to look into Trendsettah's excise taxes, they could not have done a worse job writing their motion.

This is all to say that—like its characterization of the cases in its alleged circuit split or the positions of the circuits on its overbroad question presented—Swisher's characterizations of the record are untrustworthy. Indeed, at oral argument on its previous appeal, Swisher's counsel was chastised by the Ninth Circuit—fairly, and at great length—for misrepresenting the record. *See* 16-56823 C.A. Oral Arg., https://youtu.be/_nh2KU2lWGQ?t=1603 (Nov. 16, 2018 Oral Argument at 26:45). Moreover, it is worth

noting that Swisher does not contest the substance of the antitrust violations that the jury found and the Ninth Circuit and this Court upheld—violations that included both dishonesty and industrial sabotage. To be sure, the present, purely procedural controversy does not require a competition to determine which party or counsel has cleaner hands. If it did, however, Swisher would not fare well.

II. Procedural History

Given the procedural question Swisher presents, what matters in this case is its procedural history. And while that history should not be in dispute, Swisher routinely leaves out details that reflect poorly on its current arguments.

As Swisher concedes, this case begins with a jury verdict against it which the Ninth Circuit ultimately affirmed and this Court declined to review. *See* Pet. 5. Swisher then filed a motion seeking relief from judgment under Rules 60(b)(2), (b)(3), and (d)(3), which the district court granted. Pet. 7. Swisher did not request any particular sanction associated with this motion, and courts consider "dismissal of th[e] action with prejudice" an "entirely appropriate" result where fraud on the court is involved. *See, e.g.*, *Almeciga v. Ctr. for Investigative Reporting, Inc.*, 185 F. Supp. 3d 401, 435 (S.D.N.Y. 2016). Nonetheless, the district court decided that it would only set aside the original judgment and then give Trendsettah the opportunity to retry its claims.

Initially, Trendsettah hoped it could appeal this erroneous decision without giving away its opportunity for a retrial. Accordingly, it sought certification of the Rule 60 order under 28 U.S.C. §1292(b). The

district court initially denied that request, but later granted it. Pet. App. 73a, 75a. The Ninth Circuit declined review under that provision, however. Pet. App. 76a. Trendsettah then sought mandamus relief, but three weeks after it had filed, Swisher revealed evidence demonstrating that it had had the relevant excise-tax documents already in its possession at the time of trial. *See* 20-71247 C.A. Doc. 11-1. Given that development, Trendsettah proposed either stay or dismissal of its petition. *Id.* The Ninth Circuit dismissed. Pet. App. 77a-78a.

At that point, Trendsettah determined that it was "unable to afford the litigation expenses of a second trial to replicate the verdict it previously obtained." Pet. App. 95a. It therefore sought the district court's permission to "dismiss its claims against Swisher with prejudice, so that it c[ould] directly appeal the Court's Rule 60 orders vacating the jury's verdict and ordering a new trial." Pet. App. 97a. Trendsettah carefully explained that its motion for dismissal with prejudice would necessarily "constitute the end of the case" because "either the Ninth Circuit will again order reinstatement of the verdict, or it will affirm the Court's Rule 60-related orders," and the dispute would "be over either way." *Id.*

Importantly, the district court understood that Trendsettah was not seeking to surrender its claims altogether, but rather wanted to "end the *trial phase* of this protracted litigation in order to allow the Ninth Circuit to review this Court's rulings, including the grant of a new trial." Pet. App. 80a (emphasis added). Put otherwise, the district court understood that Trendsettah was not conceding its claims insofar as they resulted in the original verdict, but only foregoing

its right to *retry* those claims by essentially conceding that Swisher would prevail at the second trial. The Court therefore determined that Swisher had become "the prevailing party," Pet. App. 84a, but would lose that status "if the Ninth Circuit reinstated the original verdict." *Id.*; *see also* Pet. App. 83a (same). So recognizing, it granted Trendsettah's motion, which Swisher ultimately declined to oppose. Pet. App. 84a.

Then, on September 28, 2020, in a separate document that is conspicuously absent from Swisher's petition appendix, the district court entered a final judgment in Swisher's favor. C.A. E.R. 2-8. That judgment set forth and incorporated the content of the court's prior decisions. And it also "acknowledge[d] that [respondents] expressly preserve their right to appeal the Court's Rule 60 orders vacating the jury's verdict and ordering a new trial." C.A. E.R. 8.

Trendsettah then appealed. Swisher tells the Court that Trendsettah "challenged only the District Court's interlocutory [new trial order] … [and] not the dismissal order which [it] invited." Pet. 8 (quoting *Microsoft*, 137 S. Ct. at 1711). But that assertion is false: Trendsettah *specifically* included the "September 16, 2020 Minute Order re Motion to Dismiss," in its Notice of Appeal. Pet. App. 103a. That order was the one that granted voluntary dismissal while explaining that "Trendsettah seeks to end the trial phase of this protracted litigation in order to allow the Ninth Circuit to review this Court's rulings, including the grant of a new trial." Pet. App. 80a.

