No. 16-1150

In The
Supreme Court of the United States

ELSA HALL,
As Personal Representative of the
Estate of Ethlyn Louise Hall and as Successor Trustee of
the Ethlyn Louise Hall Family Trust,

Petitioner,

v.

SAMUEL H. HALL, JR. AND HALL & GRIFFITH, PC

Respondents.

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

REPLY BRIEF FOR THE PETITIONER

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SUMMARY OF ARGUMENT

As required by Fed. R. Civ. P. 58(b)(1), the district court entered a final judgment in petitioner's case that "ordered" that "the action" be "dismissed on the merits." A-12. The order was entered on the docket *only* in Case No. 11-54 and did not include the caption of the consolidated case (Case No. 13-95).[1] Thereafter, the district court denied the respondents' motion for attorneys' fees because they had not filed their motion for fees within fourteen days of entry of the final judgment as required by Fed. R. Civ. P. 54(d)(2)(B)(i).[2] The judgment in this case is the classic final judgment: It terminated the action and there was no other action for the district court to take. The final judgment rule, embodied in 28 U.S.C. § 1291, unambiguously provides a right of appeal from a final judgment.

Respondents are unable to avoid the plain language of Section 1291 and instead engage in linguistic

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[1] Likewise, the judgment on the jury verdict in favor of Samuel Hall and against Elsa Hall in her individual capacity was entered solely in Case No. 13-95 and bore that case's caption only.

[2] Rule 54(d)(2)(B)(i) requires that the motion be filed within fourteen days of "judgment." Fed. R. Civ. P. 54(a) defines "judgment" as "a decree and any order from which an appeal lies." *See also Brown v. Local 58, Int'l Bhd. of Elec. Workers, AFL-CIO*, 76 F.3d 762, 767 (6th Cir. 1996) (holding that an attorney fee motion must be filed within fourteen days of an order from which an appeal lies).

gymnastics in an effort to deny petitioner the right of appeal from a final judgment provided by Section 1291. To do so, they must first interpret Fed. R. Civ. P. 42 in a manner that denies a party with a final judgment of its substantive right to appeal—in direct contravention of the Rules Enabling Act. They must then subvert the purpose of Fed. R. Civ. P. 54(b), which is designed to *increase* the availability of appeals in certain cases in which a final judgment *has not* been entered. Respondents turn Rule 54(b) on its head and seek to use it to *limit* the availability of appeals in cases where a final judgment *has* been entered.

Respondents also raise the specter of various and sundry problems that they envision will arise if appeals from final judgments in consolidated cases are allowed. These perceived concerns do not justify ignoring the plain language of Section 1291. Further, these strawman concerns are illusory. Despite the benefit of a collective seventy-five years of jurisprudence from the First and Sixth Circuits, both of which allow such appeals,[3] respondents are unable to provide examples that show that the troubles they conjure up are real. The phantom specter disappears under scrutiny.

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[3] *See In re Massachusetts Helicopter Airlines, Inc.*, 469 F.2d 439 (1st Cir.1972) (treating all consolidated cases as separate for purposes of appellate jurisdiction) and *Kraft, Inc. v. Local Union 327, Teamsters, Chauffeurs, Helpers & Taxicab Drivers*, 683 F.2d 131, 133 (6th Cir. 1982) (stating that it is "beyond peradventure" that a summary judgment dismissing one action in two consolidated cases was a final appealable order "inasmuch as the consolidation of both actions below did not merge the suits into a single cause").

ARGUMENT

Respondents' argument hinges upon three independent building blocks:

- that "final judgment" no longer means what this Court has repeatedly said it means;
- that a Rule 42 consolidation can deprive a party of a substantive right—the right to an appeal from a final judgment—when the Rules Enabling Act prohibits the federal rules from abridging or modifying a party's rights; and
- that Rule 54(b) of the Federal Rules of Civil Procedure applies in a case that has been dismissed in its entirety but is consolidated with a case that remains pending.

Removal of any one of these building blocks causes respondents' entire argument to collapse.

A. Respondents can avoid the final judgment rule only by redefining the Court's firmly-established definition of "final judgment."

