No. 15- ___

IN THE

Supreme Court of the United States

MICROSOFT CORPORATION,

Petitioner,

v.

SETH BAKER, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal court of appeals has jurisdiction to review an order denying class certification after the named plaintiffs voluntarily dismiss their claims with prejudice.

PARTIES TO THE PROCEEDINGS

The sole petitioner here (defendant below) is Microsoft Corporation.

In addition to the plaintiff-respondent identified on the cover, Jesse Bernstein, Matthew Danzig, James Jarrett, Nathan Marlow, and Mark Risk were also named plaintiffs below. With the exception of Jesse Bernstein, who dismissed his appeal, these individuals are also respondents here.

RULE 29.6 STATEMENT

Microsoft Corporation, a publicly traded company, has no corporate parent, and no publicly held company has an ownership interest of more than ten percent.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Microsoft Corporation respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit in No. 12-35946.

OPINIONS BELOW

The amended opinion of the Ninth Circuit (Pet. App. 1a) is published at 797 F.3d 607. The relevant order of the district court (Pet. App. 35a) is unpublished.

JURISDICTION

The Ninth Circuit issued its initial decision on March 18, 2015. The Ninth Circuit issued an amended opinion, simultaneously denying Microsoft's petition for rehearing en banc, on July 20, 2015. Pet. App. 1a, 5a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, Section 2 of the United States Constitution provides in relevant part: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States," and to certain "controversies."

28 U.S.C. § 1291 provides in relevant part: "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . .."

28 U.S.C. § 1292(e) provides: "The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an

interlocutory decision to the courts of appeals that is not otherwise provided under subsection (a), (b), (c), or (d)."

Federal Rule of Civil Procedure 23(f) provides in relevant part: "A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered."

STATEMENT OF THE CASE

This case presents an important jurisdictional issue concerning class-action procedure that is now the subject of an entrenched circuit split.

1. In 2005, petitioner Microsoft Corporation released the Xbox 360 console. Widely popular with video game enthusiasts, the Xbox 360 became the first console of its generation to sell over ten million units in the United States. Among other things, the Xbox 360 spins game discs in its disc drive faster than its competition, creating "a better overall video-gaming experience." CA9 ER 219.

But like any device, the Xbox 360 has limits. As with turntables that spin vinyl records, the Xbox 360 may scratch discs spinning inside if moved too quickly in the wrong direction during operation. Microsoft therefore affixed a sticker on the front of each disc drive—covering the disc tray before first use—telling users in three languages: "Do not move console with disc in tray." And Microsoft's warranty promises only that, "under normal use and service," the Xbox 360 "will conform to the printed user instruction materials," CA9 ER 544; the user instruction materials in turn warn users to "[r]emove

discs before moving the console or tilting it between the horizontal and vertical positions" to avoid "damaging discs," CA9 ER 106, 273, 278.

In the years since the Xbox 360 went on sale, "only 0.4% of Xbox users have reported disc scratching." Pet. App. 6a.

2. In 2007—five years before this case was filed—seven Xbox 360 owners sued Microsoft in separate lawsuits, alleging "the Xbox optical disc drive is unable to withstand even the smallest of vibrations, and that during normal game playing conditions discs spin out of control and crash into internal components, resulting in scratched discs that are rendered permanently unplayable." Pet. App. 6a. Those plaintiffs sought damages both for game owners whose discs were scratched and for *all* Xbox 360 owners, on the theory that the console's supposed propensity to malfunction reduced the value of *all* Xboxes, thus breaching express and implied warranties.

Five cases were consolidated in the U.S. District Court for the Western District of Washington. After the parties developed a full evidentiary record, including expert testimony, through sixteen months of active discovery, the district court denied class certification. It began by noting that "the defect asserted by the Xbox owners actually manifest[ed] in fewer than one percent of the total number of consoles purchased." Pet. App. 7a (alteration in original; internal quotation marks omitted). The district court then reasoned that the need to consider causation and damages on an individual basis for consoles that allegedly scratched discs "preclude[d] the certification of the class of Xbox owners" and the

scratched-disc subclass. *Id.* 8a (alteration in original; internal quotation marks omitted).

