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Strafford Publications Webinar (June 20, 2017): Insurance-Related Class Actions
Recent Developments in Class Action Settlements
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ADDITIONAL EXAMPLES OF RECENT FEDERAL APPELLATE COURT CLASS ACTION SETTLEMENT DECISIONS

- ***Caligiuri v. Symantec Corp.,*** 855 F.3d 860 (8th Cir. 2017) (upholding settlement; discussion of *cy pres*; calculating attorneys' fees based on total settlement fund, including administrative costs; approving settlement without knowing final administrative costs or final amount actually awarded to class not improper; incentive/service awards).

- ***Huyer v. Buckley***, 849 F.3d 395 (8^{th} Cir. 2017) (upholding settlement; district court did not abuse discretion in awarding fees based on total settlement fund, including $3.25M in administrative costs, or in awarding fees based on 33% of total; court has discretion to apply lodestar or "percentage of the benefit" in determining attorneys' fees).

- ***Koby v. ARN Nat'l Servs., Inc.***, 846 F.3d 1071 (9^{th} Cir. 2017) (reversing settlement; heightened scrutiny applies to review of proposed settlements negotiated before litigation class certified; court abused discretion in approving settlement of FDCPA class action alleging failure to provide disclosures in voicemails; class members received only two-year injunctive relief in settlement, but class was not limited to those likely to receive calls, defendant already had implemented injunctive relief, and settlement included *cy pres* donation to veterans' charity that had no nexus to class).

- ***Shane Group v. Blue Cross Blue Shield of Mich.***, 825 F.3d 299 (6^{th} Cir. 2016) (class action alleged price-fixing scheme between health insurer and hospital; reversing and remanding settlement approval for more detailed findings; court's discussion of class members' likelihood of success was only single paragraph, did not explain why it would be fair for class members to receive only 12% of expert's estimate of damages, and mentioned only general risks of litigation).

- ***Poertner v. Gillette Co.***, 618 F. App'x 624 (11th Cir. 2015) (upholding settlement; use of claims-made process "not inherently suspect"; district court did not err in including value of nonmonetary and *cy pres* relief in analysis of class benefit)*, cert. denied sub nom. Frank v. Poertner*, 136 S. ct. 1453 (2016).

- ***Allen v. Bedolla***, 787 F.3d 1218 (9th Cir. 2015) (vacating and remanding final approval order for " 'more searching inquiry into the fairness of the negotiated distribution of funds' " and "substantive reasonableness of the attorneys' fee request in light of the degree of success attained"; "multiple indicia" of collusion, but settlement "as a whole appears to afford valuable relief"; Ninth Circuit took no position on substantive fairness of settlement).

- ***Marshall v. National Football League***, 787 F.3d 502 (8th Cir. 2015) (affirming final approval order; "direct financial payment to each class member" not required), *cert. denied*, 136 S. Ct. 1166 (2016).

- ***Tennille v. Western Union Co.***, 785 F.3d 422 (10th Cir. 2015) (affirming final approval order; upholding use of consumers' unclaimed wire transfer monies as fund for class settlement), *cert. denied*, 136 S. Ct. 835 (2016).

- ***In re Online DVD-Rental Antitrust Litig.***, 779 F.3d 934 (9th Cir. 2015) (affirming approval; portion of settlement paid in gift cards to discount retailer was not "coupon" within meaning of CAFA; rejecting contentions that incentive awards were too large because they were higher than average payout).

- ***In re BankAmerica Corp. Secs. Litig.***, 775 F.3d 1060 (8th Cir. 2015) (setting standards for *cy pres* awards; *cy pres* award appropriate if "not feasible to make further distributions to class members"; residual distribution not appropriate when it would provide "windfall" for class members who were "fully compensated" on "liquidated-damages claims").

- ***Pearson v. NBTY, Inc.,*** 772 F.3d 778 (7th Cir. 2014) (reversing settlement approval on multiple grounds, including minimal value to class, excessive fees and rates, deliberately cumbersome claims process, and "hopelessly speculative" *cy press* award).

- ***Redman v. RadioShack Corp.*, 768 F.3d 622 (7th Cir. 2014)** (reversing settlement approval on multiple grounds, including excessive fees and administration costs compared to value of coupons to class), *cert. denied sub nom. Nicaj v. Shoe Carnival, Inc.*, 135 S. Ct. 1429 (2015).

- ***In re Baby Prods. Antitrust Litig.***, 708 F.3d 163 (3d Cir. 2013) (vacating *cy pres* and attorneys' fees awards):

- ***Vassalle v. Midland Funding LLC,*** 708 F.3d 747 (6th Cir. 2013) (reversing settlement approval on multiple grounds, including disparity between recovery of named plaintiffs and class members).

- ***In re Lupron Mktg. & Sales Practices Litig***., 677 F.3d 21 (1st Cir.) (extensive discussion of *cy pres*), *cert. denied sub nom. Sensing v. Porter*, 133 S. Ct. 338 (2012).

Syllabus

SUPREME COURT OF THE UNITED STATES

Syllabus

BRISTOL-MYERS SQUIBB CO. *v.* SUPERIOR COURT OF CALIFORNIA, SAN FRANCISCO COUNTY, ET AL.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 16–466. Argued April 25, 2017—Decided June 19, 2017

A group of plaintiffs, most of whom are not California residents, sued Bristol-Myers Squibb Company (BMS) in California state court, alleging that the pharmaceutical company's drug Plavix had damaged their health. BMS is incorporated in Delaware and headquartered in New York, and it maintains substantial operations in both New York and New Jersey. Although it engages in business activities in California and sells Plavix there, BMS did not develop, create a marketing strategy for, manufacture, label, package, or work on the regulatory approval for Plavix in the State. And the nonresident plaintiffs did not allege that they obtained Plavix from a California source, that they were injured by Plavix in California, or that they were treated for their injuries in California.

The California Superior Court denied BMS's motion to quash service of summons on the nonresidents' claims for lack of personal jurisdiction, concluding that BMS's extensive activities in the State gave the California courts general jurisdiction. Following this Court's decision in *Daimler AG* v. *Bauman*, 571 U. S. ___, the State Court of Appeal found that the California courts lacked general jurisdiction. But the Court of Appeal went on to find that the California courts had specific jurisdiction over the claims brought by the nonresident plaintiffs. Affirming, the State Supreme Court applied a "sliding scale approach" to specific jurisdiction, concluding that BMS's "wide ranging" contacts with the State were enough to support a finding of specific jurisdiction over the claims brought by the nonresident plaintiffs. That attenuated connection was met, the court held, in part because the nonresidents' claims were similar in many ways to the California residents' claims and because BMS engaged in other activities in the State.

Held: California courts lack specific jurisdiction to entertain the nonresidents' claims. Pp. 4–12.

(a) The personal jurisdiction of state courts is "subject to review for compatibility with the Fourteenth Amendment's Due Process Clause." *Goodyear Dunlop Tires Operations, S. A.* v. *Brown*, 564 U. S. 915, 918. This Court's decisions have recognized two types of personal jurisdiction: general and specific. For general jurisdiction, the "paradigm forum" is an "individual's domicile," or, for corporations, "an equivalent place, one in which the corporation is fairly regarded as at home." *Id.*, at 924. Specific jurisdiction, however, requires "the suit" to "aris[e] out of or relat[e] to the defendant's contacts with the forum." *Daimler*, *supra*, at ___ (internal quotation marks omitted).

The "primary concern" in assessing personal jurisdiction is "the burden on the defendant." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S. 286, 292. Assessing this burden obviously requires a court to consider the practical problems resulting from litigating in the forum, but it also encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question. At times, "the Due Process Clause, acting as an instrument of interstate federalism, may . . . divest the State of its power to render a valid judgment." *Id.*, at 294. Pp. 4–7.

(b) Settled principles of specific jurisdiction control this case. For a court to exercise specific jurisdiction over a claim there must be an "affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State." *Goodyear*, *supra*, at 919 (internal quotation marks and brackets omitted). When no such connection exists, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State. The California Supreme Court's "sliding scale approach"—which resembles a loose and spurious form of general jurisdiction—is thus difficult to square with this Court's precedents. That court found specific jurisdiction without identifying any adequate link between the State and the nonresidents' claims. The mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California does not allow the State to assert specific jurisdiction over the nonresidents' claims. Nor is it sufficient (or relevant) that BMS conducted research in California on matters unrelated to Plavix. What is needed is a connection between the forum and the specific claims at issue. Cf. *Walden* v. *Fiore*, 571 U. S. ___. Pp. 7–9.

(c) The nonresident plaintiffs' reliance on *Keeton* v. *Hustler Magazine, Inc.*, 465 U. S. 770, and *Phillips Petroleum Co.* v. *Shutts*, 472 U. S. 797, is misplaced. *Keeton* concerned jurisdiction to determine *the scope of a claim* involving in-state injury and injury to residents of the State, not, as here, jurisdiction to entertain claims involving no in-state injury and no injury to residents of the forum State. And *Shutts*, which concerned the due process rights of *plaintiffs,* has no bearing on the question presented here. Pp. 9–11.

(d) BMS's decision to contract with McKesson, a California company, to distribute Plavix nationally does not provide a sufficient basis for personal jurisdiction. It is not alleged that BMS engaged in relevant acts together with McKesson in California or that BMS is derivatively liable for McKesson's conduct in California. The bare fact that BMS contracted with a California distributor is not enough to establish personal jurisdiction in the State. Pp. 11–12.

(e) The Court's decision will not result in the parade of horribles that respondents conjure up. It does not prevent the California and out-of-state plaintiffs from joining together in a consolidated action in the States that have general jurisdiction over BMS. Alternatively, the nonresident plaintiffs could probably sue together in their respective home States. In addition, since this decision concerns the due process limits on the exercise of specific jurisdiction by a State, the question remains open whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court. P. 12.

1 Cal. 5th 783, 377 P. 3d 874, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, GINSBURG, BREYER, KAGAN, and GORSUCH, JJ., joined. SOTOMAYOR, J., filed a dissenting opinion.

SUPREME COURT OF THE UNITED STATES

No. 16–466

BRISTOL-MYERS SQUIBB COMPANY, PETITIONER *v.* SUPERIOR COURT OF CALIFORNIA, SAN FRANCISCO COUNTY, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

[June 19, 2017]

JUSTICE ALITO delivered the opinion of the Court.

More than 600 plaintiffs, most of whom are not California residents, filed this civil action in a California state court against Bristol-Myers Squibb Company (BMS), asserting a variety of state-law claims based on injuries allegedly caused by a BMS drug called Plavix. The California Supreme Court held that the California courts have specific jurisdiction to entertain the nonresidents' claims. We now reverse.

I

A

BMS, a large pharmaceutical company, is incorporated in Delaware and headquartered in New York, and it maintains substantial operations in both New York and New Jersey. 1 Cal. 5th 783, 790, 377 P. 3d 874, 879 (2016). Over 50 percent of BMS's work force in the United States is employed in those two States. *Ibid.*

BMS also engages in business activities in other jurisdictions, including California. Five of the company's research and laboratory facilities, which employ a total of around 160 employees, are located there. *Ibid.* BMS also employs about 250 sales representatives in California and maintains a small state-government advocacy office in Sacramento. *Ibid.*

One of the pharmaceuticals that BMS manufactures and sells is Plavix, a prescription drug that thins the blood and inhibits blood clotting. BMS did not develop Plavix in California, did not create a marketing strategy for Plavix in California, and did not manufacture, label, package, or work on the regulatory approval of the product in California. *Ibid.* BMS instead engaged in all of these activities in either New York or New Jersey. *Ibid.* But BMS does sell Plavix in California. Between 2006 and 2012, it sold almost 187 million Plavix pills in the State and took in more than $900 million from those sales. 1 Cal. 5th, at 790–791, 377 P. 3d, at 879. This amounts to a little over one percent of the company's nationwide sales revenue. *Id.*, at 790, 377 P. 3d, at 879.

B

A group of plaintiffs—consisting of 86 California residents and 592 residents from 33 other States—filed eight separate complaints in California Superior Court, alleging that Plavix had damaged their health. *Id.*, at 789, 377 P. 3d, at 878. All the complaints asserted 13 claims under California law, including products liability, negligent misrepresentation, and misleading advertising claims. *Ibid.* The nonresident plaintiffs did not allege that they obtained Plavix through California physicians or from any other California source; nor did they claim that they were injured by Plavix or were treated for their injuries in California.

Asserting lack of personal jurisdiction, BMS moved to quash service of summons on the nonresidents' claims, but the California Superior Court denied this motion, finding that the California courts had general jurisdiction over

BMS "[b]ecause [it] engages in extensive activities in California." App. to Pet. for Cert. 150. BMS unsuccessfully petitioned the State Court of Appeal for a writ of mandate, but after our decision on general jurisdiction in *Daimler AG* v. *Bauman*, 571 U. S. ___ (2014), the California Supreme Court instructed the Court of Appeal "to vacate its order denying mandate and to issue an order to show cause why relief sought in the petition should not be granted." App. 9–10.

The Court of Appeal then changed its decision on the question of general jurisdiction. 228 Cal. App. 4th 605, 175 Cal. Rptr. 3d 412 (2014). Under *Daimler*, it held, general jurisdiction was clearly lacking, but it went on to find that the California courts had specific jurisdiction over the nonresidents' claims against BMS. 228 Cal. App. 4th 605, 175 Cal. Rptr. 3d, at 425–439.

The California Supreme Court affirmed. The court unanimously agreed with the Court of Appeal on the issue of general jurisdiction, but the court was divided on the question of specific jurisdiction. The majority applied a "sliding scale approach to specific jurisdiction." 1 Cal. 5th, at 806, 377 P. 3d, at 889. Under this approach, "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim." *Ibid.* (internal quotation marks omitted). Applying this test, the majority concluded that "BMS's extensive contacts with California" permitted the exercise of specific jurisdiction "based on a less direct connection between BMS's forum activities and plaintiffs' claims than might otherwise be required." *Ibid*. This attenuated requirement was met, the majority found, because the claims of the nonresidents were similar in several ways to the claims of the California residents (as to which specific jurisdiction was uncontested). *Id.*, at 803–806, 377 P. 3d, at 887–889. The court noted that "[b]oth the resident and nonresident plaintiffs' claims are based on the same allegedly defective product and the assertedly misleading marketing and promotion of that product." *Id.*, at 804, 377 P. 3d, at 888. And while acknowledging that "there is no claim that Plavix itself was designed and developed in [BMS's California research facilities]," the court thought it significant that other research was done in the State. *Ibid.*

Three justices dissented. "The claims of . . . nonresidents injured by their use of Plavix they purchased and used in other states," they wrote, "in no sense arise from BMS's marketing and sales of Plavix in California," and they found that the "mere similarity" of the residents' and nonresidents' claims was not enough. *Id.*, at 819, 377 P. 3d, at 898 (opinion of Werdegar, J.). The dissent accused the majority of "expand[ing] specific jurisdiction to the point that, for a large category of defendants, it becomes indistinguishable from general jurisdiction." *Id.*, at 816, 377 P. 3d, at 896.

We granted certiorari to decide whether the California courts' exercise of jurisdiction in this case violates the Due Process Clause of the Fourteenth Amendment. 580 U. S. ___ (2017).[1]

II

A

It has long been established that the Fourteenth Amendment limits the personal jurisdiction of state courts. See, *e.g.*, *Daimler*, *supra*, at ___–___ (slip op., at 6–13); *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S. 286, 291 (1980); *International Shoe Co.* v. *Washington*, 326 U. S. 310, 316–317 (1945); *Pennoyer* v. *Neff*, 95 U. S. 714,

[1] California law provides that its courts may exercise jurisdiction "on any basis not inconsistent with the Constitution . . . of the United States," Cal. Civ. Proc. Code Ann. §410.10 (West 2004); see *Daimler AG* v. *Bauman*, 571 U. S. ___, ___ (2014) (slip op., at 6).

733 (1878). Because "[a] state court's assertion of jurisdiction exposes defendants to the State's coercive power," it is "subject to review for compatibility with the Fourteenth Amendment's Due Process Clause," *Goodyear Dunlop Tires Operations, S. A.* v. *Brown*, 564 U. S. 915, 918 (2011), which "limits the power of a state court to render a valid personal judgment against a nonresident defendant," *World-Wide Volkswagen*, *supra*, at 291. The primary focus of our personal jurisdiction inquiry is the defendant's relationship to the forum State. See *Walden* v. *Fiore*, 571 U. S. ___, ___–___ (2014) (slip op., at 5–8); *Phillips Petroleum Co.* v. *Shutts*, 472 U. S. 797, 806–807 (1985).

Since our seminal decision in *International Shoe,* our decisions have recognized two types of personal jurisdiction: "general" (sometimes called "all-purpose") jurisdiction and "specific" (sometimes called "case-linked") jurisdiction. *Goodyear*, 564 U. S., at 919. "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home." *Id.*, at 924. A court with general jurisdiction may hear *any* claim against that defendant, even if all the incidents underlying the claim occurred in a different State. *Id.*, at 919. But "only a limited set of affiliations with a forum will render a defendant amenable to" general jurisdiction in that State. *Daimler*, 571 U. S., at ___ (slip op., at 18).

