No. 23-971

IN THE

Supreme Court of the United States

GARY WAETZIG,

Petitioner,

v.

HALLIBURTON ENERGY SERVICES, INC.,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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I. The Court Should Address Only The (Properly Presented) Question Presented

With no persuasive merits arguments, Respondent begins by asking the Court to affirm based on an issue outside of, and not relevant to, the question presented: the never-before-raised theory that the district court lacked jurisdiction over Mr. Waetzig's motion to vacate the arbitration award. Resp. 15–20. Respondent alternatively asks the Court to dismiss the writ because Petitioner's motion to vacate will be doomed on remand. *Ibid*. Respondent did not make this cooked-up argument in opposing certiorari, nor in the district court or court of appeals, and there is no reason the Court should consider it.

A. There is no basis for affirming on Respondent's new theory, as "[t]he Court of Appeals did not rule on th[is] alternative ground[], which [is] beyond the scope of the question presented." *Nutraceutical Corp.* v. *Lambert*, 586 U.S. 188, 198 (2019). Indeed, in the decision below, the Tenth Circuit held only that "a voluntary dismissal without prejudice . . . is not a final judgment, order, or proceeding," so the district court lacked the authority to reopen under Rule 60(b). Pet. App. 2a. The petition thus presented one question: "whether a Rule 41 voluntary dismissal without prejudice is a 'final judgment, order, or proceeding' under Rule 60(b)."

The court below did not consider, and the question presented does not concern, whether the district court abused its discretion in granting relief under Rule 60(b), or whether its separate order vacating the arbitration award was erroneous. Similarly, the court below did not consider, and the question presented also does not include, the alternative argument now pressed by Respondent—namely, that *Kokkonen* v. *Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994), bars vacatur of the arbitration award.

Thus, under the Court's longstanding practice and its Rules, the Court should not consider Respondent's lead argument—although, after this Court reverses, "[i]f the Court of Appeals concludes that these arguments have been preserved, it can address them in the first instance on remand." *Nutraceutical*, 586 U.S. at 198; *United States* v. *Stitt*, 586 U.S. 27, 36 (2018) (refusing to consider argument first raised in this Court); *Pac. Bell Tel. Co.* v. *linkLine Commc'ns, Inc.*, 555 U.S. 438, 457 (2009) (not addressing issues "outside the scope of the question presented" and "not addressed by the Court of Appeals in the decision below"); see also Sup. Ct. Rule 14.1(a).

Respondent tries to force this Court to be one "of first view," *Stitt*, 586 U.S. at 36, by asserting that its arguments go to the district court's subject-matter jurisdiction. Resp. 16. But the fact that the Tenth Circuit concluded the district court lacked "jurisdiction" does not somehow give Respondent license to present a different jurisdictional ground outside the question presented to support the

judgment below. This Court's Rule 14.1(a), and the principle stated in *Nutraceutical* and elsewhere, still foreclose Respondent's argument. See *PennEast Pipeline Company, LLC* v. *New Jersey*, 594 U.S. 482, 512 (2021) (Gorsuch, J., dissenting) (noting separate jurisdictional argument left for remand).

There is also no basis to dismiss the writ. To begin, this Court's obligation to confirm a lower court's jurisdiction only comes into play when an alleged jurisdictional defect below means the lower court lacked jurisdiction to decide the question presented. Here, however, the supposed defect could not deprive the lower courts of jurisdiction to decide whether Rule 60(b) gives a district court authority to reopen a case, and thus poses no obstacle to review in this Court. Respondent *never* contends otherwise.

Moreover, there can be no question that the district court *did* have subject-matter jurisdiction over Petitioner's suit that the district court reopened. He brought a single claim under the ADEA, so the district court undoubtedly had federal-question jurisdiction over the reopened case. As a result, if the answer to the question presented is yes and the case is reopened, the district court would have subject-matter jurisdiction over it.[1]

[1] Even if there were a subject-matter jurisdiction defect in the underlying lawsuit (there is not), the district court may still have power to reopen a case and give Petitioner a chance to cure any jurisdictional defects. Similarly, if there is an obstacle to a vacatur motion, it will be up to the district court to determine the

B. Against this, Respondent cites *Kokkonen* and *Badgerow* v. *Walters*, 596 U.S. 1 (2022), and purports to draw from those decisions the rule that the district court lacked authority to vacate the award. This argument misses the mark because it conflates multiple issues, reflected in two different orders. The district court both (a) determined it had authority under Rule 60(b) to reopen a federal case, Pet. App. 58a, and did so, *id.* at 58a–64a (finding Rule 60(b) requirements met), and then separately (b) vacated the arbitration award, *id.* at 48a. Whether the district court had authority to vacate the award post-reopening says nothing about whether it had the power to reopen a case under Rule 60(b) in the first place.