The plaintiffs filed a petition in the Ninth Circuit seeking interlocutory review under Fed. R. Civ. P. 23(f). Rule 23(f) gives federal courts of appeals "unfettered discretion" to "permit an appeal from an order granting or denying class-action certification." Fed. R. Civ. P. 23(f); Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment. They argued the class-certification denial "constitute[d] the 'death knell' for this litigation" because the individual claims were too small to justify litigating on their own to final judgment. Pet. for Permission to Appeal Under Fed. R. Civ. P. 23(f) at 8. The Ninth Circuit denied the petition, CA9 ER 231, and the plaintiffs resolved their individual claims by an agreement with Microsoft. The district court then dismissed the consolidated cases with prejudice.

3. In 2011, the same lawyers as in the original consolidated litigation filed a new lawsuit—again in the U.S. District Court for the Western District of Washington—on behalf of respondents, a handful of Xbox 360 owners who did not sue in 2007. Respondents pressed the same claims as their predecessors and they likewise requested certification of a nationwide console class.[1] They argued the Ninth Circuit's intervening decision in

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[1] Respondents originally sought to certify a scratched-disc subclass as well. But they abandoned the scratched-disc subclass on appeal, Pltfs. CA9 Br. 18-20, recognizing their inability to prove on a classwide basis that the console, as opposed to user behavior, caused any particular disc scratch.

Wolin v. Jaguar Land Rover North America, LLC, 617 F.3d 1168 (9th Cir. 2010)—holding that proof of the manifestation of a defect is not a prerequisite to class certification and the typicality requirement in Fed. R. Civ. P. 23 "can be satisfied despite different factual circumstances surrounding the manifestation of the [alleged] defect," *id.* at 1175—now allowed certification of their proposed classes.

Microsoft replied that *Wolin* did not change the law relevant to this case. As a result, Microsoft maintained, the district court should show comity to the decision in the earlier case, which rested on the same allegations as this one. *See Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2381 (2011) ("[W]e would expect federal courts to apply principles of comity to each other's class certification decisions when addressing a common dispute."). Further, Microsoft explained, *Wolin* does not apply where, as here, only a minuscule fraction of the proposed class suffered any harm in the form of a manifestation of an alleged defect, and individual proof is necessary to determine whether any particular user's warranty was breached.

The district court struck respondents' class allegations. It found the reasoning in the first denial of class certification (by a different judge) persuasive and that "nothing in *Wolin* undermine[d] [that] causation analysis." *Baker v. Microsoft Corp.*, 851 F. Supp. 2d 1274, 1280 (W.D. Wash. 2012).

4. Invoking Fed. R. Civ. P. 23(f), respondents sought immediately to appeal the district court's order striking their class allegations. As in the previous case, respondents' counsel asserted that "[t]he small size of Plaintiffs' claims makes it

economically irrational to bear the cost of litigating this case to final judgment," such that, unless reversed, "the district court's order effectively kills this case." Pet. for Permission to Appeal Under Fed. R. Civ. P. 23(f) at 18.

Relying on its unfettered discretion to grant or deny Rule 23(f) petitions, the Ninth Circuit denied the petition, and remanded the case back to the district court. Pet. App. 10a.

5. Instead of pressing their individual claims, respondents promptly moved on remand to dismiss their claims with prejudice. Respondents explained why they wanted such an order: "After the Court has entered a final judgment, Plaintiffs intend to appeal the Court's March 27, 2012 order (Dkt. 32) striking Plaintiffs' class allegations." Pet. App. 36a.

Microsoft stipulated that the district court could dismiss respondents' claims. Pet. App. 36a. Microsoft made clear, however, that it believed "Plaintiffs will have no right to appeal the Court's Order striking Plaintiffs' class allegations after entry of their requested dismissal." *Id.*

The district court granted the dismissal with prejudice, "reserving to all parties their arguments as to the propriety of any appeal." Pet. App. 36a-37a.

