NO. 20-56016

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TRENDSETTAH USA, INC. AND TRENDSETTAH, INC.,

Plaintiffs-Appellants,

v.

SWISHER INTERNATIONAL, INC.,

Defendant-Appellee.

On Appeal from the United States District Court for the Central District of California
(Case No. 8:14-cv-01664-JVS-DFM)
(District Judge James V. Selna)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING REHEARING *EN BANC*

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INTEREST OF *AMICUS CURIAE*[*]

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

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellate-jurisdiction nerds reacted quickly to the panel's decision. Professor Bryan Lammon—a leading appellate-jurisdiction scholar—described the decision as a "specious" example of "manufactured finality." Bryan Lammon, *The Ninth Circuit Limits* Baker*, Preserves Manufactured Finality* (Apr. 19, 2022), https://bit.ly/3xJbOyh. As he explained, the decision conflicts with *Baker* and prior Ninth Circuit precedent. This Court should not allow so roundly panned a decision to

[*] No party's counsel authored any part of this brief. No one, apart from WLF and its counsel, contributed money intended to fund the brief's preparation or submission.

stand, especially when the panel essentially reinstated a previously reversed opinion.

The Supreme Court rejected the plaintiffs' bar's attempts at gamesmanship in *Baker* by holding that parties may not create appellate jurisdiction over an interlocutory order by manufacturing finality in a case. This fit with its overall jurisprudence that rejects manufacturing all types of jurisdiction—subject-matter, personal, or appellate.

This means that when parties lose on an interlocutory issue, they may appeal only to the extent permitted by law and the rules of appellate procedure. These circumstances are, of course, limited. Neither Congress nor the Supreme Court wants parties to appeal every adverse decision during litigation. Rather, they generally favor appeals from only final orders. That way, there is just one appellate review of all the case's orders.

Funneling all review into a single appeal is the most efficient way of resolving disputes. Allowing piecemeal decisions resolving discrete issues prolongs litigation, increases litigation costs, and leads to inconsistent rulings. Yet that is what the panel's decision here encourages. Rather than requiring parties to wait for final judgment to

appeal a ruling, the panel decision blesses appealing every interlocutory order.

Even if the Court does not lack appellate jurisdiction over this appeal, there is another jurisdictional problem. For any federal court to exercise jurisdiction over the case, there must be a live case or controversy. Without an actual dispute between two parties, any decision would be an advisory opinion. And federal courts cannot issue advisory opinions.

After Swisher uncovered Trendsettah's CEO's criminal conspiracy, which undermined the legitimacy of the jury's verdict, the District Court properly granted Swisher's Rule 60 motion. Following procedural posturing, Trendsettah decided that going before a jury with the newly discovered facts was a bad idea. So it voluntarily dismissed the case. This was a merits adjudication that ended the dispute. Yet the panel did not even discuss whether federal courts could exercise subject-matter jurisdiction over the case.

Even if these jurisdictional problems were not present, rehearing is warranted because the panel's decision violates the prior-panel rule. Moving forward, panels can decide the issue any way they choose. If a

panel wants, it can hold that it lacks jurisdiction over an appeal. But if the panel is determined to reach the appeal's merits, the decision here provides a roadmap for manufacturing appellate jurisdiction. So for at least three reasons—the panel's ignoring Supreme Court precedent, issuing an advisory opinion, and disregarding prior panel decisions—the Court should grant rehearing *en banc*.

ARGUMENT

This Court, "like any other state or federal court, is bound by [the Supreme] Court's interpretation of federal law." *James v. City of Boise, Idaho*, 577 U.S. 306, 307 (2016) (*per curiam*). And when a federal issue has not been decided by the Supreme Court, a panel is bound by the "prior published decisions" of this Court. *United States v. Wells*, 29 F.4th 580, 587 n.3 (9th Cir. 2022) (citing *Oregon Nat. Desert Ass'n v. U.S. Forest Serv.*, 550 F.3d 778, 782 (9th Cir. 2008)). Both the Supreme Court's and this Court's precedent require holding that the Court lacks appellate jurisdiction over this appeal.