As Swisher concedes, the court of appeals agreed with Trendsettah on the merits that the district court's new final judgment was erroneous insofar as it entered judgment for Swisher on Trendsettah's contract

claims. *See* Pet. 10-11; Pet. App. 6a. It therefore "reverse[d] the district court's dismissal of Trendsettah's breach of contract claims and remand[ed] with instructions to reinstate the jury's verdict on those claims." Pet. App. 6a.

In so doing, the Ninth Circuit considered and rejected Swisher's argument that it lacked jurisdiction for want of a final judgment. Pet. App. 12a. It began by rehearsing several of its own precedents, including cases from before and after *Microsoft*. It noted that the Ninth Circuit had come to different results in two sets of cases. First, in cases where there was a statutory scheme governing the right to appeal an interim, procedural determination, the court had followed *Microsoft* and treated voluntary dismissal as insufficient to create an appealable final judgment. *See* Pet. App. 13a-15a (discussing both class certification orders not granted immediate appeal under Rule 23(f) and orders compelling arbitration). Conversely, in cases where an individual plaintiff lost on some claims and then voluntarily dismissed her other claims with prejudice, the result was a final, appealable judgment through which she could appeal the issues the district court *had* decided against her. *See* Pet. App. 14a (explaining that, unlike *Microsoft*, the Ninth Circuit's decision in *Rodriguez v. Taco Bell Corp.*, 896 F.3d 952 (9th Cir. 2018), had "involved review of a partial summary judgment order").

Critically, in a paragraph of analysis that Swisher does not even mention, *see* Pet. 9-10, the Ninth Circuit emphasized that this case was fundamentally different from cases like *Microsoft* or *Langere v. Verizon Wireless Services, LLC*, 983 F.3d 1115 (9th Cir. 2020)—which concerned an interlocutory order

compelling arbitration—because, "unlike th[ose] plaintiffs …, Trendsettah is not attempting to take an appeal midstream, such that success on appeal would allow it to continue litigating its claims in a preferred posture or forum." Pet. App. 15a. Instead, "Trendsettah's claims *have already been litigated and a final decision on those claims has been reached*." *Id.* (emphasis added). That meant 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 Trendsettah's claims with prejudice will stand." *Id.* This was critical, because maximizing the odds that all issues will be decided in a single appeal is the core function of the final-judgment rule. The court also emphasized that the district court had played a role in refereeing Trendsettah's request to dismiss with prejudice and appeal—a fact that "carries substantial weight in determining whether appellate jurisdiction is proper." *Id.* (quoting *Galaza v. Wolf*, 954 F.3d 1267, 1272 (9th Cir. 2020)). It thus concluded that "Trendsettah's voluntary dismissal of its claims with prejudice did not deprive this court of jurisdiction." Pet. App. 15a-16a.

In its briefing, Swisher had argued that there was also no Article III controversy because "[w]hen [Trendsettah] dismissed its claims with prejudice, its interest in those claims were [sic] 'lost forever,'" with the result that "the parties are no longer 'adverse to each other on any claims,'" and the case was "moot." Pet. C.A. Br. 29-31. The panel did not specifically address this argument. But it evidently understood that Trendsettah's dismissal of its claims at the *re-trial* stage was not intended to and did not constitute abandonment of the original verdict that had already been entered in

Trendsettah's favor on those claims—which the district court's disputed Rule 60 order had disturbed. *See* Pet. App. 15a ("a final decision on those claims has been reached," such that success on appeal means "the jury's prior verdict will be reinstated").

After losing, Swisher sought rehearing en banc from the Ninth Circuit, raising both of its current jurisdictional theories, and accompanied by a brief from the same amicus supporting it here. *See* C.A. Docs. 79, 81. Not one judge voted in favor of rehearing en banc, or even requested a response. *See* Pet. App. 85a-86a.

This petition followed.

REASONS TO DENY THE WRIT

The petition should be denied for several, overlapping reasons.

First, the decision below is obviously correct, and in fact governed by on-point precedent from this Court. The plaintiffs in *Thomsen v. Cayser*, 243 U.S. 66 (1917), followed a virtually identical procedure to obtain review in this Court, and this Court approved it. The distinctions Swisher offers for *Thomsen* make no sense, and this Court has followed *Thomsen* in similar cases since it was decided. Swisher's own argument is that finality must "be given a practical rather than a technical construction." Pet. 23 (citation omitted). But on that measure, it is hard to imagine a judgment more final than this one. Indeed, the procedure Trendsettah followed and the court below approved not only avoided a pointless trial proceeding but also fully maximized the odds that the case would be fully resolved through a single appeal.

Second, petitioner's effort to broaden the question presented well beyond the Rule 60 scenario presented

here results in much more confusion than clarity, and dangerously invites this Court to invalidate a host of efficient practices Swisher fails to even identify. There are of course important distinctions that must be developed and carefully considered between the different postures in which a plaintiff might voluntarily consent to a final judgment prior to appeal. Among other considerations, one plainly important question (that Swisher does not even acknowledge) is whether the interlocutory order at issue "touches the merits," such that a reversal on appeal would properly revive the claims. *See Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1717 (2017) (Thomas, J., concurring in the judgment) (cleaned up). And yet, Swisher's question presented is so broad—and its jurisdictional theory so undeveloped—that it does not even *acknowledge* the vast set of cases where plaintiffs have been allowed to voluntarily dismiss and still appeal, let alone analyze the reasoning of those cases or try to explain those distinctions. This Court should be wary of Swisher's invitation to fly blindly into this issue by granting a question presented utterly untethered from the present case.