6. The Ninth Circuit assumed jurisdiction over respondents' appeal and reversed. Relying on its holding several months earlier in *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061 (9th Cir. 2014), the court of appeals held that "in the absence of a settlement, a stipulation that leads to a dismissal with prejudice does not destroy the adversity in that judgment necessary to support an appeal" of a class-certification denial. Pet. App. 12a (quoting *Berger*,

741 F.3d at 1064). Microsoft argued at length that *Berger* cannot be squared with this Court's holding in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), and that plaintiffs may not manufacture an immediate appeal by dismissing and thereby showing that a class-certification denial has in fact sounded the "death knell" of their claims. Def. CA9 Br. 4-16. But the Ninth Circuit responded simply that *Berger* controlled, refusing to question that prior holding. Pet. App. 11a-12a.

Turning to the class-certification denial itself, the Ninth Circuit held that the district court "abused its discretion when it struck the class action allegations." Pet. App. 19a. Relying on *Wolin*, the Ninth Circuit held that Rule 23 allows classes to be certified when plaintiffs characterize their claims as turning on "a common factual question—is there a defect?" and on whether that defect breaches a warranty. *Id.* 16a. It does not necessarily make any difference whether "the defect here may never manifest" or if it manifests for different users for different reasons. *Id.* 17a.

At the same time, the Ninth Circuit acknowledged that "Microsoft makes several arguments" besides the one adopted by the district court "to show that certification of this class would violate Federal Rule of Civil Procedure 23." Pet. App. 18a. The Ninth Circuit stressed, therefore, that it was "express[ing] no opinion on whether the specific common issues identified in this case are amenable to adjudication by way of a class action, or whether plaintiffs should prevail on a motion for class certification." *Id.* 19a. Instead, it "suffice[d] for now to hold that . . . the district court misread *Wolin*" and

to remand for further proceedings concerning the viability of respondents' proposed class. *Id.* 18a, 19a.

7. Microsoft sought rehearing en banc. It argued that the Ninth Circuit's rule allowing plaintiffs to create appellate jurisdiction over class-certification denials by voluntarily dismissing their claims not only contravenes this Court's holding in *Livesay* but also conflicts with the law in a majority of the circuits to consider the issue. The court of appeals denied the petition without any judge requesting a vote. Pet. App. 5a.

8. This petition follows.

REASONS FOR GRANTING THE WRIT

In *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), this Court held unanimously that plaintiffs may not force an appellate court to hear an interlocutory appeal from an order denying class certification. This is so, this Court explained, even if the plaintiffs demonstrate that the denial of class certification is the "death knell" of their case—that is, even if the denial effectively ends the litigation because it makes it "economically imprudent [for the plaintiffs] to pursue [the] lawsuit to a final judgment and then seek appellate review of [the] adverse class determination." *Id.* at 469-70.

Since *Livesay*, the courts of appeals have split five-to-two over whether plaintiffs faced with adverse class determinations may evade *Livesay*'s prohibition against mandatory interlocutory appellate review by voluntarily dismissing their claims, thereby purportedly creating an adverse final judgment.

This Court should grant certiorari here to resolve this conflict. The question is immensely important to

the proper administration of the class-action device. Further, this case is a particularly suitable vehicle for considering the question. It showcases the reasons why the voluntary dismissal tactic evades the carefully crafted rules governing appellate jurisdiction in class actions. Finally, the Ninth Circuit's holding that plaintiffs may create appellate jurisdiction through the voluntary dismissal tactic is wrong. The tactic is nothing more than the "death knell" doctrine dressed up in different garb—and it likewise circumvents the prerequisites for appeals contained in 28 U.S.C. § 1291 and Article III.

I. The Federal Courts Of Appeals Are Divided Over Whether Plaintiffs May Appeal An Order Denying Class Certification After Voluntarily Dismissing Their Claims With Prejudice.

As treatises and practice guides recognize, "[c]ourts disagree" on whether plaintiffs seeking to represent a class "may appeal from a judgment entered after a voluntary dismissal with prejudice." HON. A. WALLACE TASHIMA & JAMES M. WAGSTAFFE, FEDERAL CIVIL PROCEDURE BEFORE TRIAL § 16:396 (2015); *see also* THOMAS SMITH & ELIZABETH WILLIAMS, 6 CYCLOPEDIA OF FEDERAL PROCEDURE § 23.46 (3d ed. 2015) (explaining that while some courts allow such appeals of decertification orders, "other courts consider this result untenable, because it allows the putative class representative to evade the policy against piecemeal review by waiving his or her individual claims"). Over half of the circuits have weighed in as follows:

1. Five circuits have held that a court of appeals lacks jurisdiction to review a denial of class

certification where the plaintiffs have voluntarily dismissed their claims with prejudice.