Generally, courts of appeals "have jurisdiction of appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291. There are two main exceptions to this general rule. First, courts

of appeals may, "in [their] discretion, permit an appeal to be taken from" an order the district court believes "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Id.* § 1292(b). Second, courts of appeals may also allow appeals from orders granting or denying class certification. *See* Fed. R. Civ. P. 23(f).

Here, Trendsettah could not appeal the voluntary dismissal order because it was not an aggrieved party. *See Bryant v. Tech. Rsch. Co.*, 654 F.2d 1337, 1343 (9th Cir. 1981) (citations omitted). Nor could it appeal under Section 1292(b) or Rule 23(f). Still, the panel found that Trendsettah could appeal the order granting relief under Rule 60 because that order was made "final" by the voluntary dismissal. But this distorts both the Supreme Court's precedent and this Court's precedent, both of which bar such appeals.

I. THE PANEL'S OPINION CONFLICTS WITH THE SUPREME COURT'S *BAKER* DECISION.

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

Baker was a straightforward case. Consumers brought a putative class action against Microsoft arguing that the Xbox 360 game console

was defective. The claims were not worth much individually. So after the District Court denied the plaintiffs class certification, they agreed to dismiss their claims with prejudice. After the dismissal, the plaintiffs then appealed the denial of class certification to this Court.

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

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

Although *Baker* was decided in the class-certification context, nothing about its reasoning limits it to that context. Rather, the reasoning applies equally in other contexts—including rulings on post-judgment motions. The Federal Rules of Civil Procedure give district

courts the power to decide Rule 60 motions. Courts of appeals, on the other hand, have the power to review those decisions. Allowing immediate interlocutory appeals of those orders, however, would give the courts of appeals *de facto* power to decide the motions. This would erode the balance of power and undermine its objectives.

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

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

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

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

This case proves the point. After the District Court granted Swisher's Rule 60 motion and denied Trendsettah's motion for reconsideration, Trendsettah moved for leave to appeal the decision under Section 1292(b). The District Court granted that motion. (The panel opinion incorrectly states (Slip Op. at 11) otherwise. *See*

Trendsettah USA, Inc. v. Swisher Int'l, Inc., No. 20-80024 (9th Cir. Mar. 23, 2020) (*per curiam*)). This Court, however, denied the petition. *Id.* Only then did Trendsettah voluntarily dismiss its case and appeal the District Court's Rule 60 order.

So every reason that the Supreme Court gave in *Baker* for not allowing the voluntary-dismissal tactic for class-certification orders applies with equal force to the new-trial context. In fact, there are more problems with the panel's decision here. The full Court should not allow a panel to resurrect the erroneous *Baker* decision by reading the Supreme Court's holding so narrowly.

B. The Panel's Decision Undermines *Baker*'s Policy Foundations.

1. Congress has a longstanding policy against piecemeal appeals. *See Baker*, 137 S. Ct. at 1707; *see also McLish v. Roff*, 141 U.S. 661, 665-66 (1891) ("[T]he whole case and every matter in controversy in it [must be] decided in a single appeal." (citing *Forgay v. Conrad*, 47 U.S. 201, 204 (1848))). So under Section 1291, a party may generally appeal from only final orders. If Section 1291 were interpreted to permit plaintiffs to obtain immediate review of every order granting a new trial by

voluntarily dismissing their claims with prejudice, it would render Congress's policy against piecemeal appellate review a dead letter.

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

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

If the panel's insistence that the case was over no matter how it decided the appeal strove to limit the number of interlocutory appeals a party may take, the argument is nonsensical. Either there is no case or controversy, depriving federal courts of subject-matter jurisdiction (*see* § II, *infra*), or there is no limit to the number of interlocutory appeals that plaintiffs can take.