For at least 135 years, this Court has defined a final judgment as a judgment that "disposes of the whole case on its merits." *Bostwick v. Brinkerhoff*, 106 U.S. 3, 4 (1882). Most recently, the Court noted that while it gives a "practical rather than a technical construction" to the phrase "final decision" used in 28 U.S.C. § 1291, "the statute's core application is to rulings that terminate an action." *Gelboim v. Bank of Am. Corp.*, 135 S. Ct. 897, 902 (2015). While this "practical construction" has sometimes *expanded* the "core application" to a limited category of collateral

orders, *see Cohen v. Beneficial Indus. Loan Corp*., 337 U.S. 541 (1949), the Court has never *eroded* the core. It has never denied an appeal from a judgment that disposes of a whole case on the merits. The plain language of 28 U.S.C. § 1291 constrains the Court from doing so.

The "core" definition of "final judgment" is a judgment that "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). Such a final judgment puts a party "effectively out of court." *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 11, n.11(1983). One indicia of a final judgment is that the district court "disassociates itself from a case." *Swint v. Chambers County Comm'n*, 514 U.S. 35, 42 (1995).

The judgment at issue in this case falls within this core definition of the final judgment rule. The district court "dismissed" petitioner's "action" "on the merits." There was nothing further that the court could do to adjudicate the merits of the case. And, if there was any doubt that the district court considered its order to be final, that doubt was erased by its order denying respondents' motion for attorneys' fees because they failed to file the motion within fourteen days of the entry of final judgment as required by Fed. R. Civ. P. 54(d)(2)(B)(i). *Hall v. Hall*, 2016 WL 8650484, *8 (Mar. 30, 2016) (Doc. No. 452).

Because the district court entered a final judgment, the plain language of 28 U.S.C. § 1291 gave petitioner a right of appeal. There should be no need for further inquiry.

B. The Rules Enabling Act, consistent with this Court's decision in *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479 (1933), does not allow the consolidation of cases to deprive a party of a substantive right. Respondents argue that the consolidation in this case prevents petitioner from appealing a final judgment. Because the Section 1291 right of appeal is a substantive right, respondents' argument must fail.

Respondents cannot dispute that absent the consolidation of this case with another, the final judgment in this case would be appealable as of right under Section 1291. Thus, they are forced to argue that the court order consolidating the two cases altered the character of petitioner's case and thereby deprived her of the right to appeal granted by Section 1291. However, a court rule cannot modify a litigant's substantive rights. Consequently, respondents' argument cannot prevail.

The Rules Enabling Act, now codified at 28 U.S.C. § 2072, prevents federal courts from adopting rules that "extend or restrict the jurisdiction conferred by a statute." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 10 (1941).[4] *Accord Snyder v. Harris*, 394 U.S. 332, 337–38

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[4] *Sibbach* interpreted the original version of the Rules Enabling Act, (Act of June 19, 1934, 48 Stat. 1064, 28 U.S.C. 723b). There is no material difference between the original version, which provided that the federal rules "shall neither abridge, enlarge, nor modify the substantive rights of any litigant") and the current version, found at 28 U.S.C. § 2072(b).

(1969) (holding that the interpretation of the diversity of jurisdiction statute cannot be changed by a change in the rules). Rule 82 of the Federal Rules of Civil Procedure reinforces this premise with the admonition that "[t]hese rules do not extend or limit the jurisdiction of the district courts."

One year before the adoption of the Rules Enabling Act, this Court decided *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496–97 (1933) and stated that consolidation "does not merge the suits into a single cause, *or change the rights of the parties*, or make those who are parties in one suit parties in another." (Emphasis added.)[5] Respondents urge the Court to ignore its holding in *Johnson* because the case predates the promulgation of the Federal Rules of Civil Procedure. But, that argument sails wide of the mark. The premise of *Johnson*—that procedural rules cannot modify substantive rights—was engraved in statute one year later with the passage of the Rules Enabling Act with its express prohibition against rules that modified a party's rights. Thus, it does not matter whether cases are consolidated "for discovery," "for hearings," "for pre-trial purposes," "for trial," or "for all purposes." No matter how a court characterizes the

[5] In the consolidated proceeding below, the district court did not treat the underlying cases as if they were merged. The final judgment in petitioner's case, Pet. App'x A-12, ordered that "the action be dismissed." After consolidation, the two cases still retained their status as independent actions.