Moreover, although the question is for remand, Respondent's reliance on *Kokkonen* is wrong anyway. *Kokkonen* unremarkably held that a settling party cannot return to federal court for the sole purpose of enforcing the settlement of a federal case once that case is dismissed. 511 U.S. at 381–82. While so holding, this Court noted, and distinguished, a line of circuit cases where Rule 60 relief was granted to "reopen[]" a "dismissed suit by reason of breach of the agreement that was the basis for dismissal," 511 U.S. at 378. But, contrary to Respondent's representation, the party seeking enforcement of the settlement in *Kokkonen* did *not* "move[] to reopen" the dismissed

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proper course of litigation once the case is reopened, including to address the import of the award (and any *res judicata* effect it may have).

suit, *contra* Resp. 18,[2] and the district court did not reopen it. *Kokkonen* thus says nothing about Rule 60(b), or the authority of a federal court to vacate an arbitration award in a pending (and reopened) suit.[3]

In sum, whether the district court was permitted or correct to vacate the arbitration award are matters for remand (if preserved) that do not affect disposition of the question presented. These arguments provide no basis to affirm, nor to dismiss the writ. Stephen M. Shapiro, et al., Supreme Court Practice § 5.15 (11th ed. 2019) (discussing reasons for which previously granted petitions are dismissed).

II. District Courts Have Authority Under Rule 60(b) To Reopen Voluntarily Dismissed Cases

A. Rule 41(a) Voluntary Dismissals Without Prejudice Are "Final" Under Rule 60(b)

As Petitioner's brief explains, at the time the word "final" was added to Rule 60(b), legal and non-legal dictionaries, the Advisory Committee Notes, and relevant cases all defined "final" to mean case-terminating—in contrast to "interlocutory" actions as to which the district court retained plenary authority unaffected by Rule 60(b). Br. 13–16, 31–38, 43–45.

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[2] Oral Arg. Tr. at 5, *Kokkonen* v. *Guardian Life Ins. Co*, 511 U.S. 375 (1994) (No. 93-263) ("It [Rule 60] was not resorted to here.").

[3] Likewise, *Gonzalez* v. *Crosby* only interpreted 28 U.S.C. 2244(b) and said nothing about Rule 60(b)'s scope. 545 U.S. 524, 530 (2005). *Contra* Resp. 19.

Rather than meaningfully engage, Respondent declares that the definition of "final" in Rule 60(b) turns on pre-1946 definitions of "final" governing appellate jurisdiction. Resp. 23–25. Then, Respondent contends this requires a resolution of legal rights and obligations, and urges affirmance on the basis that this resolution-on-the-merits test is not met. Resp. 25–26. This is all wrong.

1. To begin, the premise of Respondent's entire argument—that a judgment, order, or proceeding can be "final" under Rule 60(b) only if appealable to a court of appeals as a "final decision" under Section 1291 and predecessors—is wrong and unsupported.[4]

As the plain text and context make clear, the word "final" was added to Rule 60(b) only to take out of Rule 60(b)'s sweep those "interlocutory" matters over which district courts retained plenary modification authority. Dictionary definitions, the 1946 Advisory Committee Note, and the Moore and Rogers article on which the Note relies all confirm this. Br. 12–15, 33–25, 42–45. Per the Note, the amendment clarified that "interlocutory judgments are not brought within the restriction of the rule, but rather they are left subject to the complete power of the court rendering them to afford such relief from them as justice requires."

[4] The Judicial Code of 1911 granted courts of appeals appellate jurisdiction to review "*final decisions* in the district courts." 61 Cong. Ch. 231, 36 Stat. 1087, 1133 § 128 (March 3, 1911) (emphasis added); 28 U.S.C. 225(a) (1946). The modern version of 28 U.S.C. 1291 was enacted in 1948 and also used the "final decisions" language, with future amendments not relevant here. 80 Cong. Ch. 646, 62 Stat. 868, 929 (June 25, 1948).

Likewise, the cited Moore and Rogers article explained that some lower courts read Rule 60(b) to limit their authority over interlocutory matters, and the Rule drafters believed this was wrong. See Advisory Committee Note—1946 Amendment, Subdivision (b); Moore & Rogers, *Federal Relief from Civil Judgments*, 55 Yale L.J. 623, 686 (1946); Br. 16, 33–35, 42–46.