Third, and relatedly, there is no genuine disagreement among the circuits here because petitioner has not even tried to identify appellate cases like this one. Even modest attention to the differences between the cases Swisher invokes demonstrates that what Swisher calls a circuit split is just different cases presenting different procedural issues coming out differently. In reality, most of the circuits do not have anything like the uniform rule that Swisher says they do. And, meanwhile, the Ninth Circuit has the exact *same* rule about arbitration cases as the one Swisher invokes to conjure a "split" with other courts.

In fact, at the level of abstraction that Swisher has used to pose its question presented, most courts are on *both* sides of the alleged splits. And, critically, there is no evidence that *any* court of appeals would reach a different outcome in a case like this one. Remarkably, Swisher's petition actually *omits* the three most similar cases we could find (apart from *Thomsen*, which is on all fours). And in all of those cases, the lower courts came to the same conclusion as the Ninth Circuit below.

Finally, on the (mistaken) assumption that *some* version of the question presented might someday merit review, this is certainly not the right vehicle. Rule 60 orders disturbing final judgments are exceedingly rare, and present special fact patterns regarding finality. This likely explains why literally zero cases cited in the petition, apart from this one, concern a voluntary dismissal after a grant of Rule 60 relief. Taken seriously, Swisher's argument affects much more ordinary circumstances, and it would be far more useful for this Court to consider those relatively common scenarios than the plainly rarified case presented here. That is particularly so because the Ninth Circuit did not even explicitly address Swisher's Article III theory, which it presented in all of three pages of briefing below.

I. The Decision Below Is Correct.

In *Microsoft*, this Court held that a plaintiff cannot create a final, adverse judgment by voluntarily dismissing its claims after losing a class-certification motion and being denied immediate appeal under Rule 23(f). This Court's core concern was "practical rather than … technical"—it worried that plaintiffs could circumvent the Rule 23(f) regime and create their own

"piecemeal" appeals of interlocutory orders if this practice was approved. *See* 137 S. Ct. at 1707, 1712 (summarizing the Court's conclusion by emphasizing these two points). Justice Thomas concurred in the judgment, noting that he thought plaintiffs did create a final judgment by voluntarily dismissing, but they could not appeal from a final judgment they invited under Article III—at least where the interlocutory order they were attempting to challenge through this procedure "'in no way touch[ed] the merits'" of the dismissed claims, such that "a favorable ruling" from the court of appeals "would not 'revive'" those claims. *Id.* at 1717.

Petitioner spends a lot of time arguing that the Ninth Circuit has cabined *Microsoft* to its facts and will henceforth apply it *only* to foreclose the use of voluntary dismissal as an end run around Rule 23(f) in class-action cases. *See, e.g.*, Pet. 9-10, 17. But that is plainly not the rule the Ninth Circuit has adopted, which is apparent from decisions like *Langere v. Verizon Wireless Services, LLC*, 983 F.3d 1115, 1118 (9th Cir. 2020), and *Sperring v. LLR, Inc.*, 995 F.3d 680, 682 (9th Cir. 2021) (per curiam), where that court has applied *Microsoft* to equally foreclose appeals of orders compelling arbitration through the tactic of voluntary dismissal. Petitioner knows all about these cases—having emphasized them in seeking rehearing below—and yet its petition for certiorari before this Court mentions *Langere* only in passing in the procedural history section, *see* Pet. 10, and does not mention *Sperring* at all.

That is likely because those decisions—which Swisher celebrates in other circuits (at 12, 15)—are obviously inconsistent with Swisher's unseemly theory that the Ninth Circuit is somehow trying to limit

Microsoft's holding to its facts in a fit of personal pique. *See* Pet. 3 (noting, for some reason, that the decision below was authored by "the same judge who authored the overturned decision in *Microsoft*"). In reality, not even *one* judge on the entire Ninth Circuit thought this decision merited *en banc* review, or even a response. And in any event, this Court reviews holdings, not opinions, *see, e.g.*, *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984), and the holding here is indistinguishable from a holding of this Court that Swisher tries to bury at the back of its petition.

That case is *Thomsen v. Cayser*, which this Court has invoked and reaffirmed by finding jurisdiction in subsequent cases where a plaintiff has appealed after inviting a final judgment against itself. *See United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958). Like this case, *Thomsen* was an antitrust suit. *See* 243 U.S. at 68 (statement). And like this case, the jury returned a verdict for the plaintiffs. *Id.* at 74. The court of appeals then disturbed that verdict on the theory that there had been an intervening change in law and, as here, "remanded the case for a new trial." *Id.* at 76. Thereafter, the plaintiff sought rehearing, "waived any right to a new trial and consented that the case should be disposed of one way or the other," with the result that the court of appeals reversed and ordered the trial court to dismiss the complaint instead of holding a new trial. *Id.* Or, as this Court itself described it, "the losing party" in *Thomsen* "got the lower court to dismiss the complaint rather than remand for a new trial, so that it could get review in this Court." *Procter & Gamble*, 356 U.S. at 681.