consolidation, it cannot abridge the rights of a party.[6]

Rule 82 of the Federal Rules of Civil Procedure provides an independent reason why a Rule 42 consolidation cannot preclude an appeal from a final judgment entered in one case of a consolidated proceeding. Rule 82 provides that the Federal Rules of Civil Procedure do not "extend" the jurisdiction of the district courts. The filing of a notice of appeal from a final judgment confers jurisdiction in the court of appeals and divests the district court of jurisdiction. *Griggs v. Provident Consumer Discount*, 459 U.S. 56, 58 (1982). An interpretation of Rule 42 that bars an appeal when a final judgment is entered in one of the cases subject to consolidation would extend the

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[6] Even if the respondents were correct that a consolidation "for all purposes" could deprive a party of a right of appeal from a final judgment, such a rule would not apply to this case. Contrary to respondents' assertions, the district court did not consolidate the cases for all purposes or treat them as a unit. The magistrate-judge entered the consolidation order without stating the scope of the consolidation. Pet. App'x A-14. The district court maintained separate dockets for each case and on February 4, 2015, separate judgments were entered in each case. *Cf. Swanigan v. City of Chicago*, 775 F.3d 953, 963 n.4 (7th Cir. 2015) (concluding that where the district court consolidated two cases but maintained separate docket numbers and disposed of the cases by separate judgments at separate times, the cases were not completely merged).

The district judge treated the scope of the magistrate judge's consolidation order as consolidating the cases for trial, as evidenced by the entry of the separate judgments and then its decision denying respondents' motion for an award of attorneys' because they did not file the motion within fourteen days of entry of the final judgment as required by Fed. R. Civ. P. 54(d)(2)(I).

jurisdiction of the district court and thereby run afoul of Rule 82.

C. A Rule 42 consolidation does not merge cases into a single unit for *any* purpose.

The cases recognizing the continuing vitality of *Johnson* and holding that consolidation does not merge cases into a single unit are legion.[7] Yet, some of the same circuits that recognize the continuing validity of *Johnson* carve out an exception when it comes to an appeal from a final judgment in a consolidated case. *Compare* the Third Circuit's statement in *Cella*, 173 F.3d at 912 that *Johnson* "remains the authoritative statement on the law of consolidation" with *Bergman v. City of Atl. City*, 860 F.2d 560, 567 (3d Cir. 1988) (concluding that "*Johnson* does not require this court

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[7] *See*, *e.g.*, *In re Massachusetts Helicopter Airlines, Inc.*, 469 F.2d 439, 441 (1st Cir. 1972)(citing *Johnson* for the proposition that consolidation does not merge cases into single causes or change the rights of the parties); *Cole v. Schenley Indus., Inc.*, 563 F.2d 35, 38 (2d Cir. 1977) (citing *Johnson* and recognizing that "consolidation cannot effect a merger of the actions" or "change the rights of the parties in separate suits"); *Cella v. Togum Constructeur Ensemleier en Industrie Alimentaire*, 173 F.3d 909, 912 (3d Cir.1999) (same and stating that *Johnson* "remains the authoritative statement on the law of consolidation (quotation omitted)); *Intown Prop. Mgmt., Inc. v. Wheaton Van Lines, Inc.*, 271 F.3d 164, 168 (4th Cir.2001) (citing *Johnson* for the principle that consolidation "does not merge the suits into a single cause, or change the rights of the parties"); *McKenzie v. United States*, 678 F.2d 571, 574 (5th Cir. 1982) (same); *Lewis v. ACB Bus. Serv., Inc.*, 135 F.3d 389, 412 (6th Cir. 1998) (same); *United States v. Altman*, 750 F.2d 684, 695 (8th Cir.1984) (same); *Lewis v. City of Los Angeles*, 5 F. App'x 717, 718 (9th Cir. 2001) (same);

to hear an appeal of one of two consolidated actions"); or the Fifth Circuit's decision in *McKenzie*, 678 F.2d at 574 (citing *Johnson* for the proposition that "consolidation does not cause one civil action to emerge from two; the actions do not lose their separate identity") with *Rd. Sprinkler Fitters Local Union v. Cont'l Sprinkler Co.*, 967 F.2d 145, 149 (5th Cir. 1992) (distinguishing *Johnson* because "it predates the Federal Rules of Civil Procedure and did not involve any issue relating to the finality of a judgment as a predicate for appellate jurisdiction").