Specific jurisdiction is very different. In order for a state court to exercise specific jurisdiction, "the *suit*" must "aris[e] out of or relat[e] to the defendant's contacts with the *forum*." *Id.*, at ___ (slip op., at 8) (internal quotation marks omitted; emphasis added); see *Burger King Corp.* v. *Rudzewicz*, 471 U. S. 462, 472–473 (1985); *Helicopteros Nacionales de Colombia, S. A.* v. *Hall*, 466 U. S. 408, 414 (1984). In other words, there must be "an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Goodyear*, 564 U. S., at 919 (internal quotation marks and brackets omitted). For this reason, "specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Ibid.* (internal quotation marks omitted).

B

In determining whether personal jurisdiction is present, a court must consider a variety of interests. These include "the interests of the forum State and of the plaintiff in proceeding with the cause in the plaintiff's forum of choice." *Kulko* v. *Superior Court of Cal., City and County of San Francisco*, 436 U. S. 84, 92 (1978); see *Daimler*, *supra*, at ___–___, n. 20 (slip op., at 21–22, n. 20); *Asahi Metal Industry Co.* v. *Superior Court of Cal., Solano Cty.*, 480 U. S. 102, 113 (1987); *World-Wide Volkswagen*, 444 U. S., at 292. But the "primary concern" is "the burden on the defendant." *Id.*, at 292. Assessing this burden obviously requires a court to consider the practical problems resulting from litigating in the forum, but it also encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question. As we have put it, restrictions on personal jurisdiction "are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States." *Hanson* v. *Denckla*, 357 U. S. 235, 251 (1958). "[T]he States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State . . . implie[s] a limitation on the sovereignty of all its sister States." *World-Wide Volkswagen*, 444 U. S., at 293. And at times, this federalism interest may be decisive. As we explained in *World-Wide Volkswagen*, "[e]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." *Id.*, at 294.

III

A

Our settled principles regarding specific jurisdiction control this case. In order for a court to exercise specific jurisdiction over a claim, there must be an "affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State." *Goodyear*, 564 U. S., at 919 (internal quotation marks and brackets in original omitted). When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State. See *id.*, at 931, n. 6 ("[E]ven regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales").

For this reason, the California Supreme Court's "sliding scale approach" is difficult to square with our precedents. Under the California approach, the strength of the requisite connection between the forum and the specific claims at issue is relaxed if the defendant has extensive forum contacts that are unrelated to those claims. Our cases provide no support for this approach, which resembles a loose and spurious form of general jurisdiction. For specific jurisdiction, a defendant's general connections with the forum are not enough. As we have said, "[a] corporation's 'continuous activity of some sorts within a state . . . is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.'" *Id.*, at 927 (quoting *International Shoe*, 326 U. S., at 318).

The present case illustrates the danger of the California approach. The State Supreme Court found that specific jurisdiction was present without identifying any adequate link between the State and the nonresidents' claims. As noted, the nonresidents were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California. The mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents' claims. As we have explained, "a defendant's relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction." *Walden*, 571 U. S., at ___ (slip op., at 8). This remains true even when third parties (here, the plaintiffs who reside in California) can bring claims similar to those brought by the nonresidents. Nor is it sufficient—or even relevant—that BMS conducted research in California on matters unrelated to Plavix. What is needed—and what is missing here—is a connection between the forum and the specific claims at issue.

Our decision in *Walden*, *supra*, illustrates this requirement. In that case, Nevada plaintiffs sued an out-of-state defendant for conducting an allegedly unlawful search of the plaintiffs while they were in Georgia preparing to board a plane bound for Nevada. We held that the Nevada courts lacked specific jurisdiction even though the plaintiffs were Nevada residents and "suffered foreseeable harm in Nevada." *Id.*, at ___ (slip op., at 11). Because the "*relevant* conduct occurred entirely in Georgi[a] . . . the mere fact that [this] conduct affected plaintiffs with connections to the forum State d[id] not suffice to authorize jurisdiction." *Id.*, at ___ (slip op., at 14) (emphasis added).

In today's case, the connection between the nonresidents' claims and the forum is even weaker. The relevant plaintiffs are not California residents and do not claim to have suffered harm in that State. In addition, as in *Walden*, all the conduct giving rise to the nonresidents' claims occurred elsewhere. It follows that the California courts cannot claim specific jurisdiction. See *World-Wide Volkswagen*, *supra*, at 295 (finding no personal jurisdiction in Oklahoma because the defendant "carr[ied] on no activity whatsoever in Oklahoma" and dismissing "the fortuitous circumstance that a single Audi automobile, sold [by defendants] in New York to New York residents, happened to suffer an accident while passing through Oklahoma" as an "isolated occurrence").

B

The nonresidents maintain that two of our cases support the decision below, but they misinterpret those precedents.

In *Keeton* v. *Hustler Magazine, Inc.*, 465 U. S. 770 (1984), a New York resident sued Hustler in New Hampshire, claiming that she had been libeled in five issues of the magazine, which was distributed throughout the country, including in New Hampshire, where it sold 10,000 to 15,000 copies per month. Concluding that specific jurisdiction was present, we relied principally on the connection between the circulation of the magazine in New Hampshire and damage allegedly caused within the State. We noted that "[f]alse statements of fact harm both the subject of the falsehood and the readers of the statement." *Id.*, at 776 (emphasis deleted). This factor amply distinguishes *Keeton* from the present case, for here the nonresidents' claims involve no harm in California and no harm to California residents.

The nonresident plaintiffs in this case point to our holding in *Keeton* that there was jurisdiction in New Hampshire to entertain the plaintiff's request for damages suffered outside the State, *id.*, at 774, but that holding concerned jurisdiction to determine *the scope of a claim* involving in-state injury and injury to residents of the State, not, as in this case, jurisdiction to entertain claims involving no in-state injury and no injury to residents of the forum State. *Keeton* held that there was jurisdiction in New Hampshire to consider the full measure of the plaintiff's claim, but whether she could actually recover out-of-state damages was a merits question governed by New Hampshire libel law. *Id.*, at 778, n. 9.

The Court's decision in *Phillips Petroleum Co.* v. *Shutts*, 472 U. S. 797 (1985), which involved a class action filed in Kansas, is even less relevant. The Kansas court exercised personal jurisdiction over the claims of nonresident class members, and the defendant, Phillips Petroleum, argued that this violated the due process rights of these class members because they lacked minimum contacts with the State.[2] According to the defendant, the out-of-state class members should not have been kept in the case unless they affirmatively opted in, instead of merely failing to opt out after receiving notice. *Id.*, at 812.

Holding that there had been no due process violation, the Court explained that the authority of a State to entertain the claims of nonresident class members is entirely different from its authority to exercise jurisdiction over an out-of-state defendant. *Id.*, at 808–812. Since *Shutts* concerned the due process rights of *plaintiffs*, it has no

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[2] The Court held that the defendant had standing to argue that the Kansas court had improperly exercised personal jurisdiction over the claims of the out-of-state class members because that holding materially affected the defendant's own interests, specifically, the res judicata effect of an adverse judgment. 472 U. S., at 803–806.

bearing on the question presented here.

Respondents nevertheless contend that *Shutts* supports their position because, in their words, it would be "absurd to believe that [this Court] would have reached the exact opposite result if the petitioner [Phillips] had only invoked its own due-process rights, rather than those of the non-resident plaintiffs." Brief for Respondents 28–29, n. 6 (emphasis deleted). But the fact remains that Phillips did not assert that Kansas improperly exercised personal jurisdiction over it, and the Court did not address that issue.[3] Indeed, the Court stated specifically that its "discussion of personal jurisdiction [did not] address class actions where the jurisdiction is asserted against a *defendant* class." *Shutts*, *supra*, at 812, n. 3.

C

In a last ditch contention, respondents contend that BMS's "decision to contract with a California company [McKesson] to distribute [Plavix] nationally" provides a sufficient basis for personal jurisdiction. Tr. of Oral Arg. 32. But as we have explained, "[t]he requirements of *International Shoe* . . . must be met as to each defendant over whom a state court exercises jurisdiction." *Rush* v. *Savchuk*, 444 U. S. 320, 332 (1980); see *Walden*, 571 U. S., at ___ (slip op, at 8) ("[A] defendant's relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction"). In this case, it is not alleged that BMS engaged in relevant acts together with McKesson in California. Nor is it alleged that BMS is derivatively liable for McKesson's conduct in California. And the nonresidents "have adduced no evidence to show how or by whom the

[3] Petitioner speculates that Phillips did not invoke its own due process rights because it was believed at the time that the Kansas court had general jurisdiction. See Reply Brief 7, n. 1.

Plavix they took was distributed to the pharmacies that dispensed it to them." 1 Cal. 5th, at 815, 377 P. 3d, at 895 (Werdegar, J., dissenting) (emphasis deleted). See Tr. of Oral Arg. 33 ("It is impossible to trace a particular pill to a particular person . . . . It's not possible for us to track particularly to McKesson"). The bare fact that BMS contracted with a California distributor is not enough to establish personal jurisdiction in the State.

IV

Our straightforward application in this case of settled principles of personal jurisdiction will not result in the parade of horribles that respondents conjure up. See Brief for Respondents 38–47. Our decision does not prevent the California and out-of-state plaintiffs from joining together in a consolidated action in the States that have general jurisdiction over BMS. BMS concedes that such suits could be brought in either New York or Delaware. See Brief for Petitioner 13. Alternatively, the plaintiffs who are residents of a particular State—for example, the 92 plaintiffs from Texas and the 71 from Ohio—could probably sue together in their home States. In addition, since our decision concerns the due process limits on the exercise of specific jurisdiction by a State, we leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court. See *Omni Capital Int'l, Ltd.* v. *Rudolf Wolff & Co.*, 484 U. S. 97, 102, n. 5 (1987).

* * *

The judgment of the California Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 16–466

BRISTOL-MYERS SQUIBB COMPANY, PETITIONER *v.* SUPERIOR COURT OF CALIFORNIA, SAN FRANCISCO COUNTY, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

[June 19, 2017]

JUSTICE SOTOMAYOR, dissenting.

Three years ago, the Court imposed substantial curbs on the exercise of general jurisdiction in its decision in *Daimler AG* v. *Bauman*, 571 U. S. ___ (2014). Today, the Court takes its first step toward a similar contraction of specific jurisdiction by holding that a corporation that engages in a nationwide course of conduct cannot be held accountable in a state court by a group of injured people unless all of those people were injured in the forum State.

I fear the consequences of the Court's decision today will be substantial. The majority's rule will make it difficult to aggregate the claims of plaintiffs across the country whose claims may be worth little alone. It will make it impossible to bring a nationwide mass action in state court against defendants who are "at home" in different States. And it will result in piecemeal litigation and the bifurcation of claims. None of this is necessary. A core concern in this Court's personal jurisdiction cases is fairness. And there is nothing unfair about subjecting a massive corporation to suit in a State for a nationwide course of conduct that injures both forum residents and nonresidents alike.

I

Bristol-Myers Squibb is a Fortune 500 pharmaceutical company incorporated in Delaware and headquartered in New York. It employs approximately 25,000 people worldwide and earns annual revenues of over $15 billion. In the late 1990's, Bristol-Myers began to market and sell a prescription blood thinner called Plavix. Plavix was advertised as an effective tool for reducing the risk of blood clotting for those vulnerable to heart attacks and to strokes. The ads worked: At the height of its popularity, Plavix was a blockbuster, earning Bristol-Myers billions of dollars in annual revenues.

Bristol-Myers' advertising and distribution efforts were national in scope. It conducted a single nationwide advertising campaign for Plavix, using television, magazine, and Internet ads to broadcast its message. A consumer in California heard the same advertisement as a consumer in Maine about the benefits of Plavix. Bristol-Myers' distribution of Plavix also proceeded through nationwide channels: Consistent with its usual practice, it relied on a small number of wholesalers to distribute Plavix throughout the country. One of those distributors, McKesson Corporation, was named as a defendant below; during the relevant time period, McKesson was responsible for almost a quarter of Bristol-Myers' revenue worldwide.

The 2005 publication of an article in the New England Journal of Medicine questioning the efficacy and safety of Plavix put Bristol-Myers on the defensive, as consumers around the country began to claim that they were injured by the drug. The plaintiffs in these consolidated cases are 86 people who allege they were injured by Plavix in California and several hundred others who say they were injured by the drug in other States.[1] They filed their suits

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[1] Like the parties and the majority, I refer to these people as "residents" and "nonresidents" of California as a convenient shorthand. See *ante,* at 2; Brief for Petitioner 4–5, n. 1; Brief for Respondents 2, n. 1.

in California Superior Court, raising product-liability claims against Bristol-Myers and McKesson. Their claims are "materially identical," as Bristol-Myers concedes. See Brief for Petitioner 4, n. 1. Bristol-Myers acknowledged it was subject to suit in California state court by the residents of that State. But it moved to dismiss the claims brought by the nonresident plaintiffs—respondents here—for lack of jurisdiction. The question here, accordingly, is not whether Bristol-Myers is subject to suit in California on claims that arise out of the design, development, manufacture, marketing, and distribution of Plavix—it is. The question is whether Bristol-Myers is subject to suit in California only on the residents' claims, or whether a state court may also hear the nonresidents' "identical" claims.

II

A

As the majority explains, since our pathmarking opinion in *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945), the touchstone of the personal-jurisdiction analysis has been the question whether a defendant has "certain minimum contacts with [the State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.,* at 316 (quoting *Milliken* v. *Meyer*, 311 U. S. 457, 463 (1940)). For decades this Court has considered that question through two different jurisdictional frames: "general" and "specific" jurisdiction. See *Helicopteros Nacionales de Colombia, S. A.* v. *Hall*, 466 U. S. 408, 414, nn. 8–9 (1984). Under our current case law, a state court may exercise general, or all-purpose, jurisdiction over a defendant corporation only if its "affiliations with the State are so 'continuous and systematic' as

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For jurisdictional purposes, the important question is generally (as it is here) where a plaintiff was injured, not where he or she resides.

to render [it] essentially at home in the forum State." *Goodyear Dunlop Tires Operations, S. A.* v. *Brown*, 564 U. S. 915, 919 (2011).[2]

If general jurisdiction is not appropriate, however, a state court can exercise only specific, or case-linked, jurisdiction over a dispute. *Id.,* at 923–924. Our cases have set out three conditions for the exercise of specific jurisdiction over a nonresident defendant. 4A C. Wright, A. Miller, & A. Steinman, Federal Practice and Procedure §1069, pp. 22–78 (4th ed. 2015) (Wright); see also *id.,* at 22–27, n. 10 (collecting authority). First, the defendant must have "'purposefully avail[ed] itself of the privilege of conducting activities within the forum State'" or have purposefully directed its conduct into the forum State. *J. McIntyre Machinery, Ltd.* v. *Nicastro*, 564 U. S. 873, 877 (2011) (plurality opinion) (quoting *Hanson* v. *Denckla*, 357 U. S. 235, 253 (1958)). Second, the plaintiff's claim must "arise out of or relate to" the defendant's forum conduct. *Helicopteros*, 466 U. S., at 414. Finally, the exercise of jurisdiction must be reasonable under the circumstances. *Asahi Metal Industry Co.* v. *Superior Court of Cal., Solano Cty.*, 480 U. S. 102, 113–114 (1987); *Burger King Corp.* v. *Rudzewicz*, 471 U. S. 462, 477–478 (1985). The factors relevant to such an analysis include "the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient

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[2] Respondents do not contend that the California courts would be able to exercise general jurisdiction over Bristol-Myers—a concession that follows directly from this Court's opinion in *Daimler AG* v. *Bauman*, 571 U. S. ___ (2014). As I have explained, I believe the restrictions the Court imposed on general jurisdiction in *Daimler* were ill advised. See *BNSF R. Co.* v. *Tyrrell*, 581 U. S. ___, ___ (2017) (SOTOMAYOR, J., concurring in part and dissenting in part); *Daimler*, 571 U. S., at ___ (SOTOMAYOR, J., concurring in judgment). But I accept respondents' concession, for the purpose of this case, that Bristol-Myers is not subject to general jurisdiction in California.

and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies." *Id.*, at 477 (internal quotation marks omitted).

B

Viewed through this framework, the California courts appropriately exercised specific jurisdiction over respondents' claims.

First, there is no dispute that Bristol-Myers "purposefully avail[ed] itself," *Nicastro*, 564 U. S., at 877, of California and its substantial pharmaceutical market. Bristol-Myers employs over 400 people in California and maintains half a dozen facilities in the State engaged in research, development, and policymaking. *Ante,* at 1–2. It contracts with a California-based distributor, McKesson, whose sales account for a significant portion of its revenue. *Supra,* at 2. And it markets and sells its drugs, including Plavix, in California, resulting in total Plavix sales in that State of nearly $1 billion during the period relevant to this suit.

Second, respondents' claims "relate to" Bristol-Myers' in-state conduct. A claim "relates to" a defendant's forum conduct if it has a "connect[ion] with" that conduct. *International Shoe*, 326 U. S., at 319. So respondents could not, for instance, hale Bristol-Myers into court in California for negligently maintaining the sidewalk outside its New York headquarters—a claim that has no connection to acts Bristol-Myers took in California. But respondents' claims against Bristol-Myers look nothing like such a claim. Respondents' claims against Bristol-Myers concern conduct materially identical to acts the company took in California: its marketing and distribution of Plavix, which it undertook on a nationwide basis in all 50 States. That respondents were allegedly injured by this nationwide course of conduct in Indiana, Oklahoma, and Texas, and not California, does not mean that their claims do not "relate to" the advertising and distribution efforts that Bristol-Myers undertook in that State. All of the plaintiffs—residents and nonresidents alike—allege that they were injured by the same essential acts. Our cases require no connection more direct than that.