Not long after this Court issued its opinion in *Livesay*, the Tenth Circuit considered whether it had jurisdiction to review a denial of class certification where the plaintiff employed "the simple device of allowing the claim of [the] class representative to be dismissed for lack of prosecution." *Bowe v. First of Denver Mortg. Investors*, 613 F.2d 798, 801 (10th Cir. 1980). The Tenth Circuit held the situation was "governed by the Supreme Court's decision in *Livesay*." *Id.* at 800. The fact that "[t]he 'death knell' has indeed sounded"—as opposed to being merely foretold—does not create a "genuine distinction" from *Livesay* allowing jurisdiction. *Id.* at 800, 802.

The Third, Fourth, and Seventh Circuits have since adopted the same view. Reviewing a case in which the plaintiffs "voluntarily dismiss[ed] all of their claims" "to manufacture finality," the Third Circuit held that such a "procedural sleight-of-hand" does not create appellate jurisdiction. *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 245-47 (3d Cir. 2013). The Fourth Circuit likewise has held that "when a putative class plaintiff voluntarily dismisses the individual claims underlying a request for class certification," a court of appeals "lack[s] jurisdiction to decide the issue whether the district court abused its discretion in denying the plaintiff['s] request for class certification." *Rhodes v. E.I. DuPont de Nemours & Co.*, 636 F.3d 88, 100 (4th Cir.), *cert. denied*, 132 S. Ct. 499 (2011); *see also Himler v. Comprehensive Care Corp.*, 993 F.2d 1537 (4th Cir. 1993) (unpublished opinion) (same). And the Seventh Circuit has held that it "will . . . not review the

district court's refusal to certify a class" when "the plaintiffs requested and were granted a voluntary dismissal of their [] claims." *Chavez v. Illinois State Police*, 251 F.3d 612, 629 (7th Cir. 2001); *see also id.* at 621, 627 (recounting detailed procedural history of case).

The Eleventh Circuit has gone even further, holding that it has "no jurisdiction" whenever a plaintiff "appeal[s] from a final judgment that resulted from a voluntary dismissal with prejudice." *Druhan v. Am. Mut. Life*, 166 F.3d 1324, 1325-26 (11th Cir. 1999). It does not matter whether "[t]he dismissal with prejudice was requested only as a means of establishing finality in the case such that the plaintiff could appeal [an] interlocutory order—an order that the plaintiff believes effectively disposed of her case." *Id.* at 1326. Nor does it matter whether the interlocutory order did, in fact, "eliminate[] the plaintiff's claim." *Id.* at 1327 n.7. In either case, neither 28 U.S.C. § 1291 nor Article III permits the appeal. *Id.* at 1326-27. *Druhan* was not a class action, but courts have since confirmed that its categorical holding applies equally to class actions. *See Woodard v. STP Corp.*, 170 F.3d 1043, 1044 (11th Cir. 1999); *Kay v. Online Vacation Ctr. Holdings Corp.*, 539 F. Supp. 2d 1372, 1373-75 (S.D. Fla. 2008).

2. In direct contrast to these holdings, two circuits now hold that a named plaintiff's "voluntary dismissal with prejudice" creates "'a sufficiently adverse—and thus appealable—final decision'" for the plaintiff to obtain review of a class-certification denial. Pet. App. 12a (quoting *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1065 (9th Cir. 2014)). Rejecting Microsoft's argument that this rule "flouts"

Livesay by "forc[ing] appellate jurisdiction whenever a plaintiff's counsel declares a death knell," Def. CA9 Br. 9; *see also id.* at 4-16, the Ninth Circuit pronounced here that, absent a settlement, a plaintiff's "stipulation that leads to a dismissal with prejudice does not destroy the adversity in that judgment necessary to support an appeal." Pet. App. 12a (quoting *Berger*, 741 F.3d at 1064).[2]

The Second Circuit similarly has held that named plaintiffs may secure appellate review of class-certification denials by precipitating entry of dismissals for failure to prosecute. *See Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 178-79 (2d Cir. 1990), *cert. denied*, 498 U.S. 1025 (1991).[3] The Second Circuit