As noted in petitioner's opening brief (Pet. Br. 19–20) and undisputed by either respondents or *amici*, the application of many different aspects of federal procedure would change dramatically if Rule 42 merged cases. Consolidated cases either retain their separate identity—or they are merged—there is no logical middle ground. Yet, the courts have gerrymandered Rule 42: Cases retain separate identity and are not merged for purposes of Fed. R. Civ. P. 4 (service of process);[8] jurisdiction;[9] Fed. R. Civ. P. 15(c) (relation back of amended pleadings);[10] Fed. R. Civ. P. 41(a)(1)(A)(ii) (voluntary dismissals);[11] Fed. R. Civ. P.

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[8] *Greenberg v. Giannini*, 140 F.2d 550, 552 (2d Cir. 1944) (Hand, J.).

[9] *Butler v. Dexter*, 425 U.S. 262, 267 n.12 (1976).

[10] *Bailey v. N. Ind. Pub. Serv. Co.*, 910 F.2d 406, 413 (7th Cir.1990).

[11] *United States v. Altman*, 750 F.2d 684, 695–97 (8th Cir. 1984).

24 (intervention);[12] Fed. R. Civ. P. 68 (offers of judgment);[13] and settlement;[14] yet, some circuits create an outlier for appeals from a final judgment in a consolidated case and hold that Rule 42 merges the cases for appeal purposes. This anomaly arises only within certain circuits. This Court should restore uniformity—and eliminate this eccentricity—in the interpretation of Rule 42.

D. Fed. R. Civ. P. 54(b) is inapplicable.

Respondents and *amici* devote most of their briefs to Rule 54(b) appeals and the perceived benefits of Rule 54(b) (from the perspective of judicial management rather than the litigants impacted by the rule). They immediately run into a roadblock, however, because *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 431 (1956) establishes beyond peradventure that when a party's complaint is dismissed in its entirety, Rule 54(b) is inapplicable. As *Gelboim* explained, Rule 54(b) applies to interlocutory rulings and "there is nothing 'interlocutory' about [a] dismissal order." *Gelboim,* 135 S.Ct. at 906. Even if the application of Rule 54(b) to final judgments in consolidated cases had the advantages ascribed to it by respondents, the plain language of Section 1291 must govern. *Demarest v.*

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[12] *Changzhou Hawd Flooring Co. v. United States,* 986 F. Supp. 2d 1372, 1377 (Ct. Int'l Trade 2014).

[13] *Cover v. Chicago Eye Shield Co.*, 136 F.2d 374, 376 (7th Cir. 1943).

[14] *State Mut. Life Assurance Co. v. Deer Creek Park*, 612 F.2d 259, 267 (6th Cir. 1979).

Manspeaker, 498 U.S. 184, 190 (1991) (a court may depart from the terms of an unambiguous statute only in "rare and exceptional circumstances").

Respondents assert that *Cold Metal Process Co. v. United Eng'g & Foundry Co.*, 351 U.S. 445 (1956), which was decided on the same day as *Mackay*, supports their position. They state that *Cold Metal Process* "held that [Rule 54(b)] applied where multiple claims were filed as different actions and later joined together." Resp. Br. at 20. But, that is not the holding of *Cold Metal Process*. While it is true that two separate actions were filed by the parties, there is no indication in any of the reported cases that the two actions were consolidated. Rather, the defendant, United Engineering, originally attempted to assert a counterclaim against Cold Metal Process but the district court dismissed that counterclaim, determining that it was not ancillary to the complaint. *United Eng'g & Foundry Co. v. Cold Metal Process Co.*, 92 F.Supp. 596, 600 (W.D. Pa. 1950). Although United Engineering then asserted its attempted counterclaim as a separate action, the Third Circuit reversed the district court's ruling dismissal of the counterclaim because it erred "in holding that the counterclaim was not ancillary." *Cold Metal Process Co. v. United Eng'g & Foundry Co.*, 190 F.2d 217, 222 (3d Cir. 1951). The circuit remanded the case and left open the possibility that United Engineering could seek leave from the district court to file the counterclaim. *Id.*