Finally, and importantly, there is no serious doubt that the exercise of jurisdiction over the nonresidents' claims is reasonable. Because Bristol-Myers already faces claims that are identical to the nonresidents' claims in this suit, it will not be harmed by having to defend against respondents' claims: Indeed, the alternative approach—litigating those claims in separate suits in as many as 34 different States—would prove far more burdensome. By contrast, the plaintiffs' "interest in obtaining convenient and effective relief," *Burger King*, 471 U. S., at 477 (internal quotation marks omitted), is obviously furthered by participating in a consolidated proceeding in one State under shared counsel, which allows them to minimize costs, share discovery, and maximize recoveries on claims that may be too small to bring on their own. Cf. *American Express Co.* v. *Italian Colors Restaurant*, 570 U. S. ___, ___ (2013) (KAGAN., J., dissenting) (slip op., at 7) ("No rational actor would bring a claim worth tens of thousands of dollars if doing so meant incurring costs in the hundreds of thousands"). California, too, has an interest in providing a forum for mass actions like this one: Permitting the nonresidents to bring suit in California alongside the residents facilitates the efficient adjudication of the residents' claims and allows it to regulate more effectively the conduct of both nonresident corporations like Bristol-Myers and resident ones like McKesson.

Nothing in the Due Process Clause prohibits a California court from hearing respondents' claims—at least not in a case where they are joined to identical claims brought by California residents.

III

Bristol-Myers does not dispute that it has purposefully availed itself of California's markets, nor—remarkably—did it argue below that it would be "unreasonable" for a California court to hear respondents' claims. See 1 Cal. 5th 783, 799, n. 2, 377 P. 3d 874, 885, n. 2 (2016). Instead, Bristol-Myers contends that respondents' claims do not "arise out of or relate to" its California conduct. The majority agrees, explaining that no "adequate link" exists "between the State and the nonresidents' claims," *ante,* at 8—a result that it says follows from "settled principles [of] specific jurisdiction," *ante,* at 7. But our precedents do not require this result, and common sense says that it cannot be correct.

A

The majority casts its decision today as compelled by precedent. *Ibid.* But our cases point in the other direction.

The majority argues at length that the exercise of specific jurisdiction in this case would conflict with our decision in *Walden* v. *Fiore*, 571 U. S. ___ (2014). That is plainly not true. *Walden* concerned the requirement that a defendant "purposefully avail" himself of a forum State or "purposefully direc[t]" his conduct toward that State, *Nicastro*, 564 U. S., at 877, not the separate requirement that a plaintiff's claim "arise out of or relate to" a defendant's forum contacts. The lower court understood the case that way. See *Fiore* v. *Walden*, 688 F. 3d 558, 576–582 (CA9 2012). The parties understood the case that way. See Brief for Petitioner 17–31, Brief for Respondent 20–44, Brief for United States as *Amicus Curiae* 12–18, in *Walden* v. *Fiore*, O. T. 2013, No. 12–574. And courts and commentators have understood the case that way. See, *e.g.,* 4 Wright §1067.1, at 388–389. *Walden* teaches only that a defendant must have purposefully availed itself of the forum, and that a plaintiff cannot rely solely on a defendant's contacts with a forum resident to establish the necessary relationship. See 571 U. S., at ___ (slip op., at 8) ("[T]he plaintiff cannot be the only link between the defendant and the forum"). But that holding has nothing to do with the dispute between the parties: Bristol-Myers has purposefully availed itself of California—to the tune of millions of dollars in annual revenue. Only if its language is taken out of context, *ante,* at 8–9, can *Walden* be made to seem relevant to the case at hand.

By contrast, our decision in *Keeton* v. *Hustler Magazine, Inc.*, 465 U. S. 770 (1984), suggests that there should be no such barrier to the exercise of jurisdiction here. In *Keeton*, a New York resident brought suit against an Ohio corporation, a magazine, in New Hampshire for libel. She alleged that the magazine's nationwide course of conduct—its publication of defamatory statements—had injured her in every State, including New Hampshire. This Court unanimously rejected the defendant's argument that it should not be subject to "nationwide damages" when only a small portion of those damages arose in the forum State, *id.,* at 781; exposure to such liability, the Court explained, was the consequence of having "continuously and deliberately exploited the New Hampshire market," *ibid.* The majority today dismisses *Keeton* on the ground that the defendant there faced one plaintiff's claim arising out of its nationwide course of conduct, whereas Bristol-Myers faces many more plaintiffs' claims. See *ante,* at 10. But this is a distinction without a difference: In either case, a defendant will face liability in a single State for a single course of conduct that has impact in many States. *Keeton* informs us that there is no unfairness in such a result.

The majority's animating concern, in the end, appears to be federalism: "[T]erritorial limitations on the power of the respective States," we are informed, may—and today do—trump even concerns about fairness to the parties. *Ante,* at 6. Indeed, the majority appears to concede that this is not, at bottom, a case about fairness but instead a case about power: one in which "'the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; . . . the forum State has a strong interest in applying its law to the controversy; [and] the forum State is the most convenient location for litigation'" but personal jurisdiction still will not lie. *Ante,* at 7 (quoting *World-Wide Volkswagen Corp.* v. *Woodson,* 444 U. S. 286, 294 (1980)). But I see little reason to apply such a principle in a case brought against a large corporate defendant arising out of its nationwide conduct. What interest could any single State have in adjudicating respondents' claims that the other States do not share? I would measure jurisdiction first and foremost by the yardstick set out in *International Shoe*—"fair play and substantial justice," 326 U. S., at 316 (internal quotation marks omitted). The majority's opinion casts that settled principle aside.

B

I fear the consequences of the majority's decision today will be substantial. Even absent a rigid requirement that a defendant's in-state conduct must actually cause a plaintiff's claim,[3] the upshot of today's opinion is that plaintiffs

[3] Bristol-Myers urges such a rule upon us, Brief for Petitioner 14–37, but its adoption would have consequences far beyond those that follow from today's factbound opinion. Among other things, it might call into question whether even a plaintiff *injured* in a State by an item identical to those sold by a defendant in that State could avail himself of that State's courts to redress his injuries—a result specifically contemplated by *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S. 286, 297 (1980). See Brief for Civil Procedure Professors as *Amici Curiae* 14–18; see also *J. McIntyre Machinery, Ltd.* v. *Nicastro*, 564 U. S. 873, 906–907 (2011) (GINSBURG, J., dissenting). That question, and others like it, appears to await another case.

cannot join their claims together and sue a defendant in a State in which only some of them have been injured. That rule is likely to have consequences far beyond this case.

First, and most prominently, the Court's opinion in this case will make it profoundly difficult for plaintiffs who are injured in different States by a defendant's nationwide course of conduct to sue that defendant in a single, consolidated action. The holding of today's opinion is that such an action cannot be brought in a State in which only some plaintiffs were injured. Not to worry, says the majority: The plaintiffs here could have sued Bristol-Myers in New York or Delaware; could "probably" have subdivided their separate claims into 34 lawsuits in the States in which they were injured; and might have been able to bring a single suit in federal court (an "open . . . question"). *Ante,* at 12. Even setting aside the majority's caveats, what is the purpose of such limitations? What interests are served by preventing the consolidation of claims and limiting the forums in which they can be consolidated? The effect of the Court's opinion today is to eliminate nationwide mass actions in any State other than those in which a defendant is "'essentially at home.'"[4] See *Daimler*, 571 U. S., at ___ (slip op., at 8). Such a rule hands one more tool to corporate defendants determined to prevent the aggregation of individual claims, and forces injured plaintiffs to bear the burden of bringing suit in what will often be far flung jurisdictions.

Second, the Court's opinion today may make it impossi-

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[4] The Court today does not confront the question whether its opinion here would also apply to a class action in which a plaintiff injured in the forum State seeks to represent a nationwide class of plaintiffs, not all of whom were injured there. Cf. *Devlin* v. *Scardelletti*, 536 U. S. 1, 9–10 (2002) ("Nonnamed class members . . . may be parties for some purposes and not for others"); see also Wood, Adjudicatory Jurisdiction and Class Actions, 62 Ind. L. J. 597, 616–617 (1987).

ble to bring certain mass actions at all. After this case, it is difficult to imagine where it might be possible to bring a nationwide mass action against two or more defendants headquartered and incorporated in different States. There will be no State where both defendants are "at home," and so no State in which the suit can proceed. What about a nationwide mass action brought against a defendant not headquartered or incorporated in the United States? Such a defendant is not "at home" in any State. Cf. *id.,* at ___–___ (SOTOMAYOR, J., concurring in judgment) (slip op., at 18–19). Especially in a world in which defendants are subject to general jurisdiction in only a handful of States, see *ibid.*, the effect of today's opinion will be to curtail—and in some cases eliminate—plaintiffs' ability to hold corporations fully accountable for their nationwide conduct.

The majority chides respondents for conjuring a "parade of horribles," *ante,* at 12, but says nothing about how suits like those described here will survive its opinion in this case. The answer is simple: They will not.

* * *

It "does not offend 'traditional notions of fair play and substantial justice,'" *International Shoe*, 326 U. S., at 316, to permit plaintiffs to aggregate claims arising out of a single nationwide course of conduct in a single suit in a single State where some, but not all, were injured. But that is exactly what the Court holds today is barred by the Due Process Clause.

This is not a rule the Constitution has required before. I respectfully dissent.

Syllabus

SUPREME COURT OF THE UNITED STATES

Syllabus

MICROSOFT CORP. *v.* BAKER ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 15–457. Argued March 21, 2017—Decided June 12, 2017

Orders granting or denying class certification are inherently interlocutory, hence not immediately reviewable under 28 U. S. C. §1291, which empowers federal courts of appeals to review only "final decisions of the district courts." In *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, a 1978 decision, this Court held that the death-knell doctrine—which rested on courts' recognition that a denial of class certification would sometimes end a lawsuit for all practical purposes—did not warrant mandatory appellate jurisdiction of certification orders. *Id.,* at 470, 477. Although the death-knell theory likely "enhanced the quality of justice afforded a few litigants," it did so at a heavy cost to §1291's finality requirement. *Id.*, at 473. First, the potential for multiple interlocutory appeals inhered in the doctrine. See *id.,* at 474. Second, the death-knell theory forced appellate courts indiscriminately into the trial process, circumventing the two-tiered "screening procedure" Congress established for interlocutory appeals in 28 U. S. C. §1292(b). *Id.*, at 474, 476. Finally, the doctrine "operat[ed] only in favor of plaintiffs," even though the class-certification question may be critically important to defendants as well. *Id.*, at 476.

Two decades later, in 1998, after Congress amended the Rules Enabling Act, 28 U. S. C. §2071 *et seq.*, to empower this Court to promulgate rules providing for interlocutory appeal of orders "not otherwise provided for [in §1292]," §1292(e), this Court approved Federal Rule of Civil Procedure 23(f). Rule 23(f) authorizes "permissive interlocutory appeal" from adverse class-certification orders in "the sole discretion of the court of appeals." 28 U. S. C. App., p. 815. This discretionary arrangement was the product of careful calibration on the part of the rulemakers.

Respondents, owners of Microsoft's videogame console, the Xbox 360, filed this putative class action alleging a design defect in the device. The District Court struck respondents' class allegations from the complaint, and the Court of Appeals denied respondents permission to appeal that order under Rule 23(f). Instead of pursuing their individual claims to final judgment on the merits, respondents stipulated to a voluntary dismissal of their claims with prejudice, but reserved the right to revive their claims should the Court of Appeals reverse the District Court's certification denial. Respondents then appealed, challenging only the interlocutory order striking their class allegations. The Ninth Circuit held it had jurisdiction to entertain the appeal under §1291. It then held that the District Court's rationale for striking respondents' class allegations was an impermissible one, but refused to opine on whether class certification was inappropriate for a different reason, leaving that question for the District Court on remand.

Held: Federal courts of appeals lack jurisdiction under §1291 to review an order denying class certification (or, as here, an order striking class allegations) after the named plaintiffs have voluntarily dismissed their claims with prejudice. Pp. 11–17.

(a) Section 1291's final-judgment rule preserves the proper balance between trial and appellate courts, minimizes the harassment and delay that would result from repeated interlocutory appeals, and promotes the efficient administration of justice. This Court has resisted efforts to stretch §1291 to permit appeals of right that would erode the finality principle and disserve its objectives. See, *e.g.*, *Mohawk Industries, Inc.* v. *Carpenter*, 558 U. S. 100, 112. Attempts to secure appeal as of right from adverse class certification orders fit that bill. Pp. 11–12.

(b) Respondents' voluntary-dismissal tactic, even more than the death-knell theory, invites protracted litigation and piecemeal appeals. Under the death-knell doctrine, a court of appeals could decline to hear an appeal if it determined that the plaintiff "ha[d] adequate incentive to continue" despite the denial of class certification. *Coopers & Lybrand*, 437 U. S., at 471. Under respondents' theory, however, the decision whether an immediate appeal will lie resides exclusively with the plaintiff, who need only dismiss her claims with prejudice in order to appeal the district court's order denying class certification. And she may exercise that option more than once, interrupting district court proceedings with an interlocutory appeal again, should the court deny class certification on a different ground.

Respondents contend that their position promotes efficiency, observing that after dismissal with prejudice the case is over if the plaintiff loses on appeal. But plaintiffs with weak merits claims may readily assume that risk, mindful that class certification often leads to a hefty settlement. And the same argument was evident in the death-knell context, yet this Court determined that the potential for piecemeal litigation was "apparent and serious." *Id.*, at 474. That potential is greater still under respondents' theory, where plaintiffs alone determine whether and when to appeal an adverse certification ruling. Pp. 12–14.

(c) Also like the death-knell doctrine, respondents' theory allows indiscriminate appellate review of interlocutory orders. Beyond disturbing the "'appropriate relationship between the respective courts,'" *Coopers & Lybrand*, 437 U. S., at 476, respondents' dismissal tactic undercuts Rule 23(f)'s discretionary regime. This consideration is "[o]f prime significance to the jurisdictional issue" in this case, *Swint* v. *Chambers County Comm'n*, 514 U. S. 35, 46, because Congress has established rulemaking as the means for determining when a decision is final for purposes of §1291 and for providing for appellate review of interlocutory orders not covered by statute, see §§2072(c) and 1292(e).

Respondents maintain that Rule 23(f) is irrelevant, for it concerns interlocutory orders, whereas this case involves an actual final judgment. Yet permitting respondents' voluntary-dismissal tactic to yield an appeal of right would seriously undermine Rule 23(f)'s careful calibration, as well as Congress' designation of rulemaking "as the preferred means for determining whether and when prejudgment orders should be immediately appealable," *Mohawk Industries*, 558 U. S., at 113. Plaintiffs in putative class actions cannot transform a tentative interlocutory order into a final judgment within the meaning of §1291 simply by dismissing their claims with prejudice. Finality "is not a technical concept of temporal or physical termination." *Cobbledick* v. *United States*, 309 U. S. 323, 326. It is one "means [geared to] achieving a healthy legal system," *ibid.*, and its contours are determined accordingly. Pp. 14–16.

(d) The one-sidedness of respondents' voluntary-dismissal device reinforces the conclusion that it does not support mandatory appellate jurisdiction of refusals to grant class certification. The tactic permits only plaintiffs, never defendants, to force an immediate appeal of an adverse certification ruling. Yet the "class issue" may be just as important to defendants, *Coopers & Lybrand*, 437 U. S., at 476, for class certification may force a defendant to settle rather than run the risk of ruinous liability. P. 17.

797 F. 3d 607, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which KENNEDY, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment, in which ROBERTS, C. J., and ALITO, J., joined. GORSUCH, J., took no part in the consideration or decision of the case.

SUPREME COURT OF THE UNITED STATES

No. 15–457

MICROSOFT CORPORATION, PETITIONER *v.* SETH BAKER, ET AL.

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

[June 12, 2017]

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns options open to plaintiffs, when denied class-action certification by a district court, to gain appellate review of the district court's order. Orders granting or denying class certification, this Court has held, are "inherently interlocutory," *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 470 (1978), hence not immediately reviewable under 28 U. S. C. §1291, which provides for appeals from "final decisions." Pursuant to Federal Rule of Civil Procedure 23(f), promulgated in 1998, however, orders denying or granting class certification may be appealed immediately if the court of appeals so permits. Absent such permission, plaintiffs may pursue their individual claims on the merits to final judgment, at which point the denial of class-action certification becomes ripe for review.

The plaintiffs in the instant case, respondents here, were denied Rule 23(f) permission to appeal the District Court's refusal to grant class certification. Instead of pursuing their individual claims to final judgment on the merits, respondents stipulated to a voluntary dismissal of their claims "with prejudice," but reserved the right to revive their claims should the Court of Appeals reverse the District Court's certification denial.

We hold that the voluntary dismissal essayed by respondents does not qualify as a "final decision" within the compass of §1291. The tactic would undermine §1291's firm finality principle, designed to guard against piecemeal appeals, and subvert the balanced solution Rule 23(f) put in place for immediate review of class-action orders.

I

A

Under §1291 of the Judicial Code, federal courts of appeals are empowered to review only "final decisions of the district courts." 28 U. S. C. §1291.[1] Two guides, our decision in *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463 (1978), and Federal Rule of Civil Procedure 23(f), control our application of that finality rule here.