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[2] The Ninth Circuit distinguished this scenario from *Huey v. Teledyne, Inc.*, 608 F.2d 1234 (9th Cir. 1979), in which it held that a dismissal for failure to prosecute does not create appellate jurisdiction to review the denial of class certification. Some other circuits (understandably) had read *Huey* to apply when named plaintiffs voluntarily stopped pursuing a case to manufacture an appeal. *See, e.g., Bowe*, 613 F.2d at 801. But the Ninth Circuit clarified here that *Huey* applies only when the dismissal was necessary to preserve district courts' ability "'to achieve the orderly and expeditious disposition of cases,'" Pet. App. 12a n.4 (quoting *Huey*, 608 F.2d at 1239)—that is, when dismissal was occasioned not just by a desire to manufacture an appeal but also by plaintiffs' "dilatory" tactics, *Huey*, 608 F.2d at 1240; *see also Hutchins v. A.G. Edwards & Sons, Inc.*, 116 F.3d 1256, 1260 (8th Cir. 1997) (same rule). The plaintiffs here were not dilatory, nor did the plaintiffs act in a dilatory manner in any of the cases cited above in the conflict.

[3] The plaintiff sought certiorari to challenge the Second Circuit's affirmance of the district court's refusal to certify the class. The petition did not raise the question presented here.

deems *Livesay* "inapplicable" in this situation on the ground that "immediate appellate review will only be available to disappointed class representatives who risk forfeiting their potentially meritorious individual claims." *Id.* at 179; *see also Palmieri v. Defaria*, 88 F.3d 136, 141 (2d Cir. 1996) (appellate review available in this situation because the denial of class certification "as a practical matter stop[s] the plaintiff's action altogether"). While sitting on the Second Circuit, then-Judge Sotomayor acknowledged that the Second Circuit's holding condoning the voluntary dismissal tactic "has been rejected by other circuits," and she suggested the rule might be infirm. *Shannon v. General Elec. Co.*, 186 F.3d 186, 193 (2d Cir. 1999). But the rule remains the law in that circuit.

3. This circuit split is now firmly entrenched. The Ninth Circuit refused to rehear this case en banc, Pet. App. 5a, perhaps taking solace in the fact that its view is seemingly endorsed by "[a] leading procedural treatise," *Berger*, 741 F.3d at 1065 (citing 7B CHARLES ALAN WRIGHT, ARTHUR MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1802, at 297-98 (3d ed. 2005)); *accord* Pet. App. 12a n.4. (The treatise cites only Second Circuit precedent; it does not mention the conflicting case law.) On the other hand, none of the circuits faithfully applying *Livesay* and Article III in this context have any reason to revisit their views—nor is there any realistic prospect that *all five* might do so. Only this Court can bring uniformity to this jurisdictional issue.

II. The Question Presented Is Exceptionally Important.

For the same reasons this Court in *Livesay* deemed the legitimacy of the "death knell" doctrine worthy of this Court's attention, the propriety of the voluntary dismissal tactic demands this Court's review.

1. "Restricting appellate review to 'final decisions' prevents the debilitating effect on judicial administration caused by piecemeal appeal disposition of what is, at practical consequence, but a single controversy." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974). Just as the "death knell" doctrine in *Livesay* threatened to upset this "vital" balance between trial and appellate courts, 437 U.S. at 476, the voluntary dismissal tactic is guaranteed to generate piecemeal appellate review. One need look no further than this case to appreciate the point. As the Ninth Circuit noted, "Microsoft makes several arguments to show that certification of this class would violate Federal Rule of Civil Procedure 23." Pet. App. 18a.[4] But the Ninth Circuit considered only one of those arguments, ultimately "express[ing] no opinion on whether the specific common issues

[4] To take but one example, the Xbox warranty promised the console would "substantially conform to the printed user instruction materials," and those materials warned users not to move or tilt the console with a disc in the drive "[t]o avoid jamming the disc drive and damaging discs." CA9 ER 106, 273, 278. Individual proof is therefore necessary to determine any breach of warranty as to any particular console owner, especially given undisputed evidence showing only 0.4% reported scratched discs.

identified in this case are amenable to adjudication by way of a class action, or whether plaintiffs should prevail on a motion for class certification." *Id.* 19a.