Five years later, the case made its way to this Court after an appeal following the proceedings on remand. The opening paragraph of this Court's opinion

establishes that the district court must have granted United Engineering leave to file the counterclaim: "[T]he issue before us is whether the [Court of Appeals] has jurisdiction to entertain [an] appeal under 28 U.S.C. § 1291, although an unadjudicated counterclaim awaits disposition in the District Court." *Cold Metal Process Co. v. United Eng'g & Foundry Co.*, 351 U.S. 445, 446 (1956) (footnote omitted). Thus, by the time the case got to the Third Circuit for the third time and then to this Court, United Engineering was asserting a *counterclaim*, rather than a separate action that had been consolidated with Cold Metal Process' action. The case therefore stands for the [now unremarkable] proposition that the court of appeals had jurisdiction over a judgment adjudicated by the district court and entered in accordance with Rule 54(b) even though the district court had not adjudicated the counterclaim.

In the absence of a determination by this Court that Rule 42 merges consolidated cases into a single "action," Rule 54(b) has no application to petitioner's case.

E. The courts of appeals are well-equipped to address the problems conjured up by respondents and *amici*.

Respondents and *amici* raise the specter of a variety of problems that they envision will arise if Rule 54(b) is not deployed to allow district courts to protect the courts of appeals from final judgments in cases consolidated with other non-final cases. Because, as explained above, 28 U.S.C. § 1291 rather than Rule 54(b) governs petitioner's appeal, even if respondents and *amici* were correct about the benefit of applying

Rule 54(b), their arguments would be to no avail. The benefits and horrors that respondents and *amici* describe, however are largely illusory.

1. Courts of appeals are perfectly capable of deciding whether cases should be consolidated.

Notwithstanding respondents' and *amici's* concerns, the courts of appeals are well-equipped to determine whether to consolidate appeals. Most, if not all, of the courts of appeals already have a local rule in place that requires the parties on appeal to identify cases that are pending that raise similar facts or issues.[15] This allows the courts of appeals to elect to consolidate cases coming up from any district within their supervision. If courts of appeals possess the skill to determine whether cases that are not consolidated at the district court level should be consolidated on appeal, it strains credulity to suggest that those same skills cannot be employed to cases that were consolidated at the district court level. In reality, the courts of appeals are in a *better* position to determine whether cases should be consolidated on appeal because they are more likely to be aware of similar issues pending across their

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[15] For example, 3d Cir. R. 28.1(a)(2) requires the appellant to state "whether the party is aware of any other case or proceeding that is in any way related, completed, pending or about to be presented before this court or any other court or agency, state or federal." Similarly, Fed. Cir. R. 47.5(b) requires each principal brief to include a statement indicating "the title and number of any case known to counsel to be pending in this or any other court that will directly affect or be directly affected by this court's decision in the pending appeal."

respective circuits, whereas a district court's perspective is limited to the cases consolidated before it.

Further, in cases consolidated at the district court level, the courts of appeals will be aided in deciding whether to keep cases consolidated on appeal by the adversarial system. One would logically expect an appellee to move to stay the appeal pending full resolution of the other consolidated cases if the appellee believes that the appeal should not proceed. On the other hand, if both the appellant and appellee believe that the appeal should proceed, the district court's reach should not extend beyond the doors of its own courthouse. *See* Fed. R. Civ. P. 1 (stating that the rules apply to civil actions and proceedings "in the United States district courts").[16]

2. The fear of piecemeal appeals is illusory.

Respondents and *amici* express concern that the courts of appeals will be inundated with "piecemeal appeals" if a party in one consolidated case appeals from a *final* judgment before the remainder of the consolidated proceeding reaches finality. Respondents and *amici* do not define "piecemeal appeals"; but, a

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[16] One can imagine that a party to the unadjudicated case in the consolidated district court proceeding might wish to appeal at the same time. But, that desire is no different than the desire of a litigant in a non-consolidated case who sees a case with a similar issue going up on appeal before his own case has proceeded to final judgment. And the solution is the same—that party can seek leave to participate in the appeal as an *amicus curiae*.

legal issue that comes before an appellate court following a final judgment will not typically present a piecemeal appeal concern. (Legal issues predominate in the courts of appeals because the standard of review for factual findings is so deferential.) If anything, to the extent the legal issue on appeal is also present in the non-final consolidated cases, resolution of that issue on appeal may well help resolve those cases faster, avoid further appeals and expedite the overall conclusion of the litigation.