1

In *Coopers & Lybrand*, this Court considered whether a plaintiff in a putative class action may, under certain circumstances, appeal as of right a district court order striking class allegations or denying a motion for class certification. We held unanimously that the so-called "death-knell" doctrine did not warrant mandatory appellate jurisdiction of such "inherently interlocutory" orders. 437 U. S., at 470, 477. Courts of Appeals employing the doctrine "regarded [their] jurisdiction as depending on whether [rejection of class-action status] had sounded the 'death knell' of the action." *Id.*, at 466. These courts asked whether the refusal to certify a class would end a lawsuit for all practical purposes because the value of the

[1] Section 1292, which authorizes review of certain interlocutory decisions, does not include among those decisions class-action certifications. See 28 U. S. C. §1292.

named plaintiff's individual claims made it "economically imprudent to pursue his lawsuit to a final judgment and [only] then seek appellate review of [the] adverse class determination." *Id.*, at 469–470. If, in the court of appeals' view, the order would terminate the litigation, the court deemed the order an appealable final decision under §1291. *Id.,* at 471. If, instead, the court determined that the plaintiff had "adequate incentive to continue [litigating], the order [was] considered interlocutory." *Ibid.* Consequently, immediate appeal would be denied.

The death-knell theory likely "enhance[d] the quality of justice afforded a few litigants," we recognized. *Id.*, at 473. But the theory did so, we observed, at a heavy cost to §1291's finality requirement, and therefore to "the judicial system's overall capacity to administer justice." *Id.,* at 473; see *id.*, at 471 (Section 1291 "evinces a legislative judgment that 'restricting appellate review to final decisions prevents the debilitating effect on judicial administration caused by piecemeal appeal disposition.'" (quoting *Eisen* v. *Carlisle & Jacquelin*, 417 U. S. 156, 170 (1974) (alterations and internal quotation marks omitted))). First, the potential for multiple interlocutory appeals inhered in the doctrine: When a ruling denying class certification on one ground was reversed on appeal, a death-knell plaintiff might again claim "entitle[ment] to an appeal as a matter of right" if, on remand, the district court denied class certification on a different ground. *Coopers & Lybrand*, 437 U. S., at 474.

Second, the doctrine forced appellate courts indiscriminately into the trial process, thereby defeating a "vital purpose of the final-judgment rule—that of maintaining the appropriate relationship between the respective courts." *Id.*, at 476 (internal quotation marks omitted); see *id.*, at 474. The Interlocutory Appeals Act of 1958, 28 U. S. C. §1292(b), we explained, had created a two-tiered "screening procedure" to preserve this relationship and to restrict the availability of interlocutory review to "appropriate cases." 437 U. S., at 474. For a party to obtain review under §1292(b), the district court must certify that the interlocutory order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." The court of appeals may then, "in its discretion, permit an appeal to be taken from such order." The death-knell doctrine, we stressed, "circumvent[ed] [§1292(b)'s] restrictions." *Id.*, at 475.

Finally, we observed, the doctrine was one sided: It "operate[d] only in favor of plaintiffs," even though the class-certification question is often "of critical importance to defendants as well." *Id.*, at 476. Just as a denial of class certification may sound the death knell for plaintiffs, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Ibid.*[2]

In view of these concerns, the Court reached this conclusion in *Coopers & Lybrand*: "The fact that an interlocutory order may induce a party to abandon his claim before final judgment is not a sufficient reason for considering [the order] a 'final decision' within the meaning of §1291." *Id.*, at 477.[3]

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[2] This scenario has been called a "reverse death knell," Sullivan & Trueblood, Rule 23(f): A Note on Law and Discretion in the Courts of Appeals, 246 F. R. D. 277, 280 (2008), or "inverse death knell," 7B C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §1802, p. 299 (3d ed. 2005), for it too ends the litigation as a practical matter.

[3] *Coopers & Lybrand* also rejected the collateral-order doctrine as a basis for invoking §1291 to appeal an order denying class certification. The collateral-order doctrine applies only to a "small class" of decisions that are conclusive, that resolve important issues "completely separate from the merits," and that are "effectively unreviewable on appeal from a final judgment." 437 U. S., at 468. An order concerning class certifi-

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After *Coopers & Lybrand*, a party seeking immediate review of an adverse class-certification order had no easy recourse. The Federal Rules of Civil Procedure did not then "contain any unique provisions governing appeals" in class actions, *id.*, at 470, so parties had to survive §1292(b)'s two-level inspection, see *id.*, at 474–475, and n. 27; *supra*, at 3–4, or satisfy the extraordinary-circumstances test applicable to writs of mandamus, see *Will* v. *United States*, 389 U. S. 90, 108 (1967) (Black, J., concurring) ("[In] extraordinary circumstances, mandamus may be used to review an interlocutory order which is by no means 'final' and thus appealable under federal statutes."); cf. *Coopers & Lybrand*, 437 U. S., at 466, n. 6.

Another avenue opened in 1998 when this Court approved Federal Rule of Civil Procedure 23(f). Seen as a response to *Coopers & Lybrand*, see, *e.g.*, *Blair* v. *Equifax Check Services, Inc.*, 181 F. 3d 832, 834 (CA7 1999); Solimine & Hines, Deciding To Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f), 41 Wm. & Mary L. Rev. 1531, 1568 (2000), Rule 23(f) authorizes "permissive interlocutory appeal" from adverse class-certification orders in the discretion of the court of appeals, Advisory Committee's 1998 Note on subd. (f) of Fed. Rule Civ. Proc. 23, 28 U. S. C. App., p. 815 (hereinafter Committee Note on Rule 23(f)). The Rule was adopted pursuant to §1292(e), see Committee Note on Rule 23(f), which empowers this Court, in accordance with the Rules Enabling Act, 28 U. S. C. §2072, to promulgate rules "to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for [in §1292]." §1292(e).[4] Rule 23(f) reads:

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cation, we explained, fails each of these criteria. See *id.*, at 469.

[4] Congress amended the Rules Enabling Act, 28 U. S. C. §2071 *et seq.*,

> "A court of appeals may permit an appeal from an order granting or denying class-action certification . . . if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders."[5]

Courts of appeals wield "unfettered discretion" under Rule 23(f), akin to the discretion afforded circuit courts under §1292(b). Committee Note on Rule 23(f). But Rule 23(f) otherwise "departs from the §1292(b) model," for it requires neither district court certification nor adherence to §1292(b)'s other "limiting requirements." Committee Note on Rule 23(f); see *supra*, at 3–4.

This resolution was the product of careful calibration. By "[r]emoving the power of the district court to defeat any opportunity to appeal," the drafters of Rule 23(f) sought to provide "significantly greater protection against improvident certification decisions than §1292(b)" alone offered. Judicial Conference of the United States, Advisory Committee on Civil Rules, Minutes of November 9–10, 1995. But the drafters declined to go further and provide for appeal as a matter of right. "[A] right to appeal would

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in 1990 to authorize this Court to prescribe rules "defin[ing] when a ruling of a district court is final for the purposes of appeal under section 1291." §2072(c). Congress enacted §1292(e) two years later, and that same year the Advisory Committee on the Federal Rules of Civil Procedure began to review proposals for what would become Rule 23(f). See Solimine & Hines, Deciding To Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f), 41 Wm. & Mary L. Rev. 1531, 1563–1564, 1566, n. 189 (2000).

[5] Rule 23(f) has changed little since its adoption in 1998. See Advisory Committee's 2007 and 2009 Notes on subd. (f) of Fed. Rule Civ. Proc. 23, 28 U. S. C. App., p. 820 (deleting a redundancy and increasing the time to petition for permission to appeal from ten to 14 days, respectively).

lead to abuse" on the part of plaintiffs and defendants alike, the drafters apprehended, "increas[ing] delay and expense" over "routine class certification decisions" unworthy of immediate appeal. *Ibid.* (internal quotation marks omitted). See also Brief for Civil Procedure Scholars as *Amici Curiae* 6–7, 11–14 ("Rule 23(f) was crafted to balance the benefits of immediate review against the costs of interlocutory appeals." (capitalization omitted)). Rule 23(f) therefore commits the decision whether to permit interlocutory appeal from an adverse certification decision to "the sole discretion of the court of appeals." Committee Note on Rule 23(f); see Federal Judicial Center, T. Willging, L. Hooper, & R. Niemic, Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 86 (1996) (hereinafter Federal Judicial Center Study) ("The discretionary nature of the proposed rule . . . is designed to be a guard against abuse of the appellate process.").[6]

The Rules Committee offered some guidance to courts of appeals considering whether to authorize appeal under Rule 23(f). "Permission is most likely to be granted," the Committee Note states, "when the certification decision turns on a novel or unsettled question of law," or when "the decision on certification is likely dispositive of the litigation," as in a death-knell or reverse death-knell situation. Committee Note on Rule 23(f); see *supra*, at 4,

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[6] Legislation striking this balance was also introduced in Congress. See H. R. 660, 105th Cong., 1st Sess. (1997). The bill, which would have amended §1292(b) to provide for interlocutory appeal of adverse class determinations, likewise committed the decision whether an immediate appeal would lie exclusively to the courts of appeals: "The court of appeals may, in its discretion, permit the appeal to be taken from such determination." *Ibid.* Upon learning that "proposed Rule 23(f) [was] well advanced," the bill's sponsor, Representative Charles Canady, joined forces with the Rules Committee. See Judicial Conference of the United States, Advisory Committee on Civil Rules, Minutes of May 1–2, 1997.

and n. 2. Even so, the Rule allows courts of appeals to grant or deny review "on the basis of *any* consideration." Committee Note on Rule 23(f) (emphasis added).

B

With this background in mind, we turn to the putative class action underlying our jurisdictional inquiry. The lawsuit is not the first of its kind. A few years after petitioner Microsoft Corporation released its popular video-game console, the Xbox 360, a group of Xbox owners brought a putative class action against Microsoft based on an alleged design defect in the device. See *In re Microsoft Xbox 360 Scratched Disc Litigation*, 2009 WL 10219350, *1 (WD Wash., Oct. 5, 2009). The named plaintiffs, advised by some of the same counsel representing respondents in this case, asserted that the Xbox scratched (and thus destroyed) game discs during normal game-playing conditions. See *ibid.* The District Court denied class certification, holding that individual issues of damages and causation predominated over common issues. See *id.*, at *6–*7. The plaintiffs petitioned the Ninth Circuit under Rule 23(f) for leave to appeal the class-certification denial, but the Ninth Circuit denied the request. See 851 F. Supp. 2d 1274, 1276 (WD Wash. 2012). Thereafter, the *Scratched Disc* plaintiffs settled their claims individually. 851 F. Supp. 2d, at 1276.

Two years later, in 2011, respondents filed this lawsuit in the same Federal District Court. They proposed a nationwide class of Xbox owners based on the same design defect alleged in *Scratched Disc Litigation*. See 851 F. Supp. 2d, at 1275–1276. The class-certification analysis in the earlier case did not control, respondents urged, because an intervening Ninth Circuit decision constituted a change in law sufficient to overcome the deference ordinarily due, as a matter of comity, the previous certification denial. *Id.,* at 1277–1278. The District Court disagreed.

Concluding that the relevant Circuit decision had not undermined *Scratched Disc Litigation*'s causation analysis, the court determined that comity required adherence to the earlier certification denial and therefore struck respondents' class allegations. 851 F. Supp. 2d, at 1280–1281.

Invoking Rule 23(f), respondents petitioned the Ninth Circuit for permission to appeal that ruling.[7] Interlocutory review was appropriate in this case, they argued, because the District Court's order striking the class allegations created a "death-knell situation": The "small size of [their] claims ma[de] it economically irrational to bear the cost of litigating th[e] case to final judgment," they asserted, so the order would "effectively kil[l] the case." Pet. for Permission To Appeal Under Rule 23(f) in No. 12–80085 (CA9), App. 118. The Ninth Circuit denied the petition. Order in No. 12–80085 (CA9, June 12, 2012), App. 121.

Respondents then had several options. They could have settled their individual claims like their *Scratched Disc* predecessors or petitioned the District Court, pursuant to §1292(b), to certify the interlocutory order for appeal, see *supra*, at 3–4. They could also have proceeded to litigate their case, mindful that the District Court could later reverse course and certify the proposed class. See Fed. Rule Civ. Proc. 23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before final judgment."); *Coopers & Lybrand*, 437 U. S., at 469 (a certification order "is subject to revision in the District Court"). Or, in the event the District Court did not change

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[7] An order striking class allegations is "functional[ly] equivalent" to an order denying class certification and therefore appealable under Rule 23(f). *Scott* v. *Family Dollar Stores, Inc.*, 733 F. 3d 105, 110–111, n. 2 (CA4 2013) (quoting *In re Bemis Co.*, 279 F. 3d 419, 421 (CA7 2002)). See also *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385, 388, and n. 4 (1977) (equating order striking class allegations with "a denial of class certification").

course, respondents could have litigated the case to final judgment and then appealed. *Id.,* at 469 ("an order denying class certification is subject to effective review after final judgment at the behest of the named plaintiff").

Instead of taking one of those routes, respondents moved to dismiss their case with prejudice. "After the [c]ourt has entered a final order and judgment," respondents explained, they would "appeal the . . . order striking [their] class allegations." Motion To Dismiss in No. 11–cv–00722 (WD Wash., Sept. 25, 2012), App. 122–123. In respondents' view, the voluntary dismissal enabled them "to pursue their individual claims or to pursue relief solely on behalf of the class, should the certification decision be reversed." Brief for Respondents 15. Microsoft stipulated to the dismissal, but maintained that respondents would have "no right to appeal" the order striking the class allegations after thus dismissing their claims. App. to Pet. for Cert. 35a–36a. The District Court granted the stipulated motion to dismiss, *id.*, at 39a, and respondents appealed. They challenged only the District Court's interlocutory order striking their class allegations, not the dismissal order which they invited. See Brief for Plaintiffs-Appellants in No. 12–35946 (CA9).

The Ninth Circuit held it had jurisdiction to entertain the appeal under §1291. 797 F. 3d 607, 612 (2015). The Court of Appeals rejected Microsoft's argument that respondents' voluntary dismissal, explicitly engineered to appeal the District Court's interlocutory order striking the class allegations, impermissibly circumvented Rule 23(f). *Ibid.*, n. 3. Because the stipulated dismissal "did not involve a settlement," the court reasoned, it was "'a sufficiently adverse—and thus appealable—final decision'" under §1291. *Id.*, at 612 (quoting *Berger* v. *Home Depot USA, Inc.*, 741 F. 3d 1061, 1065 (CA9 2014)); see *id.*, at 1065 (relying on 7B C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §1802, pp. 297–298 (3d ed.

2005), for the proposition "that finality for appeal purposes can be achieved in this manner").

Satisfied of its jurisdiction, the Ninth Circuit held that the District Court had abused its discretion in striking respondents' class allegations. 797 F. 3d, at 615. The Court of Appeals "express[ed] no opinion on whether" respondents "should prevail on a motion for class certification," *ibid.*, concluding only that the District Court had misread recent Circuit precedent, see *id.*, at 613–615, and therefore misapplied the comity doctrine, *id.*, at 615. Whether a class should be certified, the court said, was a question for remand, "better addressed if and when [respondents] move[d] for class certification." *Ibid.*

We granted certiorari to resolve a Circuit conflict over this question: Do federal courts of appeals have jurisdiction under §1291 and Article III of the Constitution to review an order denying class certification (or, as here, an order striking class allegations) after the named plaintiffs have voluntarily dismissed their claims with prejudice?[8] 577 U. S. ___ (2016). Because we hold that §1291 does not countenance jurisdiction by these means, we do not reach the constitutional question, and therefore do not address the arguments and analysis discussed in the opinion concurring in the judgment.

II

"From the very foundation of our judicial system," the general rule has been that "the whole case and every

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[8] Compare *Berger* v. *Home Depot USA, Inc.*, 741 F. 3d 1061, 1065 (CA9 2014) (assuming jurisdiction under these circumstances); *Gary Plastic Packaging Corp.* v. *Merrill Lynch*, 903 F. 2d 176, 179 (CA2 1990) (assuming jurisdiction after dismissal for failure to prosecute), with *Camesi* v. *University of Pittsburgh Medical Center*, 729 F. 3d 239, 245–247 (CA3 2013) (no jurisdiction under §1291 or Article III in this situation); *Rhodes* v. *E. I. du Pont de Nemours & Co.*, 636 F. 3d 88, 100 (CA4 2011) (no jurisdiction under Article III).

matter in controversy in it [must be] decided in a single appeal." *McLish* v. *Roff*, 141 U. S. 661, 665–666 (1891). This final-judgment rule, now codified in §1291, preserves the proper balance between trial and appellate courts, minimizes the harassment and delay that would result from repeated interlocutory appeals, and promotes the efficient administration of justice. See *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U. S. 368, 374 (1981).

Construing §1291 in line with these reasons for the rule, we have recognized that "finality is to be given a practical rather than a technical construction." *Eisen*, 417 U. S., at 171 (internal quotation marks omitted). Repeatedly we have resisted efforts to stretch §1291 to permit appeals of right that would erode the finality principle and disserve its objectives. See, *e.g.*, *Mohawk Industries, Inc.* v. *Carpenter*, 558 U. S. 100, 112 (2009); *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 511 U. S. 863, 878–879, 884 (1994); *Cobbledick* v. *United States*, 309 U. S. 323, 324–325, 330 (1940) (construing §1291's predecessor statute). Attempts to secure appeal as of right from adverse class-certification orders fit that bill. See *supra*, at 2–4. Because respondents' dismissal device subverts the final-judgment rule and the process Congress has established for refining that rule and for determining when nonfinal orders may be immediately appealed, see §§2072(c) and 1292(e), the tactic does not give rise to a "final decisio[n]" under §1291.