Respondent offers no response other than *ipse dixit* and the observation that "final" appears in both Rule 60(b) and Section 1291. But the fact that the word "final" appeared in 28 U.S.C. 225(a) (1946) to modify "decisions" does not mean that word has the same meaning in Rule 60, where it modifies "judgment, order, or proceeding." See *Yates* v. *United States*, 574 U.S. 528, 537–38 (2015) (collecting cases where "identical language . . . convey[ed] varying content when used in different statutes"). Rule 60 does not cross-reference Section 225(a), does not mention appellate jurisdiction, and does not even adopt parallel wording (*i.e.*, "final decisions," or "final decisions subject to appeal"). There is no indication Rule 60 imported a definition from one context (appellate jurisdiction) to address a very different issue (ensuring trial courts retained plenary jurisdiction over interlocutory matters), and instead the differences in phraseology as between Rule 60 and appellate jurisdiction statutes "supplies one clue" that the drafters intended a different sweep. *HollyFrontier Cheyenne Ref., LLC* v. *Renewable Fuels Ass'n*, 594 U.S. 382, 392 (2021) ("absence of any parallel

modifying language" suggests "continuity is not required").

The Advisory Committee Notes are in accord. Again, the Notes do not refer to "final decisions," "appealable" matters, or any of the other sources now relied upon by Respondent; they state simply the amendment would carve "interlocutory" matters out of Rule 60(b)'s sweep. "Advisory Committee Notes are a reliable source of insight into the meaning of a rule," and "nothing in the pertinent proceedings of the Rules Advisory Committee supports the notion that" the meaning of the word "final" in Rule 60(b) should create a third category beyond final and interlocutory, or mirror appellate-jurisdiction finality. *Hall* v. *Hall*, 584 U.S. 59, 75 (2018) (cleaned up) (refusing to adopt definition not mentioned in Advisory Committee Note); *United States* v. *Vonn*, 535 U.S. 55, 64 n.6 (2002) (similar).

Nor does Respondent's position make any sense. As Respondent's meandering exegesis of appellate jurisdiction acknowledges, this Court has treated some decisions as final for appellate purposes despite being interlocutory. Resp. 24; *e.g.*, *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) ("The Court has long given this provision of the statute this practical rather than a technical construction."). There is no indication—and it would make zero sense—for such interlocutory decisions to be subject to reopening only if they meet Rule 60(b)'s constraints, or for Rule 60(b) otherwise to use the word "final" exactly in the same way as in the appellate context,

where, for practical purposes, an appeal is sometimes permitted from interlocutory rulings.[5]

2. Respondent's discussion of the law governing appeals is thus irrelevant, but also wrong, because that law also generally looks to whether a case is over.

a. Respondent is wrong to argue that a dismissal cannot be appealed (as final) if it either "leaves the plaintiff free to refile," or fails to resolve all (or any) issues in the action. *Contra* Resp. 21, 25. Respondent admits that "[a] non-merits dismissal can be final" for purposes of appellate jurisdiction. Resp. 23–24 (citing *Wilson* v. *Republic Iron & Steel Co.*, 257 U.S. 92, 96 (1921)). And many non-merits rulings *are* appealable, such as jurisdictional dismissals, even if the case can be refiled. Respondent's authority (*Wilson*) directly supports Petitioner; the Court there held in 1921 that "a judgment of dismissal" that "leaves the merits undetermined and may not be a bar to another action does not make it interlocutory." 257 U.S. at 96. The dismissal was still final because "[i]t effectually *terminates the particular case*, prevents the plaintiff from further prosecuting the same and relieves the defendant from putting in a defense." *Ibid.* (emphasis added).

Despite Respondent's appeals to history, the principle that a judgment could be "final" for appellate purposes even if not preclusive of a future suit was

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[5] *Stone* v. *INS*, 514 U.S. 386, 401 (1995), does not help Respondent; it merely explains how Rule 60(b) motions do not affect a judgment's finality for appeal.

well-established by 1946. As one treatise stated: "there is no doubt that, in order to come within the statutes governing appellate review or to satisfy the tests applied by the common law, the judgment or decree need not finally determine the rights of the parties litigant; it is sufficient if it ends the particular suit in which it is entered." A.C. Freeman, A Treatise of the Law of Judgments (Vol. 1) at 35 (1925). And in 1907, this Court held that a judgment could be "final, so far as the case is concerned," in that it "terminated the action," regardless "[w]hether th[e] judgment would be a bar to another action." *Wecker* v. *Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 182 (1907).

