No. 23-267

In the Supreme Court of the United States

MARILYN WILLIAMS, PETITIONER

v.

BOEHRINGER INGELHEIM PHARMACEUTICALS, INC., ET AL., RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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The respondents attempt to defeat certiorari by playing down a deep circuit split and claiming that vehicle problems counsel in favor of denial. None of their arguments have merit.

I. THE RESPONDENTS' ASSERTION THAT THE DISTRICT COURT NEVER DISMISSED ANY OF MS. WILLIAMS'S CLAIMS IS FALSE

The respondents' first argument against certiorari is to say that the district court never dismissed *any* of Ms. Williams's claims, because (according to the respondents) the district court dismissed only claims in the "master" complaint, not Ms. Williams's "short-form" pleading. Opp. at 12–15.

This argument belies the district court's orders and is an affront to Article III. The district court dismissed the *plaintiffs'* design-defect claims when it held them preempted and ordered them dismissed with prejudice.[1] The master complaint serves as a template of allegations and claims that individual plaintiffs, such as Ms. Williams, incorporated into their operative pleading. The master complaint itself does not name *a single* plaintiff. By dismissing the incorporated design-defect claim in the master complaint, the district court necessarily dismissed Ms. Williams's design-defect claim.

This ineluctable conclusion does not rest on interpreting MDL orders. It would be impossible, consistent with Article III, for the district court to abstractly dismiss

1. App. 31 ("The Court ruled that both *design-defect and labeling claims were preempted* because drug retailers and distributors have no ability to alter drug design or labeling." (emphasis added)); App. 87 ("The Defendants contend in the Motion to Dismiss that *the design-defect claims* against them are preempted" (emphasis added)); App. 115 ("*[A]ll of the Plaintiffs' state-law claims* against the Defendants are pre-empted to the extent those claims are premised upon the adequacy of OTC ranitidine products' design or label and are limited to injuries stemming from the purchase of ranitidine." (emphasis added)); App. 136 ("The Court concludes that *all of the Plaintiffs' state-law claims* against the Defendants are preempted by federal law and, as a result, are dismissed. *Without a state-law claim to support it*, the Plaintiffs' sole federal claim is dismissed as well." (emphasis added)); App. 157 ("The Defendants' first point [is that] *any state-law claim based upon a faulty label* is preempted" (emphasis added)); App. 158 ("[T]he defendants' second point [is that] any claim based upon drug design is preempted" (emphasis added)); App. 161 ("The Defendants have no ability to alter a label or alter a drug's design; thus, *claims against them premised on labeling and design* are preempted.").

claims only from the master complaint, as opposed to the claims of an actual litigant. That would be an unlawful advisory opinion that binds *no* plaintiff whatsoever. The district court was crystal clear that its ruling was binding rather than advisory, holding that "all of the plaintiffs'" design-defect claims were dismissed with prejudice and without leave to replead. App. 115. Once the design-defect allegations in the master complaint are dismissed with prejudice and without leave to replead, the individual design-defect claims of *every* plaintiff who incorporated them verbatim are dismissed with prejudice as well.

The respondents present no argument to the contrary, and they make no attempt to explain how Ms. Williams's incorporated design-defect claim could survive the with-prejudice dismissal of that same claim in the master complaint. Instead, they silently shift between claims and *actions,* relying on passages in the court of appeals' opinion that say: "The district court did not dismiss any individual SFCs [short-form complaints],[2] and "there is no final order from the district court on Ms. Williams' design defect claim."[3] The first of these statements is a mere observation that the district court did not dismiss Ms. Williams's action by entirely dismissing her complaint. Pet. App. 6 ("The district court did not dismiss any individual SFCs.").

Ms. Williams whole-heartedly agrees with this point. The district court did not dismiss the short form complaint; Ms. Williams did by operation of Rule 41. Indeed, *every instance* where the split of authority implicated by

2. Pet. App. 6.

3. Pet. App. 1.

the question presented is posed will involve a situation where the district court's dismissal order did not dismiss the entire action.[4]

The court of appeals did conclude that, on these facts, "there is no final order from the district court on Ms. Williams' design defect claim." Pet. App. 1. That simply states the disputed legal conclusion that 28 U.S.C. § 1291's finality requirement was not met. But Ms. Williams's straightforward point is that it would have been met under the holdings of other courts of appeals. The respondents have merely identified the court of appeal's square presentation of the relevant split of authority, not a vehicle problem that counsels in favor of years more delay before resolving the division.