A

Respondents' voluntary-dismissal tactic, even more than the death-knell theory, invites protracted litigation and piecemeal appeals. Under the death-knell doctrine, a court of appeals could decline to hear an appeal if it determined that the plaintiff "ha[d] adequate incentive to continue" despite the denial of class certification. *Coopers & Lybrand*, 437 U. S., at 471. Appellate courts lack even that authority under respondents' theory. Instead, the decision whether an immediate appeal will lie resides exclusively with the plaintiff; she need only dismiss her claims with prejudice, whereupon she may appeal the district court's order denying class certification. And, as under the death-knell doctrine, she may exercise that option more than once, stopping and starting the district court proceedings with repeated interlocutory appeals. See *id.*, at 474 (death-knell doctrine offered "no assurance that the trial process [would] not again be disrupted by interlocutory review").

Consider this case. The Ninth Circuit reviewed and rejected only the District Court's application of comity as a basis for striking respondents' class allegations. 797 F. 3d, at 615. The appeals court declined to reach Microsoft's other arguments against class certification. See *ibid.* It remained open to the District Court, in the Court of Appeals' view, to deny class certification on a different ground, and respondents would be free, under their theory, to force appellate review of any new order denying certification by again dismissing their claims. In designing Rule 23(f)'s provision for discretionary review, the Rules Committee sought to prevent such disruption and delay. See *supra*, at 6–8.[9]

Respondents nevertheless maintain that their position promotes efficiency, observing that after dismissal with prejudice the case is over if the plaintiff loses on appeal. Brief for Respondents 38–39. Their way, they say, means prompt resolution of many lawsuits and infrequent use of the voluntary-dismissal tactic, for "most appeals lose" and

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[9] Rule 23(f) avoids delay not only by limiting class-certification appeals to those permitted by the federal courts of appeals, but also by specifying that "[a]n appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders." See *Blair* v. *Equifax Check Services, Inc.*, 181 F. 3d 832, 835 (CA7 1999) ("Rule 23(f) is drafted to avoid delay."). Respondents' dismissal tactic, by contrast, halts district court proceedings whenever invoked.

few plaintiffs will "take th[e] risk" of losing their claims for good. *Id.*, at 35–36. Respondents overlook the prospect that plaintiffs with weak merits claims may readily assume that risk, mindful that class certification often leads to a hefty settlement. See *Coopers & Lybrand*, 437 U. S., at 476 (defendant facing the specter of classwide liability may "abandon a meritorious defense"). Indeed, the same argument—that the case was over if the plaintiff lost on appeal—was evident in the death-knell context, yet this Court determined that the potential for piecemeal litigation was "apparent and serious." *Id.*, at 474.[10] And that potential is greater still under respondents' theory, where plaintiffs alone determine whether and when to appeal an adverse certification ruling.

B

Another vice respondents' theory shares with the death-knell doctrine, both allow indiscriminate appellate review of interlocutory orders. *Ibid.* Beyond disturbing the "appropriate relationship between the respective courts," *id.,* at 476 (internal quotation marks omitted), respondents' dismissal tactic undercuts Rule 23(f)'s discretionary regime. This consideration is "[o]f prime significance to the jurisdictional issue before us." *Swint* v. *Chambers County Comm'n*, 514 U. S. 35, 46 (1995) (pendent appellate jurisdiction in collateral-order context would undermine §1292(b)); see *supra*, at 3–4 (death-knell doctrine impermissibly circumvented §1292(b)).

[10] The very premise of the death-knell doctrine was that plaintiffs "would not pursue their claims individually." *Coopers & Lybrand*, 437 U. S., at 466. Having pressed such an argument for the benefit of immediate review, a death-knell plaintiff who lost on appeal would encounter the general proposition, long laid down, that "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position." *Davis* v. *Wakelee*, 156 U. S. 680, 689 (1895).

In the Rules Enabling Act, as earlier recounted, Congress authorized this Court to determine when a decision is final for purposes of §1291, and to provide for appellate review of interlocutory orders not covered by statute. See *supra*, at 5–6, and n. 4. These changes are to come from rulemaking, however, not judicial decisions in particular controversies or inventive litigation ploys. See *Swint*, 514 U. S., at 48. In this case, the rulemaking process has dealt with the matter, yielding a "measured, practical solutio[n]" to the questions whether and when adverse certification orders may be immediately appealed. *Mohawk Industries*, 558 U. S., at 114. Over years the Advisory Committee on the Federal Rules of Civil Procedure studied the data on class-certification rulings and appeals, weighed various proposals, received public comment, and refined the draft rule and Committee Note. See Solimine & Hines, 41 Wm. & Mary L. Rev., at 1564–1566, and nn. 178–189; Federal Judicial Center Study 80–87. Rule 23(f) reflects the rulemakers' informed assessment, permitting, as explained *supra*, at 5–7, interlocutory appeals of adverse certification orders, whether sought by plaintiffs or defendants, solely in the discretion of the courts of appeals. That assessment "warrants the Judiciary's full respect." *Swint*, 514 U. S., at 48; see *Mohawk Industries*, 558 U. S., at 118–119 (THOMAS, J., concurring in part and concurring in judgment).

Here, however, the Ninth Circuit, after denying respondents permission to appeal under Rule 23(f), nevertheless assumed jurisdiction of their appeal challenging only the District Court's order striking the class allegations. See *supra*, at 9–10. According to respondents, even plaintiffs who altogether bypass Rule 23(f) may force an appeal by dismissing their claims with prejudice. See Tr. of Oral Arg. 34. Rule 23(f), respondents say, is irrelevant, for it "address[es] *interlocutory* orders," whereas this case involves "an *actual* final judgment." Brief for Respondents

26, 28.

We are not persuaded. If respondents' voluntary-dismissal tactic could yield an appeal of right, Rule 23(f)'s careful calibration—as well as Congress' designation of rulemaking "as the preferred means for determining whether and when prejudgment orders should be immediately appealable," *Mohawk Industries*, 558 U. S., at 113 (majority opinion)—"would be severely undermined," *Swint*, 514 U. S., at 47. Respondents, after all, "[sought] review of only the [inherently interlocutory] orde[r]" striking their class allegations; they "d[id] not complain of the 'final' orde[r] that dismissed their cas[e]." *Camesi* v. *University of Pittsburgh Medical Center*, 729 F. 3d 239, 244 (CA3 2013).

Plaintiffs in putative class actions cannot transform a tentative interlocutory order, see *supra*, at 9, into a final judgment within the meaning of §1291 simply by dismissing their claims with prejudice—subject, no less, to the right to "revive" those claims if the denial of class certification is reversed on appeal, see Brief for Respondents 45; Tr. of Oral Arg. 31 (assertion by respondents' counsel that, if the appeal succeeds, "everything would spring back to life" on remand). Were respondents' reasoning embraced by this Court, "Congress['] final decision rule would end up a pretty puny one." *Digital Equipment Corp.*, 511 U. S., at 872. Contrary to respondents' argument, §1291's firm final-judgment rule is not satisfied whenever a litigant persuades a district court to issue an order purporting to end the litigation. Finality, we have long cautioned, "is not a technical concept of temporal or physical termination." *Cobbledick*, 309 U. S., at 326. It is one "means [geared to] achieving a healthy legal system," *ibid.*, and its contours are determined accordingly, see *supra*, at 12.[11]

[11] Respondents also invoke our decision in *United States* v. *Procter & Gamble Co.*, 356 U. S. 677 (1958), but that case—a civil antitrust

C

The one-sidedness of respondents' voluntary-dismissal device "reinforce[s] our conclusion that [it] does not support appellate jurisdiction of prejudgment orders denying class certification." *Coopers & Lybrand*, 437 U. S., at 476; see *supra*, at 4. Respondents' theory permits plaintiffs only, never defendants, to force an immediate appeal of an adverse certification ruling. Yet the "class issue" may be just as important to defendants, *Coopers & Lybrand*, 437 U. S., at 476, for "[a]n order granting certification . . . may force a defendant to settle rather than . . . run the risk of potentially ruinous liability," Committee Note on Rule 23(f); see *supra*, at 4, and n. 2 (defendants may face a "reverse death knell"). Accordingly, we recognized in *Coopers & Lybrand* that "[w]hatever similarities or differences there are between plaintiffs and defendants in this context involve questions of policy for Congress." 437 U. S., at 476. Congress chose the rulemaking process to settle the matter, and the rulemakers did so by adopting Rule 23(f)'s evenhanded prescription. It is not the prerogative of litigants or federal courts to disturb that settlement. See *supra*, at 14–15.

* * *

For the reasons stated, the judgment of the Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE GORSUCH took no part in the consideration or decision of this case.

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enforcement action—involved neither class-action certification nor the sort of dismissal tactic at issue here. See *id.,* at 681 (the Government "did not consent to a judgment against [it]" (internal quotation marks omitted)).

SUPREME COURT OF THE UNITED STATES

No. 15–457

MICROSOFT CORPORATION, PETITIONER *v.* SETH BAKER, ET AL.

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

[June 12, 2017]

JUSTICE THOMAS, with whom THE CHIEF JUSTICE and JUSTICE ALITO join, concurring in the judgment.

I agree with the Court that the Court of Appeals lacked jurisdiction over respondents' appeal, but I would ground that conclusion in Article III of the Constitution instead of 28 U. S. C. §1291. I therefore concur only in the judgment.

The plaintiffs in this case, respondents here, sued Microsoft, petitioner here, to recover damages after they purchased allegedly faulty video game consoles that Microsoft manufactured. The plaintiffs brought claims for themselves (individual claims) and on behalf of a putative class of similarly situated consumers (class allegations). Early in the litigation, the District Court granted Microsoft's motion to strike the class allegations, effectively declining to certify the class. The Court of Appeals denied permission to appeal that decision under Federal Rule of Civil Procedure 23(f), which requires a party to obtain permission from the court of appeals before appealing a decision regarding class certification.

The plaintiffs decided not to pursue their individual claims, instead stipulating to a voluntary dismissal of those claims with prejudice. They then filed a notice of appeal from the voluntary dismissal order. On appeal, they did not ask the Court of Appeals to reverse the District Court's dismissal of their individual claims. They instead asked the Court of Appeals to reverse the order striking their class allegations. The question presented in this case is whether the Court of Appeals had jurisdiction to hear the appeal under both §1291, which grants appellate jurisdiction to the courts of appeals over "final decisions" by district courts, and under Article III of the Constitution, which limits the jurisdiction of federal courts to "cases" and "controversies."

The Court today holds that the Court of Appeals lacked jurisdiction under §1291 because the voluntary dismissal with prejudice did not result in a "final decision." I disagree with that holding. A decision is "final" for purposes of §1291 if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin* v. *United States*, 324 U. S. 229, 233 (1945). The order here dismissed all of the plaintiffs' claims with prejudice and left nothing for the District Court to do but execute the judgment. See App. to Pet. for Cert. 39a ("direct[ing] the Clerk to enter Judgment . . . and close th[e] case").

The Court reaches the opposite conclusion, relying not on the text of §1291 or this Court's precedents about finality, but on Rule 23(f). Rule 23(f) makes interlocutory orders regarding class certification appealable only with the permission of the court of appeals. The Court concludes that the plaintiffs' "voluntary dismissal" "does not qualify as a 'final decision'" because allowing the plaintiffs' appeal would "subvert the balanced solution Rule 23(f) put in place for immediate review of class-action orders." *Ante,* at 2.

The Court's conclusion does not follow from its reasoning. Whether a dismissal with prejudice is "final" depends on the meaning of §1291, not Rule 23(f). Rule 23(f) says nothing about finality, much less about the finality of an order dismissing individual claims with prejudice. I agree with the Court that the plaintiffs are trying to avoid the requirements for interlocutory appeals under Rule 23(f), but our view of the balance struck in that rule should not warp our understanding of finality under §1291.

Although I disagree with the Court's reading of §1291, I agree that the plaintiffs could not appeal in these circumstances. In my view, they could not appeal because the Court of Appeals lacked jurisdiction under Article III of the Constitution. The "judicial Power" of the United States extends only to "Cases" and "Controversies." Art. III, §2. This requirement limits the jurisdiction of the federal courts to issues presented "in an adversary context," *Flast* v. *Cohen*, 392 U. S. 83, 95 (1968), in which the parties maintain an "actual" and "concrete" interest, *Campbell-Ewald Co.* v. *Gomez*, 577 U. S. ___, ___ (2016) (slip op., at 6) (internal quotation marks omitted). Put another way, "Article III denies federal courts the power to decide questions that cannot affect the rights of litigants in the case before them, and confines them to resolving real and substantial controversies admitting of specific relief through a decree of a conclusive character." *Lewis* v. *Continental Bank Corp.*, 494 U. S. 472, 477 (1990) (internal quotation marks, citation, and alteration omitted).

The plaintiffs' appeal from their voluntary dismissal did not satisfy this jurisdictional requirement. When the plaintiffs asked the District Court to dismiss their claims, they consented to the judgment against them and disavowed any right to relief from Microsoft. The parties thus were no longer adverse to each other on any claims, and the Court of Appeals could not "affect the[ir] rights" in any legally cognizable manner. *Ibid*. Indeed, it has long been the rule that a party may not appeal from the voluntary dismissal of a claim, since the party consented to the judgment against it. See, *e.g., Evans* v. *Phillips*, 4 Wheat. 73 (1819); *Lord* v. *Veazie*, 8 How. 251, 255–256 (1850); *United States* v. *Babbitt*, 104 U. S. 767 (1882); *Deakins* v. *Monaghan*, 484 U. S. 193, 199–200 (1988).

The plaintiffs contend that their interest in reversing the order striking their class allegations is sufficient to satisfy Article III's case-or-controversy requirement, but they misunderstand the status of putative class actions. Class allegations, without an underlying individual claim, do not give rise to a "case" or "controversy." Those allegations are simply the means of invoking a procedural mechanism that enables a plaintiff to litigate his individual claims on behalf of a class. See *Shady Grove Orthopedic Associates, P. A.* v. *Allstate Ins. Co.*, 559 U. S. 393, 408 (2010) (plurality opinion). Thus, because the Court of Appeals lacked Article III jurisdiction to adjudicate the individual claims, it could not hear the plaintiffs' appeal of the order striking their class allegations.

Plaintiffs' representation that they hope to "revive their [individual] claims should they prevail" on the appeal of the order striking their class allegations does not undermine this conclusion. Brief for Respondents 45. This Court has interpreted Article III "to demand that an actual controversy be extant at all stages of review, not merely at the time the complaint is filed." *Campbell Ewald Co.*, *supra*, at ___ (slip op., at 6) (internal quotation marks and alterations omitted). And in any event, a favorable ruling on class certification would not "revive" their individual claims: A court's decision about class allegations "in no way touch[es] the merits" of those claims. *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U. S. 478, 482 (1978).

* * *

Because I would hold that the Court of Appeals lacked jurisdiction under Article III to consider respondents' appeal, I concur in the judgment.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICHAEL H. RESH, On Behalf of Himself and All Others Similarly Situated; WILLIAM SCHOENKE; HEROCA HOLDING, B.V.; NINELLA BEHEER, B.V., *Plaintiffs-Appellants*,	No. 15-55432
v.	D.C. No. 2:14-cv-05083-RGK-PJW
CHINA AGRITECH, INC.; YU CHANG, Company's CEO, President, Secretary, and Chairman of the Board; YAU-SING TANG, AKA Gareth Tang, Company's Chief Financial Officer; GENE MICHAEL BENNETT, Director of CAGC; XIAO RONG TENG, Director of CAGC; MING FANG ZHU; LUN ZHANG DAI, Director of CAGC; CHARLES LAW, AKA Charles C. Law, AKA Charles Chien-Lee Law, AKA Charles Chien-Lee Loh, AKA Chien-Lee C. Loh, Director of CAGC; ZHENG WANG, Director of CAGC, *Defendants-Appellees*.	OPINION

Appeal from the United States District Court
for the Central District of California
R. Gary Klausner, District Judge, Presiding

Argued and Submitted December 5, 2016
Pasadena, California

Filed May 24, 2017

Before: Stephen Reinhardt, William A. Fletcher,
and Richard A. Paez, Circuit Judges.

Opinion by Judge W. Fletcher

SUMMARY[*]

Class Actions

The panel reversed the district court's order dismissing as untimely a would-be class action alleging that China Agritech, Inc. and its managers and directors violated the Securities Exchange Act of 1934, and remanded for further proceedings.

The panel explained that the district court's invitation to file a complaint in a separate individual suit does not render non-appealable the district court's dismissal of the class action complaint. The panel also wrote that appellate jurisdiction is proper, notwithstanding that the plaintiffs did

[*] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

not wait for the district court to set forth its judgment in a separate document, because the district court's order was a full adjudication of the issues that clearly evidenced its intention that the order be final.

The panel held that the plaintiffs' would-be class action is not time barred, where (1) the plaintiffs were unnamed plaintiffs in two earlier would-be class actions against many of the same defendants based on the same underlying events; (2) class action certification was denied in both cases; (3) the earlier actions were timely; and (4) under *American Pipe & Construction Co v. Utah*, 414 U.S. 538 (1974), and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), the statute of limitations for the individual claims of would-be class members in the earlier actions was tolled during the pendency of those actions.

The panel wrote that permitting future class-action named plaintiffs, who were unnamed members in previously uncertified classes, to avail themselves of *American Pipe* tolling would advance the policy objectives that led the Supreme Court to permit tolling in the first place. The panel wrote that to the degree that the panel's conclusion may be thought likely to lead to abusive filing of repetitive class actions, the current legal system – including Fed. R. Civ. P. 23 and principles of preclusion and comity -- is adequate to respond to such a concern.