Respondent fares no better with its related argument that a judgment is only final if it "dispos[es] of all issues involved in the litigation." Resp. 23 (quoting *Catlin* v. *United States*, 324 U.S. 229, 236 (1945)). Cases like *Catlin* and *Bostwick* v. *Brinkerhoff*, 106 U.S. 3 (1882), concern when a merits decision is final (by disposing of all issues), as opposed to interlocutory (by disposing of only some). They say nothing about whether a non-merits dismissal is final (or appealable), as indeed one could be (such as a dismissal for lack of jurisdiction). Here, the dismissal *did* "terminate[] the particular case." *Wilson*, 257 U.S. at 96. "[I]t [wa]s final, so far as the case is concerned, and terminated the action." *Wecker*, 204 U.S. at 182.

b. Respondent's contention that "[v]oluntary dismissals without prejudice are not, and never have been, final" for appellate purposes also fails on its own

terms. Resp. 25.[6] Whether a dismissal is with or without prejudice affects its preclusive effect—not its finality. *Rinieri* v. *News Syndicate Co.*, 385 F.2d 818, 821 (2d Cir. 1967) ("Although a dismissal without prejudice permits a new action . . . without regard to res judicata principles, the order of dismissal, nevertheless, is a final order from which an appeal lies.").

Again, what matters is whether the dismissal is case-terminating or whether district-court litigation will continue. As the Seventh Circuit observed:

> [W]hen "without prejudice" means "I have not resolved the merits but this case is over nonetheless," then the decision is final; when it means "the problem can be fixed so that litigation may continue in this court," then the decision is not final. In our case . . . [t]he judge contemplated that an adverse decision by the state's judiciary might justify more federal litigation, but *this case is over*, so Carter can appeal.

Lauderdale-El v. *Indiana Parole Bd.*, 35 F.4th 572, 577 (7th Cir. 2022) (emphasis added; citation omitted).

Thus, federal courts consistently hold that dismissals without prejudice that terminate cases are "final" for appellate purposes even if they do not resolve all litigation-related issues or preclude a new suit. *E.g.*, *id.* at 578–80 (collecting cases); *Allied Air*

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[6] Rule 41 voluntary dismissals might not be appealable, but that is *not* because they are not "final," *infra* at pp. 13–14.

Freight, Inc. v. *Pan Am. World Airways, Inc.*, 393 F.2d 441, 444 (2d Cir. 1968) ("[D]ismissals with and without prejudice are equally appealable as final orders.").

c. Respondent's authority does not contradict these well-settled precepts. Two cases concern a doctrine that prohibits the "use [of] voluntary dismissal[s] without prejudice as an end-run around the final judgment rule to convert an otherwise non-final—and thus non-appealable—ruling into a final decision appealable under § 1291." *Marshall* v. *Kansas City S. Ry. Co.*, 378 F.3d 495, 500 (5th Cir. 2004) (discussing origin of "*Ryan* rule"); *Treasurer of State of Michigan* v. *Barry*, 168 F.3d 8, 13 (11th Cir. 1999). Under 28 U.S.C. 1291, a plaintiff normally cannot appeal an interlocutory order. *Marshall*, 378 F.3d at 500. Accordingly, some courts reject plaintiffs' attempt to "manufacture a final judgment—and through it appellate jurisdiction" by dismissing claims without prejudice. *Id.* at 499; see also *Barry*, 168 F.3d at 17–18 (Cox, J., concurring) (discussing circuit split regarding *Ryan* rule). Whatever the merits of this doctrine, it has nothing to do with this case.[7]

Respondent's reliance on *Microsoft Corp.* v. *Baker* fails for similar reasons. Resp. 26–27, 30. In *Baker*, the district court denied plaintiffs' class-action

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[7] Respondent also cites *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212, 217 (1947), but it just describes when a party can dismiss a case without prejudice. *American States Ins. Co.* v. *Capital Associates of Jackson County, Inc.*, 392 F.3d 939, 940 (7th Cir. 2004), is off-point because it quotes out-of-context dicta.

certification motion and the court of appeals did not grant permission for an interlocutory appeal under Rule 23(f). 582 U.S. 23, 27 (2017). Plaintiffs attempted to manufacture an immediately appealable judgment by dismissing the case with prejudice, while reserving the right to proceed if they obtained reversal of the class-certification decision. *Ibid.* Five Justices rejected this gamesmanship as "severely undermin[ing]" Rule 23(f), holding that "[p]laintiffs 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." *Id.* at 40–41 (reference omitted). Three justices would have treated the judgment as final under Section 1291, but dismissed on standing grounds. *Id.* at 44–45 (Thomas, J., concurring).

