No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CBX RESOURCES, L.L.C.,
Petitioner,

v.

ACE AMERICAN INSURANCE COMPANY; ACE PROPERTY AND CASUALTY INSURANCE COMPANY,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Supreme Court should abolish the Fifth Circuit's judicially created "finality trap" and resolve the conflict among the courts of appeals regarding the finality or non-finality under 28 U.S.C. § 1291 of a judgment when a party has dismissed—*without prejudice*—remaining unadjudicated claims?

CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 29.6, there is no parent or publicly held company owning 10% or more of Petitioner's stock.

LIST OF DIRECTLY RELATED PROCEEDINGS

The following proceeding is directly related to this case:

Case No. 5:17-cv-00017-DAE, *CBX Resources, LLC v. ACE American Ins. Co., et al.*, in the United States District Court for the Western District of Texas, San Antonio Division—Final Judgment entered August 20, 2018.

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PETITION FOR A WRIT OF CERTIORARI

CBX Resources, L.L.C. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals (App. 1a – 6a) is reported at 959 F.3d 175. The opinions and orders of the District Court granting partial summary judgment are reported as 282 F. Supp.3d 948 (App. 7a – 40a) and 320 F. Supp.3d 853 (App. 41a – 59a), respectively.

BASIS FOR JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on May 12, 2020 (App. 1a – 6a). This Court's jurisdiction rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

28 U.S.C. § 1291 reads in pertinent part:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

STATEMENT OF THE CASE

Although ostensibly clear enough on its face, what constitutes a "final decision" of a district court under 28 U.S.C. § 1291—so as to confer jurisdiction on a court of appeals—has, in practice, proven difficult to determine since the statute's inception. Indeed, as this Court stated in *Gillespie v. U.S. Steel Corp.,*

> [O]ur cases long have recognized that whether a ruling is "final" within the meaning of § 1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the "twilight zone" of finality.

379 U.S. 148, 152 (1964). Just ten years later, the Court acknowledged the difficulty in applying the statute: "[w]hile the application of § 1291 in most cases is plain enough, determining the finality of a particular judicial order may pose a close question. No verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974). Because of this acknowledged difficulty in articulating a precise rule, the Court has long held that "the requirement of finality is to be given a 'practical rather than a technical construction.'"

Id. (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545 (1949)).

Perhaps in no other procedural scenario has the application of § 1291 proven more problematic than when a party appeals an adverse partial adjudication after voluntarily dismissing any non-adjudicated claims without prejudice, a circumstance that some commentators have referred to as "manufactured finality"[1] or a "manufactured appeal."[2]. For decades, the courts of appeals have struggled to create or apply any consistent rules as to when a judgment is considered final under § 1291 when non-adjudicated claims have been voluntarily dismissed without prejudice. The result has been a long-gestating Circuit conflict (and in some instances, intra-Circuit conflicts) as to when such judgments are, in fact, final, thus conferring appellate jurisdiction.

The range of the conflict is striking. Some decisions articulate a bright line rule against finality, while others recognize a bright line rule in favor of finality; some mandate a case-by-case, discretionary

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[1] Ankur Shah, *Increase Access to the Appellate Courts: A Critical Look at Modernizing the Final Judgment Rule*, 11 SETON HALL CIRCUIT REVIEW 40, 47 (2014).

[2] Bryan Lammon, *Avoiding—but Not Disarming—the Finality Trap*, FINAL DECISIONS – APPELLATE JURISDICTION AND PROCEDURE (May 9, 2020), https://finaldecisions.org/avoiding-but-not-disarming-the-finality-trap.

evaluation focusing on the parties and court's intent, and others pragmatically permit a party to change the "without prejudice" dismissal to one with prejudice, even while the judgment is on appeal, thereby making the judgment unquestionably final. As a result, what the parties and district court believed was an appealable final judgment is deemed to be just that in some circuits; in others it is deemed to be just the opposite; and in still others, it is treated as something in between those extremes. The results wrought by those distinctions, however, are not merely academic. In circuits rejecting finality, dismissal for lack of jurisdiction follows, and the parties are deprived of review on the merits—in some situations, permanently.