COUNSEL

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Seth Aronson (argued), Brittany Rogers, and Michelle C. Leu, O'Melveny & Myers LLP, Los Angeles, California; Abby F. Rudzin, O'Melveny & Myers LLP, New York, New York; for Defendants-Appellees.

OPINION

W. FLETCHER, Circuit Judge:

Plaintiffs bring a would-be class action alleging that China Agritech, Inc. ("China Agritech") and its managers and directors violated the Securities Exchange Act of 1934 ("Exchange Act"). Plaintiffs were unnamed plaintiffs in two earlier would-be class actions against many of the same defendants based on the same underlying events. Class action certification was denied in both cases. Under *American Pipe & Construction Co v. Utah*, 414 U.S. 538 (1974), and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), the statute of limitations was tolled during the pendency of these two suits for plaintiffs' individual claims. There is thus no time bar preventing plaintiffs from bringing the present suit as joined individual claims rather than as a class action. The question before us is whether plaintiffs are time-barred from pursuing their suit as a class action.

For the reasons that follow, we hold that plaintiffs are not time-barred from bringing a class action.

I. Background

China Agritech is a holding company incorporated in Delaware with its principal place of business in Beijing, China. The company claims to operate through various subsidiaries that manufacture and sell organic compound fertilizers and related products to farmers in twenty-eight Chinese provinces. China Agritech began listing its shares on the NASDAQ Stock Exchange in 2005. In a 2009 filing with the U.S. Securities and Exchange Commission ("SEC"), China Agritech reported a net revenue of $76 million, which was triple the $25 million in revenue it reported for 2005.

On February 3, 2011, LM Research, a market research company, published a report entitled "China Agritech: A Scam" ("LM Report"). The report, written by individuals who held a short position in China Agritech stock, asserted that China Agritech was "not a currently functioning business that [was] manufacturing products," but instead was "simply a vehicle for transferring shareholder wealth from outside investors into the pockets of the founders and inside management." Alleging idle factories, minimal investments, and fictitious contracts, the report concluded that China Agritech had "grossly inflated its revenue, failed to account for tens of millions of investor dollars, and [had] virtually no product in the market." Upon release of the LM Report, China Agritech's shares declined from $10.78 per share on February 2, 2011, to $9.85 per share on February 3, 2011.

China Agritech denied the allegations in an eight-page letter to shareholders. On February 15, 2011, Bronte Capital, a hedge fund that also held a short position in China Agritech, responded to China Agritech's letter in an article sarcastically titled, "China Agritech: China's amazing productivity levels" ("BC Article"). The BC Article contended that photos released by China Agritech in its letter did not show the most basic equipment required for operations of the magnitude that China Agritech claimed. For example, the pictures showed 40 kg fertilizer bags being moved manually by individual human laborers rather than with forklifts, calling into question how a factory reported to manufacture 100,000 tons of granular fertilizer annually could possibly operate as depicted. China Agritech's stock value declined to $7.44 per share the next day.

On March 13, 2011, China Agritech announced the formation of a Special Committee of its Board of Directors to investigate the allegations of fraud. The next day, China Agritech dismissed its independent auditor, Ernst & Young Hua Ming ("E&Y"), and publicly disclosed that E&Y had insisted, in December 2010, that the board commence an investigation of accounting problems it had previously identified. Also on March 14, 2011, NASDAQ halted trading in China Agritech stock and initiated delisting proceedings. On October 17, 2012, the SEC issued an enforcement order revoking the registration of China Agritech stock.

II. Procedural History

A. The *Dean* Action

On February 11, 2011, Theodore Dean, on behalf of himself and all others similarly situated, filed a would-be class action against China Agritech and several of its managers and directors. *See Dean v. China Agritech, Inc.*, Case No. 2:11-cv-1331-RGK-PJW (C.D. Cal.) (the "*Dean* Action"). Dean alleged that China Agritech had materially misstated its net revenue and income for the third quarter in 2009 on its SEC Form 10-Q filing, and had materially misstated its net revenue and income for fiscal years 2008 and 2009 in its 2009 SEC Form 10-K filing. The complaint was filed eight days after release of the LM Report. The case was assigned to Judge Klausner in the Central District of California.

On the same day that the *Dean* Action was filed, Dean's counsel notified China Agritech shareholders of the class action through two global media platforms, Business Wire and GlobeNewswire, inviting shareholders to come forward and serve as lead plaintiff. He repeated the notification a week later. *See* 15 U.S.C. § 78u-4(a)(3)(A)(i). On April 12, 2011, pursuant to § 21D(a)(3)(B) of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I), six shareholders sought appointment as lead plaintiff and approval of lead counsel. On May 16, 2011, the district court denied without prejudice these motions as premature.

On June 22, 2011, Dean filed an Amended Complaint with four additional named plaintiffs and two additional defendants. The amended *Dean* Action alleged claims for violations of: (1) Section 10(b) of the Exchange Act and SEC Rule 10b-5 by China Agritech and all individual defendants; (2) Section 20(a) of the Exchange Act by the individual defendants; (3) Section 11 of the Securities Act of 1933 ("Securities Act") by all defendants; and (4) Section 15 of the Securities Act by the individual defendants. On October 27, 2011, the district court granted China Agritech's motion to dismiss the *Dean* plaintiffs' Securities Act claims but denied its motion to dismiss the Exchange Act claims.

On January 6, 2012, the *Dean* plaintiffs moved for class certification on behalf of all persons or entities that had acquired China Agritech stock between November 12, 2009 and March 11, 2011. On May 3, 2012, the district court denied their motion. The court concluded that although the *Dean* plaintiffs had satisfied all four requirements of Rule 23(a), they failed to establish the predominance requirement of Rule 23(b)(3). Reliance is a required element for Section 10(b) securities fraud cases. The district court found that individual issues predominated because the *Dean* plaintiffs had failed to establish a fraud-on-the-market presumption of reliance. A fraud-on-the-market theory requires a showing of market efficiency, which, in the view of the district court, plaintiffs had not made. The court therefore held that plaintiffs had to establish individualized reliance to support their claims.

The *Dean* plaintiffs appealed the denial of certification under Rule 23(f). On August 8, 2012, we affirmed. *See Dean v. China Agritech, Inc.*, Case No. 12-80120 (9th Cir.), Dkt. No. 5. The *Dean* plaintiffs continued litigating their cases as individuals. They settled their individual claims on September 14, 2012. Based on the settlement, their individual claims were dismissed with prejudice on September 20, 2012.

B. The *Smyth* Action

On October 4, 2012, three weeks after the *Dean* Action settled, Kevin Smyth filed an almost identical class-action complaint on behalf of the same would-be class against China

Agritech in federal District Court for the District of Delaware. *See Smyth v. Chang*, Case No.1:12-cv-01262-RGA (D. Del.) (the "*Smyth* Action"). The *Smyth* and *Dean* Action complaints differed only in that the *Smyth* Action alleged solely Exchange Act violations and did not name several of the defendants that had been named in the *Dean* Action. The *Smyth* Action was filed one year and eight months after the LM Report was published.

On December 7, 2012, following notification of the *Smyth* Action on Business Wire, pursuant to the PSLRA, eight shareholders sought appointment as lead plaintiff and approval of their selection of lead counsel. The *Smyth* Action was subsequently transferred to the Central District of California, where it was deemed related to the *Dean* Action and assigned to Judge Klausner (Case No. 2:13-cv-3008-RGK-PJW (C.D. Cal.)). On July 18, 2013, plaintiffs in the *Smyth* Action filed an amended complaint with several additional named plaintiffs. On August 5, 2013, the *Smyth* plaintiffs moved for class certification.

On September 26, 2013, the district court denied the motion. The court found that the *Smyth* plaintiffs' personal claims failed the typicality requirement of Rule 23(a)(3) because their prior relationship with named plaintiffs in the *Dean* Action subjected them to a claim preclusion defense that was not available against unnamed class members. The court further held that the *Smyth* plaintiffs and their counsel failed to meet the adequate representation requirement of Rule 23(a)(4). The court noted that plaintiffs had failed to modify their lead plaintiff certifications that had been signed twenty-nine months earlier in connection with the *Dean* Action, and had served only one defendant ten months after filing *Smyth*.

On January 8, 2014, the parties to the *Smyth* Action agreed to dismiss the action with prejudice as to the named plaintiffs.

C. The *Resh* Action

On June 30, 2014, Michael Resh filed a would-be class action against China Agritech and several individual defendants (the "*Resh* Action"). On September 4, 2014, Resh filed an amended complaint with several additional named plaintiffs. The *Resh* plaintiffs alleged violations of Sections 10(b) and 20(a) of the Exchange Act based on the same facts and circumstances, and on behalf of the same would-be class, as in the *Dean* and *Smyth* Actions. The case was assigned, like the others, to Judge Klausner.

On September 3, 2014, the CAGC Investor Group, comprised of investors in China Agritech—William Schoenke, Heroca Holding B.V., and Ninella Beheer B.V.—filed a motion for appointment as lead plaintiff and for approval of its selection of counsel for the proposed class. On September 22, 2014, China Agritech and one of the individual defendants, Charles Law, filed motions to dismiss the complaint on the theory that the *Resh* plaintiffs' would-be class action was time-barred under the Exchange Act's two-year statute of limitations. On October 17, 2014, the district court denied without prejudice the CAGC Investor Group's motion, deferring consideration until consideration of class certification ("October 2014 Order").

On December 1, 2014, the district court granted China Agritech's and Defendant Law's motions to dismiss without leave to amend ("December 2014 Order"). Plaintiffs had argued that their would-be class action was timely because

American Pipe tolled the statute of limitations during the pendency of the *Dean* and the *Smyth* actions. With tolling, 804 of the 1243 days that had elapsed since the release of the LM Report were subtracted, meaning that only 439 days counted towards the two-year statute of limitations. The district court disagreed. It concluded that while the Supreme Court in *American Pipe* and *Crown, Cork & Seal* held that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class, and that a class member may therefore file a separate individual action prior to the expiration of his or her own limitations period, the Supreme Court had not yet determined whether *American Pipe* allowed tolling for an entirely new class action based upon a substantially identical class. Relying principally on *Robbin v. Fluor Corp.*, 835 F.2d 213 (9th Cir. 1987), and *Catholic Social Services, Inc. v. INS*, 232 F.3d 1139 (9th Cir. 2000) (en banc), the district court concluded that the statute of limitations was tolled for the individual claims of the named plaintiffs in the *Resh* Action, but was not tolled for plaintiffs' would-be class action. In the view of the district court, a contrary ruling "would allow tolling to extend indefinitely as class action plaintiffs repeatedly attempt to demonstrate suitability for class certification on the basis of different expert testimony and/or other evidence."

On December 19, 2014, the *Resh* plaintiffs sought reconsideration, arguing that the court had denied class certification in the *Dean* and *Smyth* Actions due to issues related to the lead plaintiffs' suitability as class representatives rather than the claims' suitability for class treatment. On January 7, 2015, the district court dismissed the remaining defendants ("January 2015 Order"). On February 23, 2015, it denied plaintiffs' motion for reconsideration ("February 2015 Order"), explaining that "Plaintiffs' class action claims were time-barred regardless of the grounds on which class certification was denied in the two earlier actions."

The *Resh* plaintiffs appealed, challenging the district court's October 2014, December 2014, January 2015, and February 2015 Orders.

III. Standard of Review

We review de novo a district court's order dismissing a suit on statute of limitations grounds. *Sharkey v. O'Neal*, 778 F.3d 767, 770 (9th Cir. 2015).

IV. Jurisdiction

We have jurisdiction under 28 U.S.C. § 1291. Defendants argue that the orders are not appealable final orders because the district court indicated that plaintiffs' individual claims could proceed. We disagree. The district court stated, "Plaintiffs are not prevented from filing a complaint asserting individual, rather than class action, claims . . . if they so choose." However, this statement did not affect the finality of the court's dismissal "without leave to amend" of the class action complaint that plaintiffs had filed. An invitation to file a complaint in a separate individual suit does not render non-appealable the district court's dismissal.

Defendants also assert that under Federal Rule of Appellate Procedure ("FRAP") 4(a)(7)(A)(ii), plaintiffs were required to wait 150 days after the district court's December 2014 and February 2015 orders before they appealed because the district court's judgment had not been set forth in a separate document, as required under Federal Rule of Civil Procedure ("Rule") 58(a). However, under FRAP 4(a)(7)(B), "[a] failure to set forth a judgment or order on a separate document when required by . . . Rule 58(a) does not affect the validity of an appeal from that judgment or order." "[N]either the Supreme Court nor this court views satisfaction of Rule 58 as a prerequisite to appeal." *Kirkland v. Legion Ins. Co.*, 343 F.3d 1135, 1140 (9th Cir. 2003). Because the district court's order was a full adjudication of the issues that clearly evidenced its intention that the order be final, appellate jurisdiction is proper. *See Nat'l Distrib. Agency v. Nationwide Mut. Ins. Co.*, 117 F.3d 432, 433 (9th Cir. 1997).

V. Discussion

We must decide whether the would-be class action brought by the *Resh* plaintiffs is time-barred. It is undisputed that the earlier *Dean* and *Smyth* Actions were timely. It is also undisputed that, under *American Pipe* and *Crown, Cork & Seal*, the statute of limitations for the individual claims of would-be class members in the *Dean* and *Smyth* Actions was tolled during the pendency of both of those actions. That is, there is no time bar to individual claims brought by plaintiffs who were unnamed class members in the *Dean* and *Smyth* Actions, whether brought as separate or joined claims. The question before us is whether plaintiffs' would-be class action, based on those same claims, is time-barred.

A. *American Pipe* and *Crown, Cork & Seal*

The Supreme Court has twice addressed tolling issues arising out of the dismissal of a would-be class action when no class has been certified. In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), the Court held that unnamed members of an uncertified class could intervene as individual plaintiffs in the individual suit that remained even if the statutory limitations period had passed. *Id.* at 550–56. According to the Court, "the commencement of the original class suit tolls the running of the statute [of limitations] for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status." *Id.* at 553. The Court characterized its tolling rule as serving policies underlying statutes of limitations as well as class actions. Recognizing that limitations periods serve "[t]he policies of ensuring essential fairness to defendants and of barring a plaintiff who 'has slept on his rights,'" *id.* at 554, the Court concluded that such policies would be vindicated when a named plaintiff "commences a suit and thereby notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." *Id.* at 554–55. Not permitting tolling would frustrate the goal of Rule 23 to promote economy in litigation because, absent tolling, "[p]otential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable." *Id.* at 553.

In *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), the Supreme Court extended *American Pipe* to permit tolling not only for individual intervention in the named plaintiffs' original suit, but also for individual filing of entirely new suits. The Court wrote that many of "the same inefficiencies [discussed in *American Pipe*] would ensue if *American Pipe*'s tolling rule were limited to permitting putative class members to intervene after the denial of class certification." *Id.* at 350. Specifically, if the statute of limitations for new individual claims were not tolled, "[t]he result would be a needless multiplicity of actions—precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid." *Id.* at 351. Because the commencement of a class suit already "put[s] defendants on notice of adverse claims," the goals underlying statutes of limitations would not be undermined by a broader tolling rule. *Id.* at 352. The Court concluded, "Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied. At that point, class members may choose to file their own suits or to intervene as plaintiffs in the pending action." *Id.* at 354.

B. *Catholic Social Services* and Later Cases

Under *American Pipe* and *Crown, Cork & Seal*, it is clear that the individual claims of the would-be class members in the *Resh* Action have been tolled during the pendency of earlier class actions. Those class members may intervene in existing individual suits, or may bring entirely new individual suits. Plaintiffs bringing new suits may sue either separately or jointly. *American Pipe* and *Crown, Cork & Seal* leave open the question whether such plaintiffs may bring a new suit as a class action.

In a short opinion published thirty years ago, we held that "the pendency of a class action [does not] toll[] the applicable statutes of limitation for a subsequently filed class action." *Robbin v. Fluor Corp.*, 835 F.2d 213, 213 (9th Cir. 1987). Relying principally upon a Second Circuit opinion, we concluded that "extend[ing] tolling to class actions 'tests the outer limits of the *American Pipe* doctrine and . . . falls beyond its carefully crafted parameters into the range of abusive options.'" *Id.* at 214 (citing *Korwek v. Hunt*, 827 F.2d 874, 879 (2d. Cir. 1987)). In *Korwek*, our sister circuit had held that "the tolling doctrine enunciated in *American Pipe* does not apply to permit a plaintiff to file a subsequent class action following a definitive determination of the inappropriateness of class certification." 827 F.2d at 879. Its rationale was that "[t]he Supreme Court in *American Pipe* and *Crown, Cork* certainly did not intend to afford plaintiffs the opportunity to argue and reargue the question of class certification by filing new but repetitive complaints." *Id.*

We modified *Robbin* in 2000. In *Catholic Social Services, Inc. v. INS*, 232 F.3d 1139 (9th Cir. 2000) (en banc), the district court had certified a class, but an intervening change in the law eliminated subject matter jurisdiction over the claims of the named plaintiffs. *Id.* at 1143–44. New plaintiffs then brought a second class action based on the same underlying facts against the same institutional defendants. *Id.* at 1144. The question before us was whether the pendency of the prior class action tolled the statute of limitations for the second action. *Id.* at 1145. We held that it did. *Id.* at 1149. In so holding, we clarified the analytic structure in which the *American Pipe* tolling analysis applies to future class actions:

> There is no dispute that if members of the class . . . had filed individual actions after the dismissal of their class action, the statute of limitations would have been tolled for those individual actions. . . . The only question in this case is whether those same plaintiffs should be permitted to aggregate their individual actions into a class action. *Strictly speaking, this is not a statute of limitations*

> *question at all. It is, rather, a question of whether plaintiffs whose individual actions are not barred may be permitted to use a class action to litigate those actions.*

Id. at 1147 (emphasis added).