As a result, if the district court denies class certification on remand, respondents may voluntarily dismiss again and force another appeal. If the Ninth Circuit reverses again, that process could repeat itself. And it could continue to repeat indefinitely. This potentially endless cycle enshrines piecemeal appeals as a litigation threat in proposed class actions.

2. The Ninth Circuit's voluntary dismissal rule gives plaintiffs an unfair advantage in class actions. Just as plaintiffs worry that a denial of class certification will sound the death knell for their case, "the class issue—whether to certify, and if so, how large the class should be—will often be of critical importance to defendants as well. Certification of a large class may so increase a defendant's potential damages liability and litigation costs that [the defendant] may find it economically prudent to settle and to abandon a meritorious defense." *Livesay*, 437 U.S. at 476; *see also AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (noting "the risk of 'in terrorem' settlements that class actions entail" because, "[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims"). Yet just like the "death knell" doctrine this Court rejected in *Livesay*, the voluntary dismissal tactic "operates only in favor of plaintiffs." 437 U.S. at 476. This one-way ratchet distorts litigation and settlement incentives in these high-stakes cases.

3. The increasing prevalence of nationwide class actions—and the particular attractiveness of the voluntary dismissal tactic in such cases—deepens the need for prompt review. As our economy has become less segmented and more national in scale, plaintiffs have increasingly sought to certify nationwide classes. The proposed nationwide class here, for example, may exceed 10 million people. Other examples abound of classes having a similar size and nationwide reach, especially in consumer cases with minimal per-person damages. *See, e.g., In re The NVIDIA GPU Litig.*, 539 F. App'x 822, 824 (9th Cir. 2013) (class of "about 5 million consumers" of computers); *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 26 (2d Cir. 2003) (Newman, J. concurring) (proposed class of 12 million consumers); *Ewert v. Ebay, Inc.*, No. 07-CV-2198, 2010 WL 4269259, *3, *13 (N.D. Cal. Oct. 25, 2010) (certifying class of "over one million" sellers on website); *see also Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2547-48 (2011) (proposed class of 1.5 million employees).

Cases of this nature, with potential plaintiffs residing across the country, are ripe for forum shopping. Plaintiffs in many of these cases may file in any jurisdiction they like—as illustrated by the seven cases that began this saga, in jurisdictions ranging from Washington to Florida. That being so, the need for uniform rules for litigating class-certification issues is manifest. Yet now that the Ninth Circuit has broken from other circuits and condoned the voluntary dismissal tactic, plaintiffs in class-action cases have wasted no time incorporating

the tactic into their procedural toolboxes for cases there.[5]

III. This Case Is A Particularly Suitable Vehicle For Resolving The Question Presented.

For two reasons, this case presents an excellent vehicle for resolving the propriety of the voluntary dismissal tactic.

1. This case puts into stark view the abuse that the voluntary dismissal tactic threatens. Years after *Livesay*, the Rules Committee gave the courts of appeals the authority, under Fed. R. Civ. P. 23(f), to hear interlocutory appeals of orders denying class certification. Courts of appeals have "unfettered discretion" to determine when to accept such interlocutory review. *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 957 (9th Cir. 2005). But one of the factors the courts of appeals typically consider is "whe[ther], as a practical matter, the decision on certification is likely dispositive of the litigation." Fed. R. Civ. P. 23 advisory committee's note to 1998 Amendment. If the court of appeals believes it is looking at a genuine "death [] knell situation," it may allow the appeal for that reason alone. *Chamberlan*,

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[5] *See, e.g., Bobbitt v. Milberg LLP*, ___ F.3d ___, 2015 WL 5255081, *1-2 (Sept. 10, 2015) (applying this case to find jurisdiction over appeal after plaintiffs' "voluntary dismissal of their individual claims"); Appellant Henson's Reply Br. at 1, *Henson v. Fid. Nat'l Fin., Inc.*, No. 14-56578 (9th Cir.), *available at* 2015 WL 4537372 (invoking this case to support jurisdiction after voluntary dismissal); Reply Brief of Plaintiff-Appellant, *Smith v. Microsoft Corp.*, No. 14-55807 (9th Cir. Mar. 30, 2015), ECF 25 at 28-33.