Of all the courts of appeals, however, the Fifth Circuit has taken the most draconian stance against finality when a party has dismissed unadjudicated claims without prejudice. *See Ryan v. Occidental Petroleum Corp.*, 577 F.2d 298, 302 (5th Circ. 1978); *Marshall v. Kansas City S. Ry. Co.*, 378 F.3d 495, 500 (5th Cir. 2004). Indeed, although not originally coining the term, the Fifth Circuit has described this result as a "finality trap," catching unwary litigants within its jaws who, often lacking any intent to subvert § 1291 or manufacture an improper

interlocutory appeal, find their case dismissed for lack of jurisdiction with no recourse at the district court to remedy the problem. *Williams v. Seidenbach,* 958 F.3d 341, 343 (5th Cir. 2020) (en banc). Petitioner is a victim of this judicially created trap.

Immediately prior to its final judgment dismissing Petitioner's appeal for lack of jurisdiction, the Fifth Circuit, en banc, declined to alter or abolish the finality trap. *See id.* at 348-49. In doing so—and by dismissing Petitioner's appeal here—the Fifth Circuit, contrary to this Court's mandate, continues to give § 1291 a harshly technical rather than a practical construction. *See Eisen*, 417 U.S. at 170. In insisting upon that sort of rigidity, the Fifth Circuit's rule stands in stark contrast with the more workable and just rules of practicality applied by its sister circuits on this important procedural issue.

Just over three years ago, this Court granted certiorari to resolve a conflict concerning the extent to which § 1291 confers jurisdiction to courts of appeals to review orders denying class certification after named plaintiffs have voluntarily dismissed their individual claims. *See Microsoft Corp. v. Baker*, 137 S.Ct. 1702, 1712 (2017). Now is the time for the Court to resolve this related and more prevalent conflict

concerning a rule of more general application. In granting review, the Court should jettison the Fifth Circuit's finality trap and adopt a more modern and practical solution by allowing parties, at the very least, to convert their without prejudice dismissals to those with prejudice—thus truly following the Court's decades long mandate to give § 1291 a "practical rather than a technical construction."

A. The Underlying State Court Lawsuit that Gave Rise to the District Court Action

This case began when Petitioner, CBX Resources, LLC ("CBX"), sued Espada Operating, LLC ("Espada") in Texas state court as a result of Espada's drilling of a well on a mineral tract that CBX had leased. *See CBX Res., LLC v. Ace Am. Ins. Co.*, 282 F. Supp. 2d 948, 952 (W.D. Tex. 2017). Espada's negligence related to the attempted removal of casing that resulted in the plugging and abandonment of the well; the loss of the well caused CBX's damages. *Id.* Espada was a named insured on two insurance policies issued by Respondents Ace American Insurance Company and Ace Property and Casualty Insurance Company (collectively, "ACE"). Upon answering CBX's state court suit, Espada appeared by and through counsel that had been retained by ACE pursuant to its insurance contracts. *Id.*

After more than two years of litigation and three months before the scheduled trial date, ACE sent a letter to Espada denying all coverage for CBX's claims and withdrawing its defense. *Id.* at 953. As a result, just seventy-one days before a February 2016 trial setting, the state court granted Espada's defense counsel's motion to withdraw as counsel. *Id.*

When Espada did not retain replacement counsel and failed to appear for a February 1, 2016 docket call, the state court entered a default judgment against Espada. *CBX Res., LLC,* 282 F. Supp. 2d at 953. Thereafter, at a trial to support that judgment, CBX introduced substantial evidence to prove its negligence claim and resulting damages. *Id.* Based on the evidence, the state court signed a judgment finding Espada negligent and awarding damages and interest payable by Espada to CBX. *Id.* Nine months after the entry of its final judgment, the state court signed an Order for Turnover Relief in favor of CBX. *Id.* As contemplated by Texas law, that Turnover Order compelled Espada's execution of an assignment of its claims against ACE to CBX. *Id.*

B. Proceedings at the Federal District Court

Based on diversity of citizenship pursuant to 28 U.S.C. 1332(a), CBX filed its original complaint against ACE in the District Court for the

Western District of Texas, asserting the claims assigned to it by Espada pursuant to the Turnover Order. (App. 63a – 134a). CBX amended to add a claim for violations of the Texas Insurance Code. (App. 135a – 207a). The district court permitted the parties to file preliminary, competing motions for partial summary judgment on the issue of ACE's duty to defend Espada in the underlying lawsuit based on the terms of the applicable insurance policies. It then granted ACE's motion and denied CBX's motion, holding that ACE did not have a duty to defend Espada in the underlying lawsuit. (App. 7a – 40a).