d. Finally, Respondent also errs by arguing that plaintiffs ordinarily cannot appeal a voluntary nonsuit. Before 1946, the reason had nothing to do with finality; rather, the plaintiff's dismissal was viewed as "a waiver of all previous errors." Freeman, *supra*, at 42 (discussing possible exception to this rule if "his action is practically forced and may for that reason be regarded as involuntary"). Thus, as one court held, "although a voluntary nonsuit is a *final termination of the action*, it has been entered at the request of plaintiff, and he may not, after causing the order to be entered, complain of it on appeal." *Kelly* v. *Great Atl. & Pac. Tea Co.*, 86 F.2d 296, 296–97 (4th Cir. 1936) (emphasis added) ("involuntary nonsuit" can be appealed by aggrieved party); *Baker*, 582 U.S. at 44–45 (Thomas, J., concurring) ("[I]t 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.").

Respondent's authority is in accord. In one, the Court's entire opinion stated "that in such a case, where there has been a *nonsuit*, and a motion to reinstate overruled, the court could not interfere." *United States* v. *Evans*, 9 U.S. 280, 281 (1809). In the other, the Court stated a plaintiff who suffered an involuntary nonsuit *could* "sue out a writ of error," unlike a "plaintiff[] who appears by the record to have voluntarily become nonsuit." *Cent. Transp. Co.* v. *Pullman's Palace Car Co.*, 139 U.S. 24, 39 (1891). There was no discussion of finality; the case turned on consent. *Ibid.* The same is true of *Rudolph* v. *Sensener*, 39 App. D.C. 385, 388 (D.C. Cir. 1912).[8]

3. Respondent raises several other appellate-jurisdiction-related objections. None has merit.

First, contrary to Respondent's suggestion, Resp. 23, Petitioner consistently defines "final" for judgments, orders, and proceedings (*i.e.*, non-interlocutory). To the extent Respondent argues "final judgment" is a term of art requiring the determination

[8] Post-1946 courts and treatises continued to recognize that "[w]here the trial court allows the plaintiff to dismiss his action without prejudice, the judgment, of course, qualifies as a final judgment for purposes of appeal. Ordinarily though, plaintiff cannot appeal therefrom, since it does not qualify as an *involuntary* adverse judgment so far as the plaintiff is concerned." *LeCompte*, v. *Mr. Chip, Inc.*, 528 F.2d 601, 603 (5th Cir. 1976) (emphasis added) (quoting 5 Moore's Federal Practice P41.05(3) (2d ed. 1975)).

of all legal rights, that is wrong, but it also does not follow that the term "final proceeding" must have the same meaning. "[F]inal judgment" being a term of art would not somehow transform it into an adverb modifying "proceeding." Rather, the relevant question would be what a "final *proceeding*" is, and nothing about the word "final" or the term "final *proceeding*" requires an adjudication of all (or any) legal rights. See *infra* Part II.B.

Second, regardless, Respondent is wrong to argue that Rule 41(a)(1)(A) dismissals do not affect legal rights. One effect is that the dismissal immediately ends the case, as Respondent admits. Resp. 21, 37–38. Another is that plaintiff loses the right to future Rule 41(a)(1)(A) dismissals without prejudice. Fed. R. Civ. P. 41(a)(1)(B).

Third, permitting appeals from denials of Rule 60(b) motions to reopen voluntary dismissals is consistent with the reason plaintiffs normally cannot appeal the voluntary dismissal itself: in the latter the plaintiff consented to entry of judgment, whereas in the former such consent is allegedly defective. See *Baker*, 582 U.S. at 44–45 (Thomas, J., concurring).

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Ultimately, Respondent's flawed discussion of appellate jurisdiction does not change the fact that all relevant sources—dictionary definitions, Advisory Committee Notes, caselaw—point in the same direction: Rule 41(a)(1)(A) dismissals are "final" because they are case-ending and not "interlocutory,"

and thus not subject to the district court's plenary reopening authority. And it is undisputed that a Rule 41 dismissal is *not* interlocutory.