Like this case did in the Ninth Circuit, *Thomsen* came to this Court on a writ of error—not a petition for

certiorari—because it was within this Court's appellate jurisdiction. 243 U.S. at 82. And like Swisher here, the *Thomsen* defendants moved to dismiss the appeal on the ground that the "judgment of the Circuit Court was entered in the form finally adopted at the request of plaintiffs and by their consent, and the errors assigned by plaintiffs were waived by such request and consent." *Id.* But this Court refused to adopt that formalistic view and give the defendants what they requested—namely, an automatic victory whenever a plaintiff elects to forgo a second trial in favor of taking a loss and gambling it all on getting the vacatur order overturned. Instead, this Court acknowledged the obvious reality that the *Thomsen* 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*, so that they might come to this court without further delay." *Id.* (emphasis added). On that ground, "[t]he motion to dismiss [wa]s denied." *Id.*

As the foregoing makes perfectly clear, the *only* difference between this case and *Thomsen* is that it was the court of appeals that disturbed the final judgment in plaintiffs' favor, rather than the trial court. But that is obviously irrelevant—and, in fact, Swisher does not even argue that it's relevant (*see* Pet. 31)—because *Thomsen* was a challenge to this Court's jurisdiction to review the judgment of the court below it on an appeal as of right, just as this case challenges the Ninth Circuit's appellate jurisdiction in the same posture. Accordingly, *Thomsen*'s holding could not cover this case more squarely; if Swisher is right, *Thomsen* is wrong.

Nonetheless, Swisher does not ask this Court to overrule *Thomsen* or argue that *Microsoft* changed its rule. Instead, in the space of one late-breaking paragraph, it attempts to distinguish *Thomsen* in three different ways. Each of these distinctions is nonsensical.

First, Swisher says this case is different because, unlike the plaintiffs in *Thomsen*, Trendsettah "*did* consent to a judgment against it." Pet. 31 (Swisher's emphasis). But that's exactly what the defendants argued in *Thomsen* after the plaintiffs followed a virtually identical procedure, and this Court's answer was that consenting to a final judgment against oneself "*instead of* [*an*] *interlocutory* [*one*]" did not prevent the plaintiffs from appealing the decision to disturb the judgment against them in the first place. In any event, everyone understood below that, just like in *Thomsen*, Trendsettah requested the final judgment against itself only to forego another trial, and in no way asked to surrender the original verdict it already won. Indeed, the district court *recorded* the limited nature of Trendsettah's "consent to a judgment against it" in the judgment itself, noting that Trendsettah still contested the merits of the district court's decision disturbing the verdict and would appeal it. *See supra* p.9. Apart from Swisher's magical thinking, it is self-evident that Trendsettah was asking to do *exactly* what the *Thomsen* plaintiffs did.

Second, Swisher says that *Thomsen* is different because, "unlike" in *Thomsen*, "the district court's Rule 60 order did not hold that the case [Trendsettah] had presented to the jury failed as a matter of law." Pet. 31. But Swisher does not even try to give a reason why that would matter, and none is apparent. What matters is that the court that disturbed the plaintiffs'

verdict in both cases entered only an interlocutory judgment against them, and the plaintiffs asked for the harsher result of a final judgment instead so that they could forego another trial and take their appeal. On its face, the underlying reason why the court disturbed the verdict is no more relevant than the name of the judge who decided the case or the weekday on which it came down.

Third, and finally, Swisher says *Thomsen* was different because "the district court's Rule 60 order did not require a new trial simply to allow [Trendsettah] to produce additional evidence under a newly articulated legal standard." Pet. 31. With respect, we cannot even comprehend why that would matter, and Swisher makes no effort to explain its logic. Suffice it to say that this Court did not rely on that fact in any way in *Thomsen* itself, nor even mention it when it reaffirmed *Thomsen*'s holding in *Procter & Gamble*, 356 U.S. at 681.

These three non-distinctions are all Swisher offers to address the problem that its argument is in the teeth of a binding precedent from this Court that it does not ask this Court to reconsider. That suffices to deny the petition on its own; the question this case actually presents has already been answered.