It is evident from the collective seventy-five year experience of the First and Sixth Circuits,[17] which both follow petitioner's proposed bright line rule, that concern over piecemeal appeals is illusory. Those courts have not suffered ill-effects from piecemeal appeals and no examples from those circuits are offered to show that piecemeal appeals in consolidated cases are a problem.

Relatedly, respondents argue that litigants will attempt to game the appellate process by filing "each claim in a separate suit." Resp. Br. at 28. This argument does not withstand serious scrutiny. First, it assumes that litigants approach the filing of a lawsuit with the belief that they are likely to lose at the trial level. Second, it assumes that litigants will be so confident that they will lose that they will be willing to pay separate filing fees for each claim so that they can

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[17] *See In re Massachusetts Helicopter Airlines, Inc.*, 469 F.2d 439 (1st Cir.1972) and *Kraft, Inc. v. Local Union 327, Teamsters, Chauffeurs, Helpers & Taxicab Drivers*, 683 F.2d 131, 133 (6th Cir. 1982).

go up on appeal faster. Third, it ignores the likelihood that issue preclusion after a claim is litigated will result in the dismissal of the other claims. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 24–27. It would be a poor litigation strategy for a plaintiff to separate its claims: One would expect the weakest claims to be dismissed first; the remaining claims would then be subject to potential dismissal based upon issue preclusion. Fourth, respondents offer no evidence that this strategy has been employed in the two circuits that allow appeals from a final judgment in a consolidated proceeding where the other cases remain pending.[18]

3. District courts could solve many of the "management" issues related to consolidated cases by requiring parties to follow Fed. R. Civ. P. 13(a)(1).

It is ironic that the *amici* extol the virtue of judicial management and appellate gatekeeping by district courts in support of their interpretation of Rule 54(b). It cannot be doubted that in the traditional Rule 54(b) case (an appeal following the entry of a partial final judgment in a single case), district courts serve a

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[18] Respondents instead cite the example of a *pro se* litigant filing ten separate lawsuits in one of the circuits that does *not* allow an appeal from a final judgment if other cases in the consolidated proceeding are pending. *Ivanov-McPhee v. Wash. Nat'l Ins. Co.*, 719 F.2d 927 (7th Cir. 1983). There is nothing in the history of that case that suggests that the plaintiff filed the separate claims for purposes of gaming the system on appeal. It seems more likely that the separate lawsuits were filed because of the plaintiff's lack of experience with litigation.

valuable role as gatekeepers of appeals. Paradoxically, however, one of the main reasons that certain types of consolidated cases present appellate challenges is because district judges fail to enforce the compulsory counterclaim rule, Fed. R. Civ. P. 13(a)(1). The *Gelboim* court took note of such cases: "We need not decide whether or how Rule 54(b) applies to cases consolidated for all purposes involving closely related issues, actions that could have been brought under the umbrella of one complaint." *Gelboim*, 135 S.Ct. at 906 n.7.

The scenario described in *Gelboim* is not unusual. It is common for a party to file a separate action against a party without knowing that the other party has already filed suit over the same dispute. If the party was aware of the other suit, it would be required by Rule 13(a)(1) to file a compulsory counterclaim. When the two cases come before the district court, the court on its own, or sometime on motion or stipulation of the parties, will consolidate the two cases.[19] In such cases, rather than consolidating the two actions, the proper action would be to order one party to assert its claims against the other in a Rule 13(a)(1) compulsory counterclaim and then dismiss the second action. If that practice were followed and the court subsequently issued a judgment as to a single claim or party, such a

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[19] For example, *See Lexington Ins. Co. v. Jacobs Indus. Maint. Co.*, 435 Fed. App'x 144, 146 n.1 (3d Cir. 2011) (describing interpleader action filed by insurance company with the insured commencing a breach of contract action three days later "asserting the same claims" and subsequent consolidation of the two actions by the district court).

judgment would not be a final judgment and could not be appealed absent Rule 54(b) certification. Proper case management at the district court pleading stage can avoid unnecessary consolidations and thereby eliminate the need for gatekeeping at the appellate stage.