B. A Voluntary Dismissal Without Prejudice Is A Final "Proceeding"

Next, a Rule 41 notice of voluntary dismissal without prejudice, and the dismissal itself, are "proceedings," as shown by Petitioner's dictionary definitions (which Respondent does not dispute), the 1937 Advisory Committee Notes (which state that Rule 60(b) "is based upon Calif. Code Civ. Proc. (Deering, 1937) § 473"), California court decisions uniformly interpreting that provision to include voluntary dismissals (including without prejudice dismissals), and *Hall* v. *Hall*, 584 U.S. 59 (2018).

1. Respondent's attempts to contest Petitioner's interpretation of "proceeding" fail.

a. As Petitioner discussed in detail, when Rule 60(b) was adopted, dictionaries defined "proceeding" to include, among other things, "all possible steps in an action," "any application to a court of justice, however made," and "any step or act taken in conducting litigation." Br. 17 (quoting dictionaries).

Respondent does not disagree. Respondent cites no dictionary adopting its competing, resolving-legal-rights definition, and admits that "proceeding" includes "*all possible steps in an action* from its commencement to the execution of judgment." Resp. 34 (emphasis added; quoting *Black*'s *Law* (3d. ed.

1933)). Given the parties' apparent agreement on the plain meaning of "proceeding," this should be the end of the inquiry, as a notice of voluntary dismissal without prejudice, and the dismissal itself, are "possible step[s] in an action."[9] See *Truck Ins. Exch.* v. *Kaiser Gypsum Co., Inc.*, 602 U.S. 268, 278 (2024) (dictionary set plain meaning where "[t]he parties . . . land[ed] on roughly th[e] same definition"); *Kemp* v. *United States*, 596 U.S. 528, 534 (2022) (interpreting Rule 60(b) with dictionaries).

b. The 1937 Advisory Committee Notes and California law also support Petitioner. Advisory Committee Notes are highly probative. Br. 30 (discussing *Hall*). Yet Respondent ignores them when defining "proceeding." The 1937 Advisory Committee Notes explicitly state that the provision "is based upon" Calif. Code. Civ. Proc. § 473; Section 473 covered "proceedings;" and California courts consistently interpreted the term to include voluntary dismissals, including without prejudice. Br. 39–40.

Respondent ignores *Stonesifer* v. *Kilburn*, a California Supreme Court case endorsing Petitioner's definition; the decision stated that Section 473 was to be "liberally construed," and that "[t]he term 'proceeding' is generally applicable to any step taken

[9] Respondent calls Petitioner's interpretation "implausible" (Resp. 41) because it supposedly would have been overly inclusive before "final" was added to Rule 60(b) in 1946, but "as a lead drafter of the original Rules" (Resp. 42) observed, there *were* concerns that Rule 60(b) was too broad, which is why "final" was added. Br. 43–44.

by a party in the progress of a civil action; anything done from the commencement to the termination is a proceeding." 29 P. 332, 335 (Cal. 1892) (citation omitted) (discussed at Br. 39–40). Respondent instead takes aim at Petitioner's citation to *Palace Hardware Co.* v. *Smith*, 66 P. 474 (Cal. 1901), because it involved a voluntary dismissal *with* prejudice. Resp. 47. Petitioner never suggested otherwise, and this does not change the fact that California's highest court held that voluntary dismissals are "proceedings."

Respondent also criticizes Petitioner's citation to *Salazar* v. *Steelman*, 71 P.2d 79 (Cal. Ct. App. 1937), which concerned a dismissal *without* prejudice, complaining *Salazar* was an intermediate-court case while claiming that *Lusas* v. *St. Patrick's Roman Cath. Church Corp. of Waterbury*, 193 A. 204 (Conn. 1937) "recognized conflict among intermediate California courts." Resp. 47. This is simply false. *Smurda* v. *Superior Court*, 266 P. 843 (Cal. Ct. App. 1928) (cited by Respondent), was one "[o]f the cases cited by the defendant" in *Lusas*, 193 A. at 206, but that court brushed it aside as irrelevant to "the precise question [in *Lusas*]," because there was no attempt to reopen *Smurda* after it was voluntarily dismissed. *Smurda* did not even cite Section 473, and merely stands for the unremarkable principle that a "court has lost jurisdiction as a result of a dismissal by the plaintiff." 266 P. at 845. Unsurprisingly, *Lusas* did not recognize *Smurda* as conflicting with *Palace Hardware*—there was no conflict.