When the mandate issues, the District Court must act by issuing a new judgment. The panel found that the District Court applied the wrong Rule 60(d) standard. But it could (and should) have remanded for proper application of that standard in the first instance rather than sit as factfinder itself. It likely took a different route because it didn't want to expose the flaws in the rest of its analysis. But because the panel held, implicitly, that federal courts continue to have subject-matter jurisdiction over the case, that means there is no limit to the number of interlocutory appeals that plaintiffs can take under the panel's reasoning.

2. The panel's rule is also "one sided" because "[i]t operate[s] only in favor of plaintiffs." *Baker*, 137 S. Ct. at 1708 (cleaned up). By adopting a one-sided rule that favors plaintiffs over defendants, the panel decision

conflicts with *Coopers & Lybrand v. Livesay*, which cautioned that rules governing appellate review ought to treat plaintiffs and defendants even-handedly. 437 U.S. 463, 476 (1978).

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

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

The Supreme Court rejected *Baker*'s flawed policy analysis. Yet the panel revived that analysis here in a precedential opinion that will have long-lasting effects in this Circuit. The full Court should not allow that to happen, lest it once again invite reversal by the Supreme Court. Thus, the Court should grant the petition and rehear the case *en banc*.

II. THE VOLUNTARY DISMISSAL DEPRIVES FEDERAL COURTS OF SUBJECT-MATTER JURISDICTION.

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

Voluntary dismissals are governed by Rule 41, which provides for the "voluntary dismissal" of an "action." Fed. R. Civ. P. 41(a). A voluntary

dismissal "with prejudice" amounts to a merits adjudication, which is usually subject to res judicata. *Lake at Las Vegas Invs. Grp., Inc. v. Pac. Malibu Dev. Corp.*, 933 F.2d 724, 726-27 (9th Cir. 1991).

And "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (citing *Cromwell v. Sac Cnty.*, 94 U.S. 351, 352 (1876)). "Once that litigation is dismissed with prejudice, it cannot be resumed in this or any subsequent action." *Deakins v. Monaghan*, 484 U.S. 193, 201 n.4 (1988). Because Trendsettah cannot resurrect its claims against Swisher, no "speculative contingency" exists that is "sufficiently real and immediate to show an existing controversy." *Id.* (cleaned up). This case has "therefore lost its character as a present, live controversy of the kind that must exist if [this Court is] to avoid advisory opinions." *Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982) (*per curiam*) (citation omitted).

The Supreme Court's long-standing precedent confirms that plaintiffs cannot appeal the propriety of a dismissal with prejudice to which they consented. *See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24-25 (1994); *United States v. Procter & Gamble Co.*, 356

U.S. 677, 680 (1958) (citing *United States v. Babbitt*, 104 U.S. 767, 768 (1881); *Evans v. Phillips*, 17 U.S. 73, 73 (1819) (*per curiam*)).

Trendsettah voluntarily dismissed its entire action with prejudice. Because "to qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review," this action is moot, and Trendsettah may not appeal from the judgment or any other order below. *See Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 67 (1997) (citing *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)). This is a straightforward application of binding Supreme Court precedent and is another reason to rehear the case *en banc*.

III. THE PANEL'S DECISION CONFLICTS WITH TWO PRIOR PANEL OPINIONS.

One reason that courts of appeals hear cases *en banc* is to resolve intra-circuit conflicts. Here, the panel's decision conflicts with two prior panel decisions. Swisher cited these two cases. But rather than meaningfully engage with the reasoning of either decision, the panel dismissed them in a single paragraph based on a distinction without a difference. *See* Slip. Op. at 14-15. So even if the panel's decision can be shoehorned into not conflicting with *Baker*, the Court should still rehear the case *en banc*.