Thomsen is not petitioner's only problem, however. There is also the uncomfortable reality that the judgment here is the most final judgment imaginable. As the Ninth Circuit pointed out, the procedural posture here means that the district court's work is done no matter what. *See supra* pp.10-11. Because there was already a verdict in plaintiff's favor, there were only two possible outcomes from the appeal: (1) a final win for Trendsettah through reinstatement, or (2) a

final win for Swisher if the Rule 60 order were affirmed, since Trendsettah's abandonment of a second trial would have been conclusive. Swisher's own argument on the merits is that "finality is to be given a practical rather than a technical construction." Pet. 23 (quoting *Microsoft*, 137 S. Ct. at 1712). From the standpoint of practical finality, it is hard to imagine a case that better avoids the risk of piecemeal appeals than what was presented here—a case-ending outcome no matter which side won the appeal.[1]

Indeed, this judgment is far *more* final than a normal final judgment. In the typical case—like one arising from a dismissal or adverse verdict—one side has prevailed while the other was derailed somewhere along the way to proving its case. And in such indisputably final cases, the typical result of a successful appeal is a remand to the district court for further proceedings; the appellant rarely wins outright. From that baseline, it is impossible to fault a procedure that allows parties like Trendsettah—who have lost fully finalized verdicts in their favor under Rule 60—to abandon their right to a retrial in favor of an appeal that will instantly and forever settle the parties' dispute.[2]

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[1] Swisher also argues that allowing Trendsettah's procedure undermines 28 U.S.C. §1292(b)'s discretionary interlocutory appeal. But §1292(b) is available in every case, and so if that mattered, the entire collateral order doctrine would need to be jettisoned.

[2] Swisher's struggle to hypothesize a scenario in which the district court *might* have work left to do in a case like this one is telling. *See* Pet. 24 (speculating that Swisher could in theory have asked for further discovery on its Rule 60 motion, which the appeals court might have permitted even after finding against it on the merits). And Swisher ignores that, even in that rare and

Swisher's only answer is that this question should not be answered "under the facts of a particular case" but rather "across *all classes* of cases." Pet. 24 (emphasis added). That would be truly weird. Typically, this Court spends its time distinguishing classes of cases from each other based on their material differences. And that is exactly what it will be able to do for different classes of cases raising the issues Swisher is trying to press here if it wisely allows those cases to percolate and avoids granting a radically overbroad question presented like the one Swisher has framed here. *See infra* pp.22-25.

In any event, the relevant "class of cases" here is one where the appellant foregoes a retrial after having a final judgment in its favor disturbed under Rule 60. And in every such case, the adverse judgment that results from the appellant's voluntary surrender will be as final as any judgment could be—an up or down vote from the court of appeals on who wins.[3] In the only case close to this one that Swisher cites, its argument was wholly rejected. *See supra* pp.16-19 (discussing *Thomsen*). And the closest cases in the courts of

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unlikely hypothetical, the result would be the same remand that occurs in a typical appeal. In fact, this argument cuts *against* Swisher, because the additional discovery on the Rule 60 issues that it hypothesizes *would not be developed anyway* in a retrial on the merits—so a rule requiring that retrial creates even *more* work for the district court and court of appeals.

[3] Swisher contends that this strategy is impermissibly "one-sided" because "plaintiffs alone" can pursue it. Pet. 28. But that's not true—a defendant who wins a jury trial only to have its verdict vacated under Rule 60 could likewise concede to the full judgment the plaintiff seeks and place all of its eggs in the basket of successfully overturning the Rule 60 order. And in that scenario, too, the appeal will equally end the case.

appeals—which Swisher does not even cite—come out the same way. *See infra* p.26. Certiorari should accordingly be denied.

II. The Question Presented Is Poorly Framed.

While petitioner's alleged circuit split is dissected in greater detail below, it is helpful to first flag the dangerous breadth at which petitioner needs to frame that question in order to even allege a split. The problem—which should gravely concern this Court—is that petitioner's question is so far abstracted from this case that it could undermine a host of doctrines that this Court cannot anticipate because Swisher does not even acknowledge they exist.

Swisher's question presented is whether appellate jurisdiction disappears "when a plaintiff voluntarily dismisses its claims with prejudice in order to obtain review of an interlocutory ruling." Pet. i. And we know the answer to that question cannot be more precise than "sometimes," because that question describes both *Thomsen* and *Microsoft*—as well as a host of other procedural postures that come out in different ways. Such an imprecise question cannot be given any kind of precise answer and is poorly suited for this Court's review because this Court cannot safely anticipate the consequences of its decision and the lower courts cannot accurately parse the holding from the case's fact pattern.

To see this, consider the following, relatively quotidian practices that Swisher does not even acknowledge, even though its overbroad question presented haphazardly calls them into question:

(1) A party voluntarily dismisses with prejudice after what it reasonably regards as a "case-dispositive

interlocutory ruling" against it, and appeals. *See LeFande v. District of Columbia*, 841 F.3d 485, 490-93 (D.C. Cir. 2016) (Tatel, J., joined by Kavanaugh, J.) (finding appeal was of final order and permitted by Article III).

(2) A party stipulates to summary judgment of non-infringement after receiving an unfavorable patent claim construction and appeals. *See Taylor Brands LLC v. GB II Corp.*, 627 F.3d 874 (Fed. Cir. 2010) (permitting this approach).

(3) After losing a motion to suppress, a defendant stipulates to the facts the government intends to offer, which suffice to convict, and appeals. *See United States v. Larson*, 302 F.3d 1016, 1020 (9th Cir. 2002) (describing and approving procedure).