402 F.3d at 957. But courts of appeals always remain free to reject plaintiffs' Rule 23(f) petitions for any reason.

As this case illustrates, the Ninth Circuit's acceptance of the voluntary dismissal tactic allows plaintiffs who try, and fail, to obtain discretionary review under Rule 23(f) to *force* courts to accept review anyway. Respondents sought interlocutory review under Rule 23(f), arguing "The District Court's Order Creates a Death-Knell Situation for Plaintiffs." Pet. for Permission to Appeal Under Fed. R. Civ. P. 23(f) at 17. Their predecessors in the original Xbox suit did likewise. *See supra* at 3-4. The Ninth Circuit denied both petitions. Yet respondents countered by voluntarily dismissing their claims—thereby, under Ninth Circuit law, *requiring* the court of appeals to hear the very appeal it denied twice.

This makes a mockery of the discretion and balance Rule 23(f) confers. When that rule was promulgated, the Advisory Committee, drawing support from a Federal Judicial Center study, noted that "many suits with class action allegations present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings." Fed. R. Civ. P. 23 advisory committee's note to 1998 amendment. For that reason and others, the courts of appeals deny plaintiffs' Rule 23(f) petitions about eighty percent of

the time.[6] Yet under the Ninth Circuit's voluntary dismissal rule, plaintiffs can require courts of appeals to hear *all* of these appeals. This cannot be right.

2. The jurisdictional issue is outcome-determinative here. Denials of class certification are reviewed for abuse of discretion. *See, e.g., Stearns v. Ticketmaster, Inc.*, 655 F.3d 1013, 1018 (9th Cir. 2011). Therefore, even when a court of appeals improperly assumes jurisdiction over an appeal challenging the denial of class certification, the court will often affirm, as the Ninth Circuit did in *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1070-71 (9th Cir. 2014). Such affirmances would be unlikely vehicles for addressing the propriety of the voluntary dismissal tactic, for a defendant in that situation would have no basis to seek review of a case in which it has prevailed, and plaintiffs would not seek review of a jurisdictional issue decided in their favor.

By contrast, both Microsoft and respondents have real interests in play here. The fact that the Ninth Circuit reversed the district court's denial of certification means that, if plaintiffs' voluntary dismissal gambit is allowed to stand, Microsoft faces years of continued litigation and uncertainty. Reversing the Ninth Circuit's decision, on the other hand, would require dismissal of respondents' appeal, thereby allowing the district court's final judgment for Microsoft to take effect.

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[6] John Beisner et al., *Study Reveals US Courts of Appeals Are Less Receptive to Reviewing Class Certification Rulings*, http://www.skadden.com/newsletters/OUTCOMES_TABLE.pdf.

IV. The Ninth Circuit's Decision Is Wrong.

The voluntary dismissal tactic that the Ninth and Second Circuits condone flies in the face of settled jurisdictional principles.

1. This Court held in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), that plaintiffs may not create appellate jurisdiction over orders denying class certification by maintaining that the orders sound the "death knells" of their lawsuits. It makes no difference whether the plaintiffs, in fact, "will not pursue their individual claim[s] if the decertification order stands." *Id.* at 466 n.7; *see also id.* at 470 (accepting that "refusal to certify a class" may sometimes "induce a plaintiff to abandon his individual claim"). Writing for a unanimous Court, Justice Stevens explained that the cost of avoiding mandatory appellate jurisdiction in this situation is "outweighed" by the impact such jurisdiction would have "on the judicial system's overall capacity to administer justice." *Id.* at 473. Accordingly, "the *only sure path* to appellate review" for plaintiffs refused class certification "is by proceeding to final judgment on the merits of [their] individual claim[s]," and, if they succeed, appealing the denial of class certification. Fed. R. Civ. P. 23 advisory committee's note to1998 Amendment (emphasis added).