The respondents also suggest that the district court's opinions refute Ms. Williams's contention that the district court "dismissed" her design-defect claim when it dismissed claims in the master complaint. Opp. at 14 (citing MDL Dkt. 3913 at 5–6, MDL Dkt. 6303 at 8–9, and MDL Dkt. 6622 at 12–13). None of these opinions say anything of the sort; they say only that the dismissal of the master complaint did not dismiss an individual plaintiff's *entire case*. *See* MDL Dkt. 3913 at 5 ("It was therefore the Court's intent that, at the proper time and upon proper motion, the Court could enter a final order of dismissal or a final judgment *in an individual case*." (emphasis added)); MDL Dkt. 6303 at 8–9 ("What is clear from the Eleventh Circuit's discussion . . . is that if an individual

4. If the district court had dismissed Ms. Williams's entire action, then the appellate jurisdiction of the Eleventh Circuit would have been indisputably secure. *See* 28 U.S.C. § 1291.

case is to be dismissed or to receive final judgment, a Defendant must move for dismissal of the case or for entry of final judgment." (emphasis added)); MDL Dkt. 6622 at 13 (same). To repeat the obvious, Ms. Williams is *not* contending (and has never asserted) that the district court dismissed her entire individual case; otherwise there would have been no need for her to voluntarily dismiss her *action* under Rule 41(a)(1)(A)(i). *See* Fed. R. Civ. P. 41(a)(1)(A) ("[T]he plaintiff may dismiss an *action* without a court order by filing (i) a notice of dismissal . . ." (emphasis added)). None of this requires any "interpretation" of court orders, as neither the district court nor the Eleventh Circuit ever denied that the dismissal of the design-defect claim in the master complaint dismissed Ms. Williams's incorporation of that same design-defect claim with prejudice.

The respondents want to scare the Court from taking this case by exaggerating the complexity of the MDL proceedings and sowing confusion over the relationship between the master and short-form complaints. Opp. at 3 (claiming that the decision below "turned on . . . interpretation of complex, case-specific orders"). But the procedural history of this case is simple and straightforward: Ms. Williams had her design-defect claim dismissed with prejudice when the district court rejected the allegations in the master complaint, and she seeks to appeal that decision by voluntarily relinquishing her remaining claims. Her situation is no different from a litigant who appeals a district court's partial-dismissal order outside the MDL context by abandoning her remaining claims and then

filing a notice of appeal. The MDL proceedings are no reason to deny certiorari.

The simplest proof is as follows: because Ms. Williams's entire *action* has been dismissed, even the respondents admit she would have been given audience on the merits in the Fourth and Eighth Circuits. Opp. at 18 n.2; Opp. at 21–23; *GO Computer, Inc. v. Microsoft Corp.*, 508 F.3d 170 (4th Cir. 2007); *Chrysler Motors Corp. v. Thomas Auto Co.*, 939 F.2d 538, 540 (8th Cir. 1991). None of the procedural distractions respondents pose about the supposed complexity of MDLs would factor into those circuits' jurisdictional calculi. That shows *per force* that this Court can similarly resolve the intractable divisions between the courts of appeals on the meaning of Section 1291's statutory text.

II. THE COURTS OF APPEALS ARE DIVIDED ON WHEN A RULE 41(a) DISMISSAL SHOULD ALLOW A PLAINTIFF TO APPEAL AN EARLIER PARTIAL-DISMISSAL RULING

The respondents never deny the existence of a circuit split, but they disparage the admitted division as "superficial," "unimportant," "mostly illusory," and "rarely dispositive." Opp. at 15–16. But we will begin with the issue on which we agree: The courts of appeals *are* divided on the circumstances in which a Rule 41(a) dismissal creates an appealable final judgment under 28 U.S.C. § 1291 that allows a plaintiff to appeal a district court's prior partial-dismissal order.