(4) A party loses its core claims at summary judgment and voluntarily dismisses its remaining claims with prejudice so as to appeal the issues decided against it. *See, e.g.*, *Trevino-Barton v. Pittsburgh Nat'l Bank*, 919 F.2d 874, 877-78 (3d Cir. 1990); *Volvo Constr. Equip. N. Am., Inc. v. CLM Equip. Co.*, 386 F.3d 581, 591 n.9 (4th Cir. 2004) (both approving appeal).

(5) The district court outlines a relevant antitrust market on summary judgment, and the plaintiff believes it cannot prove a violation on the merits under that market definition. It thus voluntarily dismisses and appeals. *See Raceway Props., Inc. v. Emprise Corp.*, 613 F.2d 656 (6th Cir. 1980) (per curiam).

(6) A plaintiff is subjected to a sanctions order excluding evidence that it believes is necessary to prove its case. It thus stipulates to dismissal with

prejudice and appeals the sanction. *See OFS Fitel, LLC v. Epstein, Becker & Green, P.C.*, 549 F.3d 1344, 1358 (11th Cir. 2008).

(7) A plaintiff's case is removed to federal court, and the plaintiff believes federal jurisdiction is lacking. The district court disagrees. To avoid prosecuting a case to a judgment the plaintiff *himself* believes must eventually be struck down, the plaintiff voluntarily dismisses and appeals the order denying remand. *See Martin v. Franklin Cap. Corp.*, 251 F.3d 1284 (10th Cir. 2001), *abrogated on other grounds by Dart Cherokee Basin Operating Co. v. Owens*, 574 U.S. 81 (2014).

Of course, this list is not remotely exhaustive of the kinds of practices that Swisher's theory calls into question. Nor is it obvious that the outcome must necessarily be the same in every one of these scenarios. But the important point is that Swisher has presented a question to this Court that is so wildly overbroad that even Swisher itself seems oblivious to the consequences of the answer it seeks. As we discuss in greater detail below, many of the cases above are approvals of appeals after voluntary or stipulated dismissals in circuits that Swisher claims are on its side of the alleged circuit split. This means Swisher either failed to tell this Court that the courts of appeal are in fact internally inconsistent on the question Swisher purports to present, or that this question presented is so unwieldly that even Swisher couldn't determine what the circuits' positions really are. Neither possibility is attractive.

A proper guide to the disposition of this petition is provided by the careful decision of the D.C. Circuit in *LeFande*, 841 F.3d at 490-93. That decision—written

by Judge Tatel and joined by then-Judge Kavanaugh—explicitly notes that voluntary dismissal with prejudice may or may not result in appealable final judgments within the court's Article III jurisdiction depending on different aspects of the case. It then holds that the appeal there *was* appropriate insofar as the "voluntary dismissal with prejudice … served solely as a means to facilitate immediate review of a case-dispositive interlocutory ruling." *Id.* at 492. And, as the opinion carefully explains, that fact pattern does "not implicate[]" the "broader question whether Article III appellate jurisdiction exists over *all* voluntary dismissals with prejudice," *id.* at 493 (court's emphasis)—which is precisely the "broader question" Swisher seeks to present here so that it can conjure its illusory circuit splits.

This Court carefully guards against premature grants of certiorari because waiting for parallel and appropriately narrow fact-patterns to emerge in the courts of appeals ensures that the question presented is properly framed and that this Court can provide a clear and helpful answer that does not create unforeseen consequences. Swisher's question presented does the opposite and should be rejected.

III. There Is Nothing Resembling a Circuit Split on the Question Swisher Presents.

Before addressing the individual circuits, it is important to flag a critical, global point. The main failure of Swisher's alleged circuit conflict(s) is that Swisher does not cite even one case, in any court, that arises from a situation where the appellant already held a verdict in its favor, let alone a final judgment disturbed under Rule 60. By far the closest case that

Swisher cites is *Thomsen*, where this Court fully rejected its position.

Meanwhile, the only appellate cases that are in the same universe that we have uncovered are three instances—utterly ignored by Swisher—where a plaintiff faced an adverse new trial order and solicited entry of a final judgment against itself instead so it could immediately appeal. In two of those, circuits that Swisher places on its side of the "splits" it purports to identify found that appellate jurisdiction *was proper* after the plaintiff solicited an adverse J.N.O.V. order to avoid a previously ordered retrial. *See Nat'l Polymer Prods., Inc. v. Borg-Warner Corp.*, 660 F.2d 171, 176-77 (6th Cir. 1981); *Deas v. PACCAR, Inc.*, 775 F.2d 1498, 1502-03 (11th Cir. 1985). And in the third case, another circuit that Swisher counts in its favor similarly allowed a plaintiff to appeal an adverse order setting aside a judgment after the appellant voluntarily refused to prosecute a retrial. *See Bethel v. McAllister Bros.*, 81 F.3d 376, 382 (3d Cir. 1996).

This is not a conflict at all, let alone one that merits review. All the closest cases—in the courts of appeals and in this Court—are in perfect agreement, and there is no evidence that any other court would have reached a different result in *this* case. That is all that matters.