Seeking to sidestep the consistent holdings of these California court cases, Respondent also invokes *Kemp*. There, this Court held that the meaning of a phrase in Rule 60(b) was not sufficiently well-settled because, in addition to conflicting state-court decisions, a treatise (authored by Moore, one of the principal Rules drafters) took a contrary view. 596 U.S. at 538–39. That is the opposite of the situation here. In addition to relevant California cases consistently interpreting Section 473 to capture voluntary dismissals and dictionary definitions aligning with Petitioner's interpretation, "the weight of authority" elsewhere was in accord. *Lusas*, 193 A. at 206. Moreover, unlike in *Kemp*, Professor Moore took the view that it *was* appropriate to look to California case law to interpret the meaning of proceeding in Rule 60(b)—in the article cited by the 1946 Advisory Committee Notes. Moore & Rogers, *supra*, at 633–34 ("California decisions" "are persuasive in interpreting the first two sentences of Rule 60(b) adapted" in 1938).

c. Abandoning the Tenth Circuit's interpretation of "proceeding," Respondent urges that textual canons supply a new meaning of the word not reflected in cases or dictionaries. Resp. 35 (arguing "proceeding" is a "step" that "determines the parties' rights and obligations"). These canons cannot overcome the weight of other textual indications, and Respondent is wrong again anyway.

Petitioner argued (and Respondent ignored) the established precept that the canon of *ejusdem generis*

does not apply where a term is unambiguous. Br. 24. Here, the parties largely agree on the plain meaning. See pp. 16–17, *supra*. And Respondent does not respond to Petitioner's other reasons why the canon is inapt. Br. 24–25.

Respondent also fails to persuade by invoking the *noscitur* and surplusage canons. As explained in the opening brief, the *noscitur* canon helps Petitioner; regarding surplusage, Respondent admits its definition leads to overlaps. See Resp. 35 ("In practice, actions that do not require a separate judgment may be final orders or final proceedings."). And again, these canons cannot provide a definition conflicting with dictionaries and other, superior authorities.

Rule 60's use of the word "relieve" also does not require (or even suggest) Respondent's definition. Resp. 36. It is not illogical or meaningless to say that a court provides relief from a step in the litigation process, including relieving a party from the filing of a notice of dismissal. Post-relief, the notice and dismissal are undone, and the case reopened.

Finally, other Federal Rules do not support Respondent. None requires "proceeding" to include a determination of legal rights—particularly when dictionaries and court cases did not have such a requirement. And the Federal Rules make clear that a "proceeding" may at times be a "judgment" or "order." *Contra* Resp. 42. Rule 62 is instructive: it stays "execution on a judgment and *proceedings* to enforce it" in certain circumstances, but at the same time exempts from those stayed proceedings any

"*final judgment* in an action for an injunction or receivership," and any "*judgment* or *order* that directs an accounting in an action for patent infringement."

2. Regardless, even accepting Respondent's argument that a Rule 60(b) "proceeding" includes only activities resulting in "a determination of legal rights that imposes legal burdens on a party through the judicial process," Resp. 34, that test is met. Rule 41 voluntary dismissals without prejudice *do* determine a person's substantive legal rights and result in a legal burden. See p. 15, *supra*. Moreover, as they are steps in the litigation process, the notice and the dismissal itself affect rights and obligations within a lawsuit: the notice leads to a discontinuance of an action, "prevent[ing] the plaintiff from further prosecuting the [case] and reliev[ing] the defendant from putting in a defense." *Wilson*, 257 U.S. at 96. What more could be required?

C. Alternatively, A Voluntary Dismissal Without Prejudice Is A Final "Judgment"

Alternatively, as *Black's Law Dictionary*, the Federal Rules, and circuit decisions confirm, a Rule 41(a)(1)(A) dismissal is a "judgment." Br. 25–29. Respondent resists this conclusion by arguing that Petitioner forfeited this argument and that "judgment" in Rule 60 carries the same meaning as "final decision" in Section 1291. Wrong again.

1. Respondent's forfeiture argument starts by relying on the false premise that Petitioner failed to raise the argument in the Tenth Circuit. Respondent

relies on a passing statement in the background section of Petitioner's petition that the "parties agreed that Petitioner's voluntary dismissal was not a 'final judgment,'" Resp. 32, but that statement was made in the context of describing the Tenth Circuit's decision. Pet. 8. In that court, Petitioner cited cases holding that voluntary dismissals (albeit with prejudice) are judgments under Rule 60(b), Br. 26 n.5. There was no waiver.

Regardless, this Court may address whether voluntary dismissals are "judgments" because that is a pure question of law covered by the question presented, and is fairly included as part of it. Cf. *City of Sherrill, N.Y.* v. *Oneida Indian Nation of New York*, 544 U.S. 197, 214 n.8 (2005); Sup. Ct. R. 14.1(a).