Both conflicting decisions arose under the Federal Arbitration Act. In *Langere v. Verizon Wireless Servs., LLC*, 983 F.3d 1115 (9th Cir. 2020), the plaintiffs voluntarily dismissed their suit after the district court granted the defendant's motion to compel arbitration. After the district court denied the plaintiffs' reconsideration motion, the plaintiffs voluntarily dismissed their suit. Recognizing that pre-*Baker* circuit precedent would have allowed the appeal, the panel explained that "when the reasoning of a prior case of [this Court] is 'clearly irreconcilable' with the reasoning of a subsequent Supreme Court case, a three-judge panel is not bound by the former and is free to reject it as 'effectively overruled.'" *Id.* at 1121 (quoting *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (*en banc*)).

Applying that rule, the *Langere* panel held that *Baker* "effectively overruled" the prior circuit precedent allowing the Court to exercise jurisdiction over appeals of interlocutory orders after the plaintiffs voluntarily dismiss the cases. 983 F.3d at 1122. The panel relied on three factors when deciding that it lacked jurisdiction over the appeal.

"First and foremost, [the plaintiffs'] voluntary-dismissal tactic undermine[d] the discretionary appellate-review scheme designed by

Congress." *Langere*, 983 F.3d at 1122. As described above, the same is true here. Congress made a policy decision to give federal courts jurisdiction over interlocutory appeals only in limited circumstances under Section 1292(b). Trendsettah tried to persuade this Court to accept the interlocutory appeal. It failed. So allowing Trendsettah to appeal the Rule 60 order undermines the discretionary appellate scheme Congress chose.

"Second, [the plaintiffs'] voluntary-dismissal tactic 'invite[d] protracted litigation and piecemeal appeals.'" *Langere*, 983 F.3d at 1123 (quoting *Baker*, 137 S. Ct. at 1713). As described more fully above, the same is true here. Plaintiffs now have the ability to voluntarily dismiss their claims after any adverse ruling and obtain immediate appellate review of that decision. That will cause cases to drag on and force this Court to decide more appeals.

"Third, like in [*Baker*], the dismissal tactic [in *Langere* was] one-sided: only plaintiffs, never defendants, [could] force the immediate appeal of an order compelling arbitration." *Langere*, 983 F.3d at 1123. Again, the same is true here. If a district court grants the plaintiffs' Rule 60 motion, the defendants cannot voluntarily dismiss the case to get

immediate appellate review of that decision. Rather, the defendants must either settle or wait until final judgment to appeal.

The panel here tried to distinguish *Langere* by saying that the FAA's unique statutory scheme was "adversely affected by permitting voluntary dismissal of claims with prejudice." Slip Op. at 15. But the premise of that argument is wrong. There is a statutory scheme for appealing interlocutory orders—Section 1292(b). Of course, the panel did not mention that statutory provision when trying to distinguish *Langere*.

So *Langere* holds that the voluntary-dismissal tactic is a dead letter after *Baker* when there is a statutory scheme governing interlocutory appeals. In the class-action context, that is Rule 23(f). For arbitration cases, the FAA itself governs. And in this case, Section 1292(b) allowed Trendsettah to seek interlocutory review of the District Court's order granting Swisher's Rule 60 motion. Trendsettah availed itself of that opportunity, but it failed. There is thus no way to distinguish *Langere* from this case. If the conflicting decisions are left standing, panels can do whatever they want.

The panel's decision also conflicts with *Sperring v. LLR, Inc.*, 995 F.3d 680 (9th Cir. 2021) (*per curiam*). Recognizing that *Langere*

controlled whether the voluntary-dismissal tactic was still viable post-*Baker*, the panel dismissed the appeal in a published *per curiam* opinion. The panel here relegated that decision to a "see also" cite in the paragraph discussing *Langere*. *See* Slip Op. at 14.

* * *

Rather than follow the Supreme Court's binding *Baker* precedent, the panel brushed that decision aside and split from two prior panel decisions to reach the merits of an appeal over which it lacked jurisdiction. The Court should not allow that to happen and should grant rehearing *en banc*.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limits of Ninth Circuit Rule 29-2(c)(2) because it contains 3,600 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f).

I also certify that this brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and (6) because it uses 14-point Century Schoolbook font.

/s/ John M. Masslon II
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May 3, 2022