A. The Fourth Circuit

Swisher says the Fourth Circuit has taken its side of its question presented both as a matter of finality (Pet. 12, citing *Keena v. Groupon, Inc.*, 886 F.3d 360, 361 (4th Cir. 2018) and Article III (Pet. 19-20, citing *Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88 (4th Cir. 2011)). Suggesting a split using these

citations is laughable. *Keena* found a lack of finality after a plaintiff used voluntary dismissal to appeal an order compelling arbitration—which is *the exact same rule* that the Ninth Circuit adopted in *Langere* and confirmed in the decision below. *See* Pet. App. 14a-15a. And *Rhodes* rejected a plaintiff's effort to appeal a class-certification order after a voluntary dismissal, *see* Pet. 19-20. That is the same result from *Microsoft*, which the Ninth Circuit wholeheartedly endorsed below. *See* Pet. App. 13a-14a.

Swisher's real argument seems to be that the Ninth Circuit's own holdings are internally inconsistent. But that is a terrible argument for certiorari because it recommends allowing the Ninth Circuit to sort out its case law itself. This explains why Swisher cited *Langere* and related cases countless times below but fails to forthrightly acknowledge the *agreement* between the Fourth and Ninth Circuits here. *See* Pet. C.A. Br. iv, 28 (citing *Langere* "*passim*").

Meanwhile, given the breadth with which Swisher has articulated its question presented, the Fourth Circuit is clearly on *both* sides. Prior to *Microsoft*, the Fourth Circuit permitted parties to voluntarily dismiss claims and obtain a final judgment against themselves in order to challenge prior interlocutory decisions dismissing other claims. *See Volvo*, 386 F.3d at 591 & n.9. And it has similarly approved of voluntary dismissals as a way of creating appealable final judgments in some circumstances since. *See Affinity Living Grp., LLC v. StarStone Specialty Ins. Co.*, 959 F.3d 634, 639 (4th Cir. 2020) ("In this context, the voluntary dismissal without prejudice … created a final judgment.").

B. The Second Circuit

Swisher counts the Second Circuit on its side of the alleged disagreement based on another arbitration case—this one unpublished. *See* Pet. 15 (citing *Bynum v. Maplebear Inc.*, 698 F. App'x 23, 23 (2d Cir. 2017)). Again, the Ninth Circuit agrees. And, again, the Second Circuit can be counted on both sides of the question presented given Swisher's overbroad formulation. *See, e.g.*, *Ali v. Fed. Ins. Co.*, 719 F.3d 83, 88-90 (2d Cir. 2013) (permitting appeal after party agreed to dismissal of claims with prejudice that it believed were doomed by prior interlocutory decision).

C. The Federal Circuit

Claiming that the Federal Circuit has taken its side of the question on finality grounds, Swisher invokes *Princeton Digital Image Corp. v. Office Depot Inc.*, 913 F.3d 1342 (Fed. Cir. 2019)). But Swisher's own summary of *Princeton Digital* makes clear that it is far afield from this case. *See* Pet. 13-14. *Princeton Digital* involved a convoluted fact pattern where an intervenor sought judgment against itself to appeal an interlocutory decision about the *potential* recovery of attorney's fees on that very claim if they *later* prevailed. In contrast to the virtual guarantee against a piecemeal appeal that the Ninth Circuit emphasized here, *see* Pet. App. 15a, this cart-before-horse approach to an interlocutory fee-liability decision maximized the odds of unnecessary, seriatim appeals. There is accordingly nothing surprising about these different results.

Indeed, it is notable that fee liability is just like class certification and compelled arbitration, in that it "in no way touches the merits" and getting an

appellate reversal on potential fee liability for a particular claim thus would not revive that claim on the merits. In contrast, a reversal on a Rule 60 decision would revive a verdict the plaintiff already won on the merits, even if it lost on retrial. This distinction—which Justice Thomas emphasized in *Microsoft* itself—likewise makes the different outcome in *Princeton Digital* utterly unremarkable.

Finally, the Federal Circuit is just one more circuit that finds itself straddling both sides of Swisher's ill-formulated question. A*s Princeton Digital* ***itself*** explains, that court explicitly allows parties to transform an interlocutory order construing their patent claims into a final decision against themselves by voluntarily stipulating that "the accused activities are not infringing under the adopted claim construction." *See* 913 F.3d at 1348 (citing *Taylor Brands*, 627 F.3d at 877). The Federal Circuit thus has nothing resembling the bright line rule against appeal after voluntary dismissal that Swisher suggests.