The voluntary dismissal tactic cannot be squared with *Livesay*. The reason named plaintiffs voluntarily dismiss their individual cases after being denied class certification is to obtain immediate appellate review of orders they view as death knells. (Indeed, respondents explained here that they dismissed their claims because they viewed the district court's refusal to certify a class as the "death

knell" of their case. Pet. for Permission to Appeal Under Fed. R. Civ. P. 23(f) at 17. They wanted immediately "to appeal the [order] striking Plaintiff's class allegations." Pet. App. 36a.) And the Second and Ninth Circuits allow such appeals because the denials of class certifications "as a practical matter stop[] the plaintiff's action altogether." *Palmieri v. Defaria*, 88 F.3d 136, 141 (2d Cir. 1996) (explaining basis for the holding in *Gary Plastic*); *see also Gary Plastic*, 903 F.2d at 180 (noting that plaintiff "conceded that it does not intend to pursue its individual claims").

This reasoning simply resuscitates the death knell doctrine *Livesay* rejected. In fact, insofar as plaintiffs who voluntarily dismiss their claims may revive those claims on remand from reversal of an order denying class certification, the voluntary dismissal tactic functions *exactly the same* as the death knell doctrine did.

To be sure, plaintiffs under a voluntary dismissal regime must offer "a graphic demonstration"—by way of a formal motion to dismiss—"that the 'death knell' has indeed sounded." *Bowe*, 613 F.2d at 800. But that does not distinguish the voluntary dismissal tactic from the death knell doctrine. The very foundation of the death knell doctrine was a requirement that plaintiffs prove that "they would not pursue their claims individually." *Livesay*, 437 U.S. at 466. Confirming that reality in a separate filing is nothing more than meaningless formalism.

Lest there be any doubt that the voluntary dismissal tactic and the death knell doctrine are effectively one and the same, the voluntary dismissal tactic presents the same practical problems as well.

First, like the death knell doctrine, the voluntary dismissal tactic creates a "serious" "potential for multiple appeals in every complex case," *Livesay*, 437 U.S. at 474. *See supra* at 16-17. Second, like the death knell doctrine, the voluntary dismissal tactic "operates only in favor of plaintiffs even though the class issue—whether to certify, and if so, how large the class should be—will often be of critical importance to defendants as well," *Livesay*, 437 U.S. at 476. *See supra* at 14.

Third, and perhaps most significant, the voluntary dismissal tactic "circumvents" restrictions that federal law imposes upon "interlocutory review of decisions made by the trial judge," *id.* at 474-75. The death knell doctrine evaded the restrictions on interlocutory review embodied in 28 U.S.C. § 1292(b), which require parties seeking immediate appellate review to persuade the trial and appellate courts, in their discretion, to allow an appeal. *See Livesay*, 437 U.S. at 474-75. Rule 23(f) has now replaced Section 1292(b) with respect to class-certification orders, requiring plaintiffs to persuade only appellate courts (and not district courts) to allow interlocutory review of class-certification denials. But as this case vividly illustrates, the voluntary dismissal tactic circumvents this Rule in precisely the same way the death knell doctrine sidestepped Section 1292(b). It thus cannot be tolerated.

2. The only other conceivable argument a plaintiff might make to differentiate the voluntary dismissal tactic from the death knell doctrine would be to contend that voluntarily dismissing one's claims amounts to an irrevocable abandonment of the case, preventing the plaintiff's individual claims from

springing back to life even if a court of appeals reverses the denial of class certification. But any plaintiff who might make such an argument to evade *Livesay* would have yet another problem: Article III requires the named plaintiff in a class action to have a "personal stake" in the litigation. *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980). "If an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528 (2013) (quoting *Lewis v. Cont'l Bank Corp.,* 494 U.S. 472, 477-78 (1990)) (additional internal quotation marks omitted in original). Thus, as the Fourth Circuit has explained, "when a putative class plaintiff voluntarily dismisses the individual claims underlying a request for class certification, . . . there is no longer a 'self-interested party advocating' for class treatment in a manner necessary to satisfy Article III requirements." *Rhodes*, 636 F.3d at 100 (quoting *Geraghty*, 445 U.S. at 403); *see also Bd. of Sch. Comm'rs v. Jacobs*, 420 U.S. 128, 129-30 (1975) (per curiam) (case became moot when named plaintiffs seeking injunctive relief became ineligible for such relief before class certification).

In short, no matter how one approaches the voluntary dismissal tactic, it runs headlong into settled restrictions on appellate jurisdiction and the power of federal courts. This Court should grant review and repudiate the ploy.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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