Defendants read our opinion in *Catholic Social Services* as denying tolling for plaintiffs in certain categories of class action denials. They rely principally on a passage in which we wrote, "If class action certification had been denied in [an earlier case], and if plaintiffs in this action were seeking to relitigate the correctness of that denial, we would not permit plaintiffs to bring a class action." *Id.* Two of our sister circuits may have read *Catholic Social Services* similarly. *See Yang v. Odom*, 392 F.3d 97, 107 (3d Cir. 2004) ("*Catholic Social Services* can be read as authority for our holding that class claims should be tolled where the district court denies class certification based on deficiencies of a class representative, and not on the validity of the class itself."); *Great Plains Tr. Co. v. Union Pac. R.R. Co.*, 492 F.3d 986, 997 (8th Cir. 2007) ("Whether the *American Pipe* rule applies to subsequent class actions . . . depends on the reasons for the denial of certification of the predecessor action.").

This is a misreading of *Catholic Social Services*. We did indeed write that "we would not permit plaintiffs to bring a class action" if they sought to serially re-litigate a previous denial of certification. 232 F.3d at 1147. However, we did not write that the availability of a subsequent class action depended on general tolling principles. Rather, its availability depended on the operation of preclusion and preclusion-related principles. *See id.* For example, if plaintiffs in *Catholic Social Services* had been named plaintiffs in the earlier suit, if an issue relating to the propriety of the class action had been resolved against them, if their earlier suit had been dismissed with prejudice based on that ruling, and if plaintiffs had then sought to bring a new class action raising that same issue, they would have been barred by issue preclusion from raising that issue.

Three recent Supreme Court decisions have confirmed this view. First, in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), the Court rejected an argument by defendant Allstate that only certain categories of claims are eligible for class treatment under Rule 23. The Court wrote:

> There is no reason . . . to read Rule 23 as addressing only whether claims made eligible for class treatment by some *other* law should be certified as class actions. Allstate asserts that Rule 23 neither explicitly nor implicitly empowers a federal court "to certify a class in each and every case" where the Rule's criteria are met. But that is *exactly* what Rule 23 does[.]

Id. at 399 (emphases in original and internal citation omitted). *Shady Grove* directs us, for purposes of class certification, to look only to the criteria of Rule 23 and not to "some other law." There is nothing in the certification criteria of Rule 23 that tells us to look to whether the statute of limitation has, or has not, been tolled. That is, the statute of limitations is not part of Rule 23 but is, instead, "some other law."

After *Shady Grove*, the Seventh Circuit explicitly adopted our general approach in *Catholic Social Services* in treating the issue of successive would-be class actions as an issue of preclusion rather than tolling. In *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560 (7th Cir. 2011), the court held that the overarching inquiry in determining whether prior class actions can toll future class actions is "not the statute of limitations or the effects of tolling, but the preclusive effect of a judicial decision in the initial suit applying the criteria of Rule 23." *Id.* at 563. "To the extent that [another court] may believe that Rule 23 must be set aside when a suit's timeliness depends on a tolling rule, that view cannot be reconciled with the Supreme Court's later decision in *Shady Grove* . . . , which holds that Rule 23 applies to all federal civil suits, even if that prevents achieving some other objective that a court thinks valuable." *Id.* at 564.

Second, in *Smith v. Bayer Corp.*, 564 U.S. 299 (2011), the Court refused to allow a federal district court to enjoin a state court from certifying a class. The federal court had denied class certification of a class in a would-be class action against Bayer. *Id.* at 304. A parallel would-be class action was pending in state court, brought by different named plaintiffs than the named plaintiffs in federal court. *Id.* at 303. After the federal court ruled, it enjoined the state court from certifying the class in the case before that court, relying on the "relitigation exception" to the Anti-Injunction Act, 28 U.S.C. § 2283. *Id.* at 304–05. The Supreme Court reversed, pointing out, *inter alia*, that the named plaintiffs in the state court suit had been unnamed members of the uncertified class in federal court, and that they had thus never been made parties to the federal court suit. *Id.* at 316–18. In that circumstance, there was no basis to apply formal preclusion principles against them, and thus no basis to enjoin the state court from certifying the class action. *Id.*

The Court in *Smith* acknowledged Bayer's argument that "serial relitigation of class certification" was unfair to defendants, and that defendants "would be forced in effect to buy litigation peace by settling." *Id.* at 316 (internal quotation marks omitted). The Court responded that Bayer's "form of argument flies in the face of the rule against nonparty preclusion." *Id.* Its answer to Bayer's concern was that traditional principles of *stare decisis* and comity, combined with the possibility of removal under the Class Action Fairness Act or consolidation by the Panel on Multidistrict Litigation, were adequate to the task of protecting defendants. *Id.* at 316–18. Though the question of sequential class action litigation in two or more federal courts, as distinct from such litigation in federal and state court, was not presented in the case before it, the Court nonetheless addressed that question. The troublesome case, of course, is one in which the plaintiffs were unnamed plaintiffs in an earlier uncertified class action in federal court and were therefore not subject to issue preclusion, and in which the plaintiffs later seek to bring an identical or substantially similar would-be class action in federal court. With respect to such a case, the Court wrote, "[W]e would expect federal courts to apply principles of comity to each other's class certification decisions when addressing a common dispute." *Id.* at 317.

Two years later, the Sixth Circuit had occasion to apply both *Shady Grove* and *Smith*. In *Phipps v. Wal-Mart Stores, Inc.*, 792 F.3d 637 (6th Cir. 2015), with respect to tolling, the Sixth Circuit cited and followed the Seventh Circuit's decision in *Sawyer*. *Id.* at 652. With respect to preclusion, the court relied on *Smith*. Wal-Mart, like Bayer in *Smith*, objected that allowing repeated litigation of class action certification questions by different named plaintiffs would force defendants "to settle to buy peace." *Id.* at 653. The court responded that Wal-Mart's concerns "need not bar legitimate class action lawsuits or distort the purposes of *American Pipe* tolling. Instead, we follow the Supreme Court's lead and trust that existing principles in our legal system, such as *stare decisis* and comity among courts, are suited to and capable of addressing these concerns." *Id.*

Third and finally, in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046–48 (2016), the Supreme Court considered whether class action plaintiffs could use statistical sampling evidence to prove liability to a class. The Court held that they could, reasoning that "[i]n a case where representative evidence is relevant in proving a plaintiff's individual claim, that evidence cannot be deemed improper merely because the claim is brought on behalf of a class." *Id.* at 1046. To hold otherwise would be to "ignore the Rules Enabling Act's pellucid instruction that use of the class device cannot 'abridge . . . any substantive right.'" *Id.* (quoting 28 U.S.C. § 2072(b)). We recognize that for purposes of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), and the Rules Enabling Act, statutes of limitation occupy a no-man's land between substance and procedure. *See Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 532–34 (1949) (in a suit based on state-law cause of action applying state tolling rule rather than Federal Rule of Civil Procedure 3); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 748–53 (1980) (same); *West v. Conrail*, 481 U.S. 35, 37–40 (1987) (in a suit based on a federal-law cause of action applying Rule 3). We therefore do not regard the Court's reasoning in *Tyson Foods* as compelling a holding that the Rules Enabling

Act requires that the statute of limitations apply the same way in both individual and class actions. But *Tyson Foods*, when read in combination with *Shady Grove* and *Smith*, nonetheless reinforces our conclusion that the statute of limitations does not bar a class action brought by plaintiffs whose individual actions are not barred.

C. Plaintiffs' Would-be Class Action Is Not Time-barred

We conclude, based on *American Pipe* and *Crown, Cork & Seal*, read in the light of *Shady Grove*, *Smith* and *Tyson Foods*, that permitting future class action named plaintiffs, who were unnamed class members in previously uncertified classes, to avail themselves of *American Pipe* tolling would advance the policy objectives that led the Supreme Court to permit tolling in the first place. The rule creates no unfair surprise to defendants because the pendency of a prior class suit has already alerted them "not only [to] the substantive claims being brought against them, but also [to] the number and generic identities of the potential plaintiffs who may participate in the judgment." *American Pipe*, 414 U.S. at 554–55. The rule also promotes economy of litigation by reducing incentives for filing duplicative, protective class actions because "[a] putative class member who fears that class certification may be denied would have every incentive to file a separate action prior to the expiration of his own period of limitations." *Crown, Cork & Seal*, 462 U.S. at 350–51.

We further conclude, based on *Smith*, that to the degree that our conclusion may be thought likely to lead to abusive filing of repetitive class actions, the current legal system is adequate to respond to such a concern. First, if it is clear that a proposed class is not viable under Rule 23, as evidenced by an earlier federal court decision, potential future plaintiffs (or, more precisely, their attorneys) will have little to gain from repeatedly filing new suits. Attorneys who are going to be paid on a contingency fee basis, or in some cases based on a fee-shifting statute, at some point will be unwilling to assume the financial risk in bringing successive suits. Second, ordinary principles of preclusion and comity will further reduce incentives to re-litigate frivolous or already dismissed class claims, and will provide a ready basis for successor federal district courts to deny class action certification.

In light of the above, we conclude that plaintiffs' class action complaint is not time-barred. Plaintiffs' individual claims were tolled under *American Pipe* and *Crown, Cork & Seal* during the pendency of the *Dean* and *Smyth* Actions. So long as they can satisfy the criteria of Rule 23, and can persuade the district court that comity or preclusion principles do not bar their action, they are entitled to bring their timely individual claims as named plaintiffs in a would-be class action.

Conclusion

We hold that plaintiffs' class action claims are timely. Because we so hold, we do not reach plaintiffs' additional arguments. We reverse the district court's order of dismissal and remand for further proceedings consistent with this opinion.

REVERSED and **REMANDED.**

No. 16-56418

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TRANSAMERICA LIFE INSURANCE COMPANY, an Iowa corporation, TRANSAMERICA INVESTMENT MANAGEMENT, LLC, a Delaware limited liability company, and TRANSAMERICA ASSET MANAGEMENT, INC., a Florida corporation,

Defendants-Appellants,

v.

JACLYN SANTOMENNO, KAREN POLEY, BARBARA POLEY, all individually and on behalf of all others similarly situated,

Plaintiffs-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
THE HONORABLE DEAN D. PREGERSON, DISTRICT JUDGE
CASE NO. 2:12-CV-02782-DDP (MANX)

BRIEF FOR THE AMERICAN COUNCIL OF LIFE INSURERS, THE AMERICAN BENEFITS COUNCIL, AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* SUPPORTING APPELLANTS

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RULE 26.1 DISCLOSURE

The American Council of Life Insurers has no parent corporation. No publicly held corporation owns 10 percent or more of its stock.

The American Benefits Council has no parent corporation. No publicly held corporation owns 10 percent or more of its stock.

The Chamber of Commerce of the United States of America has no parent corporation. No publicly held corporation owns 10 percent or more of its stock.

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), this brief is being filed with the consent of all parties by the American Council of Life Insurers ("ACLI"), the American Benefits Council ("Council"), and the Chamber of Commerce of the United States of America ("Chamber"), all of which support the defendants-appellants, Transamerica Life Insurance Company, Transamerica Investment Management, LLC, and Transamerica Asset Management, Inc. (collectively, "Transamerica"), in seeking the reversal of the district court's rulings below.[1]

ACLI is a trade association with approximately 290 member companies operating in the United States and abroad. ACLI advocates in state, federal, and international forums for public policy that supports the industry marketplace and the 75 million American families that rely on life insurers' products for financial and retirement security. ACLI members offer life insurance, annuities, retirement plans, long-term care and disability income insurance, and reinsurance, representing 94 percent of industry assets, 93 percent of life insurance premiums, and 97 percent of annuity considerations in the United States. ACLI members' retirement-related business includes group annuities issued to employer-sponsored

[1] No party's counsel authored this brief in whole or in part, and no party, no party's counsel, and no other person contributed money intended to fund the brief's preparation or submission other than *amici*, their members, or their counsel.

retirement plans like those at issue in this case. ACLI regularly participates as *amicus curiae* in appellate litigation affecting its members and their customers, including several cases that are highly relevant to this one: *McCaffree Financial Corp. v. Principal Life Insurance Co.*, 811 F.3d 998 (8th Cir. 2016), *Santomenno v. John Hancock Life Insurance Co. (U.S.A.)*, 768 F.3d 284 (3d Cir. 2014), and *Leimkuehler v. American United Life Insurance Co.*, 713 F.3d 905 (7th Cir. 2013).

The Council is a national non-profit organization dedicated to protecting and fostering privately sponsored employee benefit plans. The Council's approximately 400 members are primarily large multistate employers that provide employee benefits to active and retired workers and their families. The Council's membership also includes organizations that provide employee benefit services to employers of all sizes. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans covering virtually all Americans who participate in employer-sponsored benefit programs. The Council frequently participates as *amicus curiae* in appellate cases that could affect the design and administration of benefit plans.

The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the executive branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that present issues of concern to the nation's business community.

INTRODUCTION

At almost every turn in the proceedings below, the district court misunderstood and misapplied a fundamental concept in ERISA jurisprudence: the statutory definition of "fiduciary." Five published opinions from three Courts of Appeals have applied this concept to service providers like Transamerica; in each instance, the court held that the service provider did *not* act as a fiduciary in any relevant respect.[2] The district court's opinions are at odds with each of those opinions, as well as basic and long-established rules about the limits of fiduciary status.

The retirement services industry and the plans and plan sponsors they serve—including many members of the ACLI, the Council, and the Chamber—have come to rely on these long-established rules, which give service providers appropriate freedom to (1) negotiate their fees before being hired, without the constraints of fiduciary status, and (2) collect those agreed-upon fees after being hired. If affirmed, the district court's decision to abandon these rules would lead to severe

[2] *McCaffree Fin. Corp. v. Principal Life Ins. Co.*, 811 F.3d 998 (8th Cir. 2016); *Santomenno v. John Hancock Life Ins. Co. (U.S.A.)*, 768 F.3d 284 (3d Cir. 2014); *Leimkuehler v. Am. United Life Ins. Co.*, 713 F.3d 905 (7th Cir. 2013); *Renfro v. Unisys Corp.*, 671 F.3d 314 (3d Cir. 2011); *Hecker v. Deere & Co.*, 556 F.3d 575 (7th Cir.), *reh'g denied in suppl. opinion*, 569 F.3d 708 (7th Cir. 2009).

and damaging repercussions for the service provider industry and increased complexity and cost for retirement plan sponsors. By making it impossible for service providers to negotiate their fees as a practical matter (because, in the district court's view, they are wearing their fiduciary "hats" when doing so), the district court's approach would likely force many service providers to exit the marketplace, leading to less choice, lower quality services, and higher prices.

Equally problematic is the district court's holding that it is unlawful for service providers to collect asset-based fees, even under contract terms accepted by an independent plan fiduciary. If allowed to stand, this holding would upend a well-established and entirely lawful means of paying the administrative and other costs of 401(k) plans.

ERISA does not require employers to establish retirement savings programs. Instead, the law is meant to encourage employers to offer retirement plans by lowering costs and reducing regulatory hurdles. *See Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) (in enacting ERISA, Congress sought to avoid "a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place"). The district court's ruling would thwart this goal by making it harder for employers to offer such plans, to the detriment of service providers, plan sponsors, and participants alike. As another court warned in an analogous context, "litigation about pension plans" can sometimes "make everyone worse off." *Cooper v. IBM Personal Pension Plan*, 457 F.3d 636, 642 (7th Cir. 2006). If the district court's rulings are not reversed, this case would do exactly that.

ARGUMENT

I. The 401(k) landscape.

A. The role of service providers.

This case involves 401(k) plans, a type of "defined contribution" plan. These plans provide a tax-advantaged way for workers to save for retirement, and, as the Supreme Court has observed, they "dominate the retirement plan scene today." *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 255 (2008). In 401(k) plans, employees (and usually employers) contribute money on a tax-deferred basis to employees' accounts, and that money grows over time as it earns returns from investment options chosen by the plan sponsor and the employees.

Running a 401(k) plan requires many services, including keeping records of participant accounts, generating account statements, developing educational materials, running call centers, maintaining websites, ensuring regulatory compliance, and processing investment transactions, plan loans, distributions, roll-overs, contributions, and more. As a 1998 report commissioned by the Department of Labor recognized: "The services provided by typical 401(k) plans are elaborate. They evolved, in part, from the requirements of ERISA . . . . Over the years, services have become more elaborate in response to the demand of participants and sponsors." Economic Systems, Inc., *Study of 401(k) Plan Fees and Expenses*, at 5.2 (1998).[3] Since that report was issued, the services provided by 401(k) plans have only grown in scope and complexity. For example, the number of investment options the average plan offers grew from six in 1995 to fourteen in 2005. Investment Company Institute, *401(k) Plans: A 25-Year Retrospective* 17 (2006).[4] In recent years, plans have also added online and mobile-based options as ways for participants to interact with their plans. Deloitte, *Annual Defined Contribution Benchmarking Survey* 47 (2015) ("Deloitte Survey").[5]

Sponsors of 401(k) plans generally do not have the wherewithal to perform all these services. Instead, they are performed by service providers like Transamerica. The competitors in this marketplace include not only insurance companies, but also mutual fund companies, banks, consulting firms, third-party administrators, brokerage firms, accounting firms, and payroll providers. *See* Keith Clark, *The Defined Contribution Handbook* 26-27 (2003). And the competition is fierce: A 2015 survey showed that 70 percent of plan sponsors had evaluated whether to change their service provider in the previous five years, and 28 percent had in fact changed providers during that time frame. Deloitte Survey at 53. Because of the

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[3] *Available at* http://www.dol.gov/ebsa/pdf/401kRept.pdf.