D. The Sixth Circuit

The Sixth Circuit is also a terrible friend to Swisher, for similar reasons. The case Swisher cites, *Board of Trustees of Plumbers, Pipe Fitters & Mechanical Equipment Service, Local Union No. 392 v. Humbert*, 884 F.3d 624 (6th Cir. 2018), found finality lacking because, despite the parties' nominal stipulation, they had in fact preserved their ability to litigate the exact issues they purported to stipulate to facilitate an appeal. That rationale is wholly inapplicable here. And Swisher omits that, after *Humbert*, the Sixth Circuit distinguished it in a careful opinion reaffirming its *Raceway* doctrine, which identifies instances when plaintiffs *can* use voluntary dismissals to create

appealable final judgments after interlocutory decisions against them. *See Innovation Ventures, LLC v. Custom Nutrition Lab'ys, LLC*, 912 F.3d 316, 327-32 (6th Cir. 2018); *supra* p.23 (describing *Raceway*). The Sixth Circuit is also one of the courts that has permitted a plaintiff to immediately appeal a new trial order by soliciting a J.N.O.V. order against itself instead. *See supra* p.26. So this is just one more court that has never endorsed an outcome remotely like the one Swisher seeks in this case, and whose own doctrine becomes incoherent under Swisher's jury-rigged question presented.

E. The D.C. Circuit

The same goes for the D.C. Circuit. Indeed, as explained above, that court has rejected not only the rule that Swisher essays (under both finality and Article III), but also the broader effort Swisher makes to lump all these disparate voluntary-dismissal cases together as presenting a single "broader question." *See supra* pp.22-23, 24-25 (discussing *LeFande*). Counting the D.C. Circuit against the Ninth Circuit in a "lopsided" circuit split on a *question* the D.C. Circuit has rejected as ill-framed is legal dadaism.

F. The Third Circuit

Swisher claims support from the Third Circuit, on both finality and Article III grounds, based on its decision in *Camesi v. University of Pittsburgh Medical Center*, 729 F.3d 239 (3d Cir. 2013). Once again, this is revealingly mistaken. *Camesi* is directly parallel to *Microsoft* itself; the only difference is that the interlocutory order that preceded voluntary dismissal there was seeking an FLSA collective action rather than a Rule 23 class action. This is, yet again, a non-merits

determination that would not affect an adverse merits judgment if reversed on appeal. And given the close parallel to *Microsoft*, there is every reason to believe the Ninth Circuit would decide it the same way it did *Langere* and *Sperring*.

Moreover, and *yet again*, the Third Circuit finds itself on both sides of Swisher's bafflingly broad question. Indeed, it is one of the three circuits that has confronted the question of acceding to judgment as a way of avoiding a retrial and found appellate jurisdiction proper. *See supra* p.26. So it is in far closer agreement with the Ninth Circuit than it is with Swisher.

G. The Eleventh Circuit

Unsurprisingly, the pattern repeats with the Eleventh Circuit, too. In *Druhan v. American Mutual Life*, 166 F.3d 1324 (11th Cir. 1999), the interlocutory order the plaintiff sought to appeal was, again, not merits related. *See id.* at 1325. And, worse, Swisher omits that the Eleventh Circuit explicitly distinguished *Druhan* in a later case permitting appeal after voluntary dismissal. *See supra* pp.23-24 (discussing *OFS Fitel*). Moreover, the Eleventh Circuit is yet another of the three courts to find jurisdiction in the J.N.O.V. context identified above. *See supra* p.26. So it, too, cannot possibly belong opposite the Ninth Circuit in any kind of split.

H. The Seventh Circuit

By its own admission, Swisher's final case involves an appeal of two obviously non-merits-related interlocutory orders by a *pro se* plaintiff in a facially "meritless" case. Pet. 20 (describing *Lush v. Bd. of Trs. of N. Ill. Univ.*, 29 F.4th 377 (7th Cir. 2022)). This would not merit a response even if the Seventh Circuit were

not *again* on both sides of Swisher's question presented. But, of course, it is. *See Fairley v. Andrews*, 578 F.3d 518, 521-22 (7th Cir. 2009) (Easterbrook, J.) (permitting appeal of order excluding evidence after appellant's subsequent consent to adverse judgment against itself). In Judge Easterbrook's words, "a party who asks for a final judgment in order to appeal an antecedent ruling is entitled to contest the merits of that issue on appeal." *Id.* at 522. That is exactly what Trendsettah did here, and exactly what the Ninth Circuit approved.

IV. This Case Is a Bad Vehicle for Considering the Issues Swisher Raises.

Finally, even if one rejects all of the foregoing and assumes there is some certworthy question lurking somewhere in this petition, this case remains a terrible vehicle for two reasons.

First, the parties and lower courts *agree* here that this case was utterly final from a practical perspective—the district court's work was done after appeal either way. And the judgment, entered only with the district court's permission, *explicitly recorded* Trendsettah's continued disagreement with and intent to appeal the logically antecedent, adverse ruling that prompted appellant's voluntary surrender. *See supra* pp.9, 18. Those special facts make Swisher's protestations that finality or Article III adversity were lacking here semantic *at best*, and make this an absurd vehicle for considering the very different scenarios in the other cases Swisher cites (and fails to cite, *see supra* pp.22-24).

Second, the Rule 60 scenario presented here is not only unusually final, but unusual period. Rule 60

relief itself is rare, and Swisher has not identified even *one* other case raising its question presented where Rule 60 relief was involved. Orders setting aside already final judgments obviously raise unique arguments. So if Swisher's question were worth considering (which it is not), it would still be far better to consider it in a posture that was likely to repeat more than once in a generation.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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