The respondents admit (as they must) that the law of the Eighth Circuit allows *all* voluntary dismissals under Rule 41(a) to convert a previously interlocutory partial-

dismissal order into an appealable "final decision." Opp. at 21–23; *see also Chrysler Motors Corp. v. Thomas Auto Co.*, 939 F.2d 538, 540 (8th Cir. 1991). The respondents try to downplay the significance of this split with the Eleventh Circuit by observing that the Eighth Circuit will often reverse a district court's Rule 41(a)(2) order on the *merits* if it suspects that the district court is allowing Rule 41(a) to "'frustrate[] the limitations on federal appellate jurisdiction.'" Opp. at 21 (quoting *Great Rivers Cooperative of Southeastern Iowa v. Farmland Industries, Inc.*, 198 F.3d 685, 689 (8th Cir. 1999)). But that does nothing to refute or mitigate the split on the *jurisdictional* issue that Ms. Williams is asserting, which turns solely on whether a Rule 41(a) dismissal in response to a partial-dismissal order creates an appealable "final decision" within the meaning of 28 U.S.C. § 1291.

Neither does the respondents' citation of *In re Municipal Stormwater Pond Coordinated Litigation*, 73 F.4th 975 (8th Cir. 2023), which holds only that a *conditional* Rule 41(a)(1) dismissal is incapable of creating an appealable final decision. *See id.* at 978 (explaining that the plaintiffs had "conditionally dismissed" their claims that survived the district court's partial-dismissal order, which would allow them to "reinstate" those claims on remand if the appellate court were to reverse the district court's dismissal of the other claims); *id.* at 979 (criticizing this tactic because "a conditional dismissal effectively leaves claims pending in the district court, and allows the plaintiff to avoid the usual consequences of a dismissal."). Ms. Williams dismissed her remaining claims *unconditionally*, as she expressly renounced all of her non-design-defect

claims in her amended short-form complaint. Pet. at 6–7 n.6. And *Municipal Stormwater* reaffirms that a plaintiff *may* create a final decision by unconditionally dismissing its remaining claims in response to a partial-dismissal order. *See Municipal Stormwater*, 73 F.4th at 979 ("[A] plaintiff may create a final decision on the dismissal of claims against one defendant by unconditionally dismissing claims against a second defendant."). So the circuit split is real, as the Eighth Circuit would have asserted jurisdiction over Ms. Williams's appeal and held that her unconditional dismissal of her remaining claims would have converted the district court's with-prejudice dismissal of her design-defect claims into a "final decision" under 28 U.S.C. § 1291. The respondents do not refute any of this.

Nor do the respondents refute Ms. Williams's claim that the Fourth Circuit would have asserted jurisdiction over her appeal. The respondents tout *Waugh Chapel South LLC v. United Food and Commercial Workers Union Local 27*, 728 F.3d 354 (4th Cir. 2013), but the plaintiffs in *Waugh Chapel* (like those in *Municipal Stormwater*) responded to a district court's partial-dismissal order by dismissing their remaining claims conditionally rather than unconditionally:

> [A]fter the district court dismissed WCS's Count I and most of Count II with prejudice, ELG and the unions entered into a consent order, which purported to dismiss the remainder of Count II of the complaint "with prejudice, but without prejudice to refiling in any other proceeding."

Id. at 359. Ms. Williams renounced her non-design-defect claims unconditionally, so her situation would be covered by the holding of *GO Computer, Inc. v. Microsoft Corp.*, 508 F.3d 170 (4th Cir. 2007). The respondents themselves admit that *GO Computer* allows the Fourth Circuit to assert jurisdiction when a plaintiff appeals a partial dismissal-with-prejudice order and "'promises never to raise'" the remaining claims "'in federal court again.'" Opp. at 18 n.2 (quoting *GO Computer*, 508 F.3d at 176). That is precisely what Ms. Williams has done. Pet. at 6–7 n.6. Both the Fourth Circuit and the Eighth Circuit would have asserted jurisdiction over Ms. Williams's appeal under 28 U.S.C. § 1291, so the circuit split is real and squarely implicated by Ms. Williams's petition.