F. Respondents' solution leaves appellants in consolidated cases without a bright line rule.

Respondents urge that forcing a party to wait to appeal until an entire consolidated proceeding is resolved creates a bright line rule that is better than the bright line rule proposed by petitioner. Resp. Br. at 40. But, what it actually creates is a trap for the party who receives a final judgment and must await resolution of the consolidated proceeding. What is the triggering event that allows the party to appeal? Respondents assert that the final judgment is the triggering event because "the court cannot resolve the remaining claims in a fully consolidated case without rendering a judgment of some kind. *See* Fed. R. Civ. P. 58(b)." This assertion is incorrect. Rule 58(b) only applies when: a jury returns a general verdict; the court awards costs or a sum certain; or the court denies all relief. The vast majority of federal cases are resolved *without* the entry of a judgment because they settle. When cases settle, parties typically stipulate to a dismissal of the case under Fed. R. Civ. P. 41(a)(1)(A)(ii)—"without a court order."[20]

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[20] Because consolidated cases are not merged, only the parties to a single action need sign the stipulation of dismissal. *See*

An example of the trap demonstrates exactly why respondents' solution is unworkable and is not a true bright line. Suppose Mrs. Doe has had a final judgment entered dismissing her case and is awaiting the disposition of the action that was consolidated with her case. A year after the final judgment was entered in Mrs. Doe's case, the other case is settled and dismissed by stipulation under Fed. R. Civ. P. 41(a)(1)(A)(ii). Mrs. Doe has thirty days "after entry of the judgment or order appealed from" in which to file a notice of appeal. Fed. R. App. P. 4(a)(1)(A).[21] However, there is no order for Mrs. Doe to appeal from when a case is dismissed by stipulation; and in the example, more than thirty days have passed since the entry of

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United States v. Altman, 750 F.2d 684, 695–97 (8th Cir. 1984).

[21] In the effort to address this Court's ruling in *Hamer v. Neighborhood Hous. Serv. of Chicago*, 138 S.Ct. 13 (2017), which was issued as petitioner was finalizing her principal brief for printing, petitioner overstated the ramifications of that holding and indicated that the deadline for filing an appeal is a "mandatory claims processing rule" rather than jurisdictional. That statement is accurate in the context of appeals in criminal cases because the deadline for filing an appeal is created by rule. *See* Fed. R. App. P. 4(b)(1). Although Fed. R. App. P. 4(a) establishes times for filing an appeal in civil cases, it mirrors the statutory requirements set forth in 28 U.S.C. § 2107. As the civil appeal deadline is created by statute, this Court's prior jurisprudence holding that the deadline to file an appeal in a civil case is jurisdictional, *see, e.g.*, *Browder v. Dir., Dept. of Corrections of Illinois*, 434 U.S. 257, 264 (1978), remains the law. Therefore, the need for a bright line rule establishing when a judgment is final for appeal purposes is all the more essential and "should above all be clear." *Budinich v. Becton Dickinson & Co.* 486 U.S. 196, 202 (1988).

the judgment that dismissed Mrs. Doe's case and she cannot appeal it. Respondents' bright line rule would cost Mrs. Doe her right of appeal.[22]

CONCLUSION

For the foregoing reasons, this Court should hold that the Third Circuit had jurisdiction over petitioner's appeal and therefore reverse the decision of the Third Circuit. It should remand with instructions to the Third Circuit to reach the merits of petitioner's appeal.

Respectfully submitted,

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[22] The same result occurs even if consolidated cases are deemed merged for purposes of Rule 41. Mrs. Doe is dismissed and therefore the remaining parties can dismiss the case without her signature. And, even if the Court orders dismissal under Fed. R. Civ. P. 41(a)(2), that order is not the order that Mrs. Doe "appeals from" and her appeal of the final judgment is still untimely.

Addendum

Statutory Provisions

1. 28 U.S.C. § 2072 (the Rules Enabling Act) provides:

Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.