[4] *Available at* http://www.ici.org/pdf/per12-02.pdf.

[5] *Available at* https://www2.deloitte.com/content/dam/Deloitte/us/Documents/human-capital/us-hc-annual-defined-benchmarking-survey-2015.pdf.

intensity of the competition, service providers generally earn thin profit margins, as illustrated by the fact that it generally takes Transamerica six or seven years before recouping its costs of serving a new customer. Dkt. 13 at 12.

B. Fees for plan services.

Plan services have a cost. The most common way for plans to pay for these services is through an asset-based fee, calculated as a percentage of the assets invested in various investment options. The U.S. Department of Labor, the agency charged with enforcing ERISA, has explained this methodology in a brochure targeted to plan participants:

> In some instances, the costs of administrative services will be covered by investment fees that are deducted directly from investment returns. Otherwise, if administrative costs are separately charged, they will be borne either by your employer or charged directly against the assets of the plan.

U.S. Dep't of Labor, *A Look at 401(k) Plan Fees* 3 (2013).[6]

The use of asset-based fees provides flexibility for employers to cover the cost of 401(k) plans, thus making such plans affordable for small employers that might otherwise choose not to offer them. As a 2007 report found, a system of asset-based fees "may be good, in that it reduces overall plan costs and provides the plans, especially small ones, with services and benefits which might not be affordable." *See* U.S. Dep't of Labor, Advisory Council on Employee Welfare and

[6] *Available at* https://www.dol.gov/ebsa/publications/401k_employee.html.

Pension Benefit Plans, *Report of the Working Group on Fiduciary Responsibilities and Revenue Sharing Practices* 6 (2007) ("Advisory Council Report").[7] The same report noted that asset-based charges "allow[] the market to develop efficiencies and innovations that have enhanced the quality of services [and] products available to [defined contribution] and 401(k) plans." *Id.* at 3.

As noted, asset-based charges are by far the most popular way to pay for 401(k) plan services. As of 2015, fully half of 401(k) plans paid their plan costs entirely through asset-based charges, with no additional direct fees, and this percentage was even higher for smaller plans. Deloitte Survey at 43.

The Department of Labor has never suggested that using an asset charge to pay a service provider is problematic in any way, much less unlawful. To the contrary, the Department has promulgated regulations implicitly approving of the practice by requiring robust disclosure of asset-based and other fees. *See* 29 C.F.R. § 2550.404a-5 (participant-level disclosures); 29 C.F.R. § 2550.408b-2 (plan-level disclosures). As the Department explained when promulgating the plan-level regulation:

> The definition of compensation [to be disclosed] under the proposal was very broad and encompassed not only the compensation and fees received by service providers, but also compensation attendant to plan investments and investment options. Disclosures concerning investment-related compensation (i.e., investment management and similar fees charged against investment returns) are particularly

[7] *Available at* http://www.dol.gov/ebsa/publications/AC-1107b.html.

> significant in that they typically constitute a large portion of the total expenses incurred by a plan and its participants.

Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure, 75 Fed. Reg. 41600, 41611 (July 16, 2010) (codified at 29 C.F.R. 2550.408b-2(c)); *see also* 29 C.F.R. § 2550.408b-2(c)(1)(viii)(B)(3) (noting that compensation "may be expressed as a . . . percentage of the covered plan's assets").

II. The district court's misinterpretation of ERISA would harm service providers, plan sponsors, plans, and plan participants.

A. The district court's "fiduciary" rulings would drive service providers out of the marketplace.

In its rulings on Transamerica's fiduciary status, the district court made several critical errors arising from its misunderstanding of the meaning of "fiduciary" under ERISA. The word is defined in the statute: a person is a fiduciary "to the extent" he does certain things, such as exercise control over plan assets. *See* 29 U.S.C. § 1002(21)(A). This "to the extent" limitation is important because it means a person can be a fiduciary for some purposes but not others. In other words, "fiduciary status under ERISA is not an all-or-nothing concept." *McCaffree Fin. Corp. v. Principal Life Ins. Co.*, 811 F.3d 998, 1002 (8th Cir. 2016). "In every case charging breach of ERISA fiduciary duty, then, the threshold question is not whether the actions of some person employed to provide services under a plan adversely affected a plan beneficiary's interest, but whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint." *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000).

Acting as a fiduciary is a prerequisite for all of Plaintiffs' claims, as is breaching a legal duty. See 29 U.S.C. §§ 1104(a), 1106(b). And if there is one principle that is absolutely clear in this factual setting, it is that a service provider neither acts as a fiduciary nor breaches any duty when it charges fees that were authorized in advance by an independent plan fiduciary.[8]

In a series of rulings from the courts of appeal, this hornbook ERISA law has been applied to theories of fiduciary status aimed at 401(k) service providers that allegedly collected "excessive" fees. Each time, the plaintiffs' theories have been rejected.[9] Just last year, the Eighth Circuit rejected the same type of claim Plaintiffs make here—a claim that a 401(k) service provider acted as a fiduciary by collecting asset charges from the "separate accounts" of an insurance company holding assets of a 401(k) plan. *McCaffree*, 811 F.3d at 1001. As in this case, the asset charge was authorized by contract and assessed by the service provider,

[8] *See, e.g.*, *Chicago Dist. Council of Carpenters Welfare Fund v. Caremark, Inc.*, 474 F.3d 463, 473 (7th Cir. 2007) ("Given that this [pricing] scheme was the very deal for which [plaintiff] bargained at arms' length, [defendant] owed no fiduciary duty in this regard."); *accord Seaway Food Town, Inc. v. Med. Mut. of Ohio*, 347 F.3d 610, 619 (6th Cir. 2003); *Harris Tr. & Sav. Bank v. John Hancock Mut. Life Ins. Co.*, 302 F.3d 18, 31 (2d Cir. 2002).

[9] *Hecker*, 556 F.3d at 583 ("[A] service provider does not act as a fiduciary with respect to the terms in the service agreement if it does not control the named fiduciary's negotiation and approval of those terms."); *see also Santomenno*, 768 F.3d at 295; *Renfro*, 671 F.3d at 324.

another insurance company. As in every other appellate decision to consider the issue, *supra* nn.2, 8-9, the court found that this meant plaintiffs had no viable claim. "Because [the service provider] did not owe plan participants a fiduciary duty while negotiating the fee terms" with the plan fiduciary, it "could not have breached any such duty merely by charging the fees described in the contract that resulted from that bargaining process." *McCaffree*, 811 F.3d at 1003.

These rulings makes sense. Transamerica and other service providers are in the business of selling services to 401(k) plans at market prices. If their prices are too high, plan sponsors can refuse to contract with them and go elsewhere in a highly competitive marketplace. *Id.*; *Santomenno v. John Hancock Life Ins. Co. (U.S.A.)*, 768 F.3d 284, 295 (3d Cir. 2014). The independent plan fiduciary who hires the service provider has a duty to ensure that the prices are reasonable, thereby providing ample protection to plan participants. *See, e.g.*, *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 599 (8th Cir. 2009) (holding that ERISA plan participant stated claim against plan fiduciary for agreeing to excessive fees).

The district court in this case turned these principles on their head. In the district court's view, even when a service provider negotiates an asset-based charge before it assumes any arguable fiduciary duties, and even when an independent fiduciary approves that asset charge in a written contract, it is still unlawful for the service provider to collect that charge because it "is negotiating to become a fiduciary and negotiating for the fees that, as a fiduciary, it will assess on the employees' retirement accounts." ER196; *see also* ER181 ("Defendants' fiduciary duties attached at the time they negotiated their fees[.]").

This holding is contrary to the well settled law discussed above that an ERISA service provider can properly earn a profit by collecting the compensation it has negotiated in advance. *See also Hannan v. Hartford Fin. Servs., Inc.*, No. 3:15-CV-0395, 2016 WL 1254195, at *4 (D. Conn. Mar. 29, 2016), *appeal filed*, No. 16-1316 (2d Cir. Apr. 26, 2016) ("Insurance is a financial product which is structured, offered and sold by insurance companies for the primary purpose of making a profit. . . . The fact that [defendant] profits from the relationship . . . is neither unique nor improper [under ERISA]"). As the Second Circuit has held, any alternative rule "would render meaningless the negotiation of the terms of the agreement between the parties and would likely destroy the market for long-term ERISA contracts." *Harris Trust*, 302 F.3d at 29.

If not reversed, the district court's ruling would mean the profit margins of ERISA service providers will be further compressed by an unwarranted fiduciary duty to act in the interests of participants when they negotiate their fees. Service providers would likely exit the marketplace and dedicate their capital to more productive uses. The result would be a market with less choice, lower quality services, and, in the long term, higher fees.

The district court's misunderstanding of ERISA's definition of fiduciary is also apparent in its dismissal of the concept of "limited" fiduciary responsibilities, which it characterized as "oxymoronic." *See* ER192. This view, it appears, led the district court to decide that because Transamerica acknowledged that it owed *some* fiduciary responsibility to the plan, that meant that *every* interaction it had with the plan was colored with that same duty. But the idea of limited fiduciary status is embedded in the "to the extent" limitation of the statute itself, as expounded by the Supreme Court's opinion in *Pegram*.

Similarly, the district court dismissed as "formalistic line-drawing" the distinction between (1) contract negotiations that lead to an agreed-upon fee, and (2) potentially fiduciary acts that occur during a contractual relationship. ER195-96. Again, this line-drawing is grounded in the text of the statute, the Supreme Court's ruling in *Pegram*, and multiple other cases. It is hornbook ERISA law, and the district court erred by ignoring it.

The district court compounded its error even further by accepting the theory that things Transamerica *might* do were enough to make it a fiduciary. For instance, the district court held that the "power to add and delete investment options" made Transamerica a fiduciary, and that whether it actually did so was irrelevant. ER202. But ERISA provides that a person becomes a fiduciary by "exercising" control over plan assets, 29 U.S.C. § 1002(21), so the district court's suggestions that "having and exercising discretionary authority are so close as to be identical," and that the power to exercise authority is the same thing as actually exercising it, *see* ER205, were erroneous. The Seventh Circuit appropriately rejected a similar argument as "unworkable"—"a 'non-exercise' theory of exercise." *Leimkuehler v. Am. United Life Ins. Co.*, 713 F.3d 905, 914 (7th Cir. 2013). The theory is no more workable here.

B. The district court's misunderstanding of ERISA's "prohibited transaction" rules would drive up costs for 401(k) plans and participants.

In addition to a general prohibition on breaching fiduciary duties, ERISA bars certain specific actions, such as fiduciary self-dealing. *See* 29 U.S.C. § 1106(b). This provision of ERISA is what might be called an "unsafe harbor"—it lists specific actions that, unless exempt under another provision of ERISA, create liability. The district court held that Transamerica may have breached this duty because it assessed an agreed-upon asset charge from plan assets, an action the district court viewed as "dealing with those assets for one's own interest." *See* ER40. This ruling was erroneous for at least the same reasons discussed above: Transamerica was not "acting as a fiduciary . . . when taking the action subject to complaint," *Pegram*, 530 U.S. at 226, namely assessing an agreed-upon asset charge.

But the district court went even further by holding that the rules against self-dealing prohibit service providers from negotiating and collecting fees based on asset-based charges at all. It held that "a fiduciary cannot pay itself out of the plan assets over which the fiduciary exercises its fiduciary duties—period. This rule applies regardless of whether the fees are agreed upon service fees disclosed in a contract and constitute reasonable compensation for services provided." ER93.

As with other aspects of the district court's fiduciary-related rulings, numerous other authorities have rejected this position. The Second Circuit has held that "the mere deduction of [a service provider's compensation] from [plan] assets does not, in itself, create a fiduciary relationship," nor does it violate ERISA, so long as the service provider negotiated the compensation in advance and cannot unilaterally change it. *United States v. Glick*, 142 F.3d 520, 528 (2d Cir. 1998). Similarly, as the Department of Labor has explained in a binding regulation—which the district court inexplicably disregarded—even if Transamerica served as a fiduciary in some respect (as Transamerica acknowledged it did), it cannot be liable for a prohibited transaction unless it used its fiduciary power to "cause a plan to pay additional fees." *See* 29 C.F.R. § 2550.408b-2(e)(2). Nothing in the record suggests that anything like this ever happened.

The district court read this Court's opinion in *Barboza v. California Association of Professional Firefighters*, 799 F.3d 1257 (9th Cir. 2015), as creating a bright-line rule that forbade Transamerica's collection of its agreed-upon fee. ER93. But

Barboza merely applied the longstanding rule that a person who helps himself to plan assets without permission violates ERISA, as Transamerica explained in its opening brief. Dkt. 13 at 47-49. The permission of an independent fiduciary makes all the difference. *See IT Corp. v. Gen. Am. Life Ins. Co.*, 107 F.3d 1415, 1420 (9th Cir. 1997) ("If a fiduciary tells a bookkeeping service to send a check for $950 to Mercy Hospital, the bookkeeping service does not thereby become a fiduciary."). When a plan fiduciary hires a service provider and authorizes that provider to collect an asset-based fee, the service provider neither acts as a fiduciary nor violates any duty when it does what it was authorized to do. *See McCaffree*, 811 F.3d at 1003; *see also Hecker v. Deere & Co.*, 556 F.3d 575, 584 (7th Cir. 2009).

This aspect of the district court's ruling would, if adopted elsewhere, harm plan sponsors, retirement plans, and their participants, insofar as it would force 401(k) plans to stop paying for plan services with asset-based charges. As explained above, roughly half of all 401(k) plans pay for plan services entirely with asset-based charges, and significantly more do so in part. Under the district court's rule, all of these plan sponsors would have to change how they pay for services—assuming they can find a service provider willing to assume the risk of fiduciary liability if the district court's opinion were affirmed.

The district court suggested that this result could be avoided if plan sponsors simply approve the withdrawal of a service provider's fees from the plans' assets each time it occurs. ER55–56. But this would impose an immense administrative burden because almost all retirement plans allow participants daily access to their accounts.[10] Asset-based charges thus would have to be assessed on a daily basis, which would require at least daily approvals from each independent plan fiduciary.

It is hard to see how plans and employers could function under such a regime. Because few plan sponsors would accept the burden and cost of such an onerous system, the district court's ruling would mean that fewer service providers would offer the option to pay for plan services with asset-based charges. The only alternative for plans would be to increase their direct plan and participant-level charges. But as a report by a Department of Labor Advisory Council suggested, these direct charges may not be as affordable. Advisory Council Report at 6. More direct charges will thus tend to discourage small employers from establishing 401(k) plans and discourage low-income employees from enrolling in them. The foreseeable result is that fewer small employers will offer their employees retirement plans, and fewer participants will find it worthwhile to enroll.

C. The district court compounded its errors by misconstruing an exemption to ERISA's prohibited transaction rules.

The negative consequences described above could be mitigated somewhat

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[10] As of 1997, 64 percent of 401(k) plans allowed daily investment transfers. Economic Systems, Inc., *Study of 401(k) Plan Fees and Expenses*, at 2.3.7 (1998), *available at* http://www.dol.gov/ebsa/pdf/401kRept.pdf. Although exact data is not available, that number is likely higher today, as plan participants have come to expect 24/7 access to their accounts through the internet.

through the application of an exemption to ERISA's prohibited transaction rules, 29 U.S.C. § 1108(b)(8). This exemption expressly permits payments from a plan to a service provider for services rendered, so long as certain criteria are met, including that the service provider (in this case, the insurance company) "receives not more than reasonable compensation." But the district court held that, even if an asset charge qualifies as "reasonable compensation," this exemption does not apply. *See* ER92-93.

The district court's holding conflicts with the plain language of the statute, as well as the legislative history that led to its enactment. This Court need look no further than a Department of Labor opinion that approved a plan's purchase of interests in a collective trust. DOL Adv. Op. No. 2005-09A, 2005 WL 1208696 (May 11, 2005). In concluding that the transaction was exempt, the Department found that "Congress anticipated that the term 'reasonable compensation' would apply to the purchase or sale of an interest in a collective investment fund by a plan and to amounts to be paid by the plan for investment management of such assets." *Id*. at *5. If the Department thought the exemption did not shelter collection of agreed-upon asset-based charges paid from plan assets, it would have said so.

This exemption is important to service providers' ability to offer affordable services. As explained above, if service providers cannot collect asset-based fees, plan sponsors and participants will lose a popular and fair way of paying for 401(k) plan services, one that has expanded access to 401(k) plans, especially among smaller employers. If it reaches this issue (and it need not, if it reverses on the threshold issue of fiduciary status), this Court should clarify that the exemption permits insurance companies to collect fees from plan assets pursuant to arrangements approved by their clients.

Dated: February 10, 2017

Respectfully submitted,

AMERICAN COUNCIL OF LIFE INSURERS, AMERICAN BENEFITS COUNCIL, and CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contain 4,427 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2017, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

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