The Second, Third, Sixth, and Seventh Circuits would have heard Ms. Williams's appeal as well. The respondents admit that all of these circuits would assert jurisdiction over an appeal from a partial-dismissal order if the appellant "cannot revive the abandoned claims." Opp. at 17. And the respondents do not deny that Ms. Williams made a binding renunciation of the non-design-defect claims that she abandoned in the district court. Pet. at 6–7 n.6. So all four of those appellate courts would have held that Ms. Williams had appealed a "final decision" under 28 U.S.C. § 1291, contrary to the Eleventh Circuit's holding below. The respondents deny this only by reiterating their false claim that the district court never actually "dismissed" Ms. Williams's design-defect claim. Opp. at 26–27.

The respondents suggest that the Eleventh Circuit has established "the most plaintiff-friendly approach"

because it will *always* allow a court-approved voluntary dismissal under Rule 41(a)(2) to confer finality and permit appeal of an earlier partial-dismissal order. Opp. at 23 (citing *Corley v. Long-Lewis, Inc.*, 965 F.3d 1222, 1229 (11th Cir. 2020)). But that is not at all friendly to Ms. Williams, who dismissed her claims unilaterally under Rule 41(a)(1), and the decision below distinguished *Corley* on this ground without providing a reason why unilateral dismissals under Rule 41(a)(1) should be treated differently from court-approved dismissals under Rule 41(a)(2). Pet. App. 13–14.

The Eleventh Circuit's indulgence toward plaintiffs who appeal from court-approved Rule 41(a)(2) dismissals is no reason to deny review of Ms. Williams's appeal, which was bounced on jurisdictional grounds because she dismissed her claims unilaterally rather than pursuant to stipulation or court order. App. 13–14. And that is especially true when there is no other circuit (to our knowledge) that allows the meaning of "final decision" in 28 U.S.C. § 1291 to turn on whether a litigant has appealed after unilaterally dismissing its claims under Rule 41(a)(1), rather than obtaining a court-approved dismissal under Rule 41(a)(2). The respondents note that many of the cases cited from other circuits involved court-approved dismissals under Rule 41(a)(2) rather than unilateral dismissals under Rule 41(a)(1),[5] but none of the decisions from other circuits hold or even suggest that the outcome would have differed had the appellant unilaterally

5. Opp. at 27 ("[T]he vast majority of the cases Petitioner cites reviewed dismissal orders under Rule 41(a)(2), while Petitioner unilaterally dismissed her claim under Rule 41(a)(1)").

dismissed under Rule 41(a)(1). So the Eleventh Circuit's distinction is not only arbitrary, atextual, and unexplained, it is also an outlier among the circuits, which only amplifies the need for this Court to step in and resolve the issue once and for all.

Perhaps the respondents' most outlandish argument against certiorari is their suggestion that this Court should leave litigants "to learn and follow" the "rules of the circuit in which [their] suit is pending." Opp. at 24. The principal function of this Court's certiorari jurisdiction is to remove disharmony from the circuit courts, especially when it comes to interpreting a federal statute such as 28 U.S.C. § 1291. It is unacceptable for an Act of Congress to have different meanings depending on where a case is being litigated, and the idea that this Court should leave divergent interpretations in place because litigants can be expected to research and discern the idiosyncrasies of their circuit would mean that this Court should never grant certiorari to resolve a circuit split.

III. THE FALSE CONTENTION THAT MS. WILLIAMS WILL LOSE ON THE MERITS IS NO REASON TO DENY REVIEW OF HER JURISDICTIONAL ARGUMENTS

The respondents' final argument against certiorari is that Ms. Williams is destined to lose on the merits. Opp. at 3–4; *id.* at 28. Suffice it to say that Ms. Williams emphatically disagrees. But all that matters here is that she seeks the opportunity to make her case on the merits, and the respondents' tendentious prediction of how the merits will unfold says precisely nothing about the cert-worthiness of the jurisdictional question Ms. Williams poses.

Jurisdiction is the power to declare the law, and the presence or absence of jurisdiction is unrelated to whether a litigant has a winning or losing claim on the merits. Where jurisdiction is lacking, a federal court is only empowered to announce that fact and nothing more. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). It follows that the respondents' merits argument cannot possibly present a vehicle problem to resolution of the question presented. This Court, even if it preferred to, could not wade into the merits before addressing the split in authority on the presence or absence of jurisdiction. Granting the petition therefore guarantees that the intractable division across eleven courts of appeals will be resolved. That is hardly the exercise in futility that respondents falsely claim it to be.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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