2. Respondent fares no better on the merits. Again, it erroneously equates "judgment" in Rule 60(b) with "final decision[]" in Section 1291. That fails for the reasons stated above (pp. 6–14). Again, a voluntary dismissal is a final decision that would be appealable but for the plaintiff's consent. See Freeman, *supra*, at 41 ("The dismissal of a suit by the plaintiff is a judgment within the meaning of the code" even if it permits relitigation); see also *id.* at 39–42; *Kelly*, 86 F.2d at 297 ("no appeal lies from a *judgment* of voluntary nonsuit," even though it is a "final termination of the action" because the judgment was "entered at the request of plaintiff" (emphasis added).

Respondent quotes dicta that "[a] 'judgment' for purposes of the Federal Rules of Civil Procedure would appear to be equivalent to a 'final decision' as

that term is used in 28 U.S.C. § 1291." *Bankers Tr. Co.* v. *Mallis*, 435 U.S. 381, 384 n.4 (1978). *Mallis*, however, concerned whether "a judgment set forth on a 'separate document' is a prerequisite to appellate jurisdiction," given that Rule 58 states "every judgment shall be set forth on a separate document." *Id.* at 382–83. This "drive-by" footnoted statement was not necessary to resolving the case and did not even address Rule 60. Cf. *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 511 (2006) ("no precedential effect" given to "drive-by jurisdictional rulings").

In fact, the Court's analysis in *Mallis* undermines Respondent's position on multiple fronts. The Court refused to decide whether "the requirements for an effective judgment set forth in the Federal Rules of Civil Procedure must generally be satisfied before § 1291 jurisdiction may be invoked," but instead just assumed that was the case, showing the two definitions may diverge. *Mallis*, 435 U.S. at 384.

The *Mallis* decision also undercuts Respondent's Rule 58 argument. Respondent contends Rule 58's "separate document" requirement is evidence that Rule 41(a)(1)(A) dismissals cannot be judgments, given that the dismissal does not require a separate document. Resp. 33. But despite Rule 58's seemingly mandatory requirement, *Mallis* held no separate document was necessary for appellate jurisdiction, as otherwise "[w]heels would spin for no practical purpose." 435 U.S. at 384–85. Instead, the Court held it would deem the Rule 58 requirement waived, as the opinion and order were plainly intended to represent

a final judgment. *Id.* at 387–88. That logic applies here: a Rule 41(a)(1)(A) dismissal is intended to be a final judgment terminating a case, and any Rule 58 requirement is unnecessary.

The fact a Rule 41(a)(1)(A) dismissal is entered without any involvement by the court does not prevent it from being a judgment. Such a dismissal is like a Rule 68 "offer of judgment," which is also executed "without any involvement by the court" and does not involve a decision on the merits: "[t]hat the Rules call one of these means a 'judgment' strongly suggests that the drafters would have intended to treat the other as a judgment as well." *White* v. *Nat'l Football League*, 756 F.3d 585, 595–96 (8th Cir. 2014). Indeed, as the Eighth Circuit held in comparing a Rule 68 offer of judgment to a Rule 41 stipulated dismissal with prejudice, "[n]either may be appealed," and "[a]lthough an offer of judgment differs from a stipulated dismissal in that the former requires the clerk to enter a formal judgment in favor of the plaintiff, the court itself exercises no review over the judgment." *Ibid.*

Tellingly, despite Petitioner discussing *White* in its opening brief (Br. 15, 29), Respondent fails to address this case at all, including the Rule 68 offer-of-judgment issue. The fact that the Rules drafters chose the word "judgment" in Rule 68 is consistent with Petitioner's argument that Rule 54's use of "*includes*" does not mean *only* those things.

As usual, Respondent's other authority either misses the mark or hurts its case. For instance,

Respondent quotes *Commissioner* v. *Bedford's Estate*, that entry of a "judgment is the act of the court" even when entered by a clerk. 325 U.S. 283, 286 (1945). But *Bedford's Estate* was not analyzing what constitutes a "judgment" for Rule 60 purposes. *Id.* at 287–88 (assessing appellate jurisdiction). Regardless, the case supports Petitioner, showing that even where "a clerk does all of the ministerial acts," the act is *still* treated as an "act of the court." *Id.* at 286. Thus, even though a clerk does the ministerial acts related to entering a Rule 41(a)(1)(A) dismissal, it can still be an "act of the court."

CONCLUSION

The judgment of the Tenth Circuit should be reversed.

Respectfully submitted,

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