Having resolved the duty to defend issue, the district court permitted the parties to file another round of motions for partial summary judgment on the issue of whether the underlying judgment was a result of a fully adversarial trial and thus binding and admissible against ACE in the federal action. The district court held that the underlying judgment was not the result of a fully adversarial proceeding under Texas law, and therefore not binding on ACE in the current suit; it granted ACE's motion and denied CBX's. (App. 41a – 59a). In its order, the district court advised the parties to provide a joint status report concerning the remaining issues in the case and recognized that its

summary judgment rulings might have effectively disposed of some claims in the case. *CBX Res., LLC v. v. Ace Am. Ins. Co.*, 320 F. Supp.2d 853, 861-62 (W.D. Tex. 2018). As to the latter category of claims, the district court suggested that the parties might move to dismiss any such claims.

Accordingly, on July 19, 2018, CBX and ACE submitted their Joint Status Report to the Court (the "Status Report"). (App. 208a – 210a). In the Status Report, the parties informed the district court that its two partial summary judgment orders had negated one or more essential elements on which CBX had the burden of proof for its claims of negligent settlement practices, breach of duty of good faith and fair dealing, and breach of contract. *Id.* Further, the parties agreed that CBX's claim for violations of the Texas Insurance Code remained technically viable, although the rulings had significantly limited the amount of recoverable damages. *Id.* As such, the parties proposed that CBX would voluntarily dismiss its remaining claim for violations of the Texas Insurance Code without prejudice, and that ACE would not object to or assert any statute of limitations defense as to the reinstitution of such claim in the event

the Fifth Circuit reversed and remanded the district court's orders as to the other claims. *Id.*

On July 20, 2018, the district court entered its Order on Parties' Status Report, stating that it "finds the parties' proposed course of action an acceptable resolution to the remaining matters in this case." (App. 211a – 213a). The district court concluded by stating its intention to render a final and appealable judgment upon the voluntary dismissal of the statutory claims. *Id.* Accordingly, CBX filed its Stipulation of Dismissal, dismissing its claim for violations of the Texas Insurance Code without prejudice, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii). (App. 214a – 215a). The district court then rendered its Final Judgment, which expressly provided that "Plaintiff take nothing by its suit and that the action be dismissed on the merits." (App. 60a – 61a).

C. Proceedings at the Fifth Circuit Court of Appeals

After both CBX and ACE submitted their briefs on the merits but before the scheduled oral argument (App. 216a), the Fifth Circuit notified the parties that the panel had *sua sponte* requested supplemental briefing as to "whether CBX's dismissal of remaining claims without

prejudice precludes this court's appellate jurisdiction"—the so-called "finality trap." (App. 217a). The Court's request cited its prior decisions in *Ryan* and *Marshall*. *Id.*

CBX's Supplemental Letter Brief set forth various reasons why its case was factually and legally distinguishable from *Ryan* and *Marshall*: CBX urged that the finality trap was inapplicable, and the Court's appellate jurisdiction remained intact. (App. 218a – 222a). Two months after oral argument, the Court issued a directive, informing the parties that the case was being held in abeyance pending the Court's en banc decision in *Williams*. (App. 223a). Shortly after the en banc decision in *Williams* issued, the Fifth Circuit issued its opinion in this cause, dismissing CBX's appeal. *CBX Res., LLC v. Ace Am. Ins. Co.*, 959 F.3d 175, 177 (5th Cir. 2020). The Court rejected CBX's arguments distinguishing *Ryan* and *Marshall*, holding that because it had chosen in *Williams* not to overrule its past decisions that there is "not an appealable final judgment when some claims are dismissed without prejudice . . . CBX [was] not free from the [finality] trap." *Id.* at 176. That holding disposed of CBX's appeal without resolving any claims on the merits. More broadly—if not more importantly—through its rigid

implementation of its self-created finality trap, the Fifth Circuit remains in conflict with many of its sister Circuit courts of appeals as to the existence of appellate jurisdiction under § 1291 when a party dismisses without prejudice remaining unadjudicated claims.

D. The Finality Trap Closes Shut on CBX

In an attempt extricate itself from the jaws of the finality trap, CBX returned to the district court and filed two motions in an effort to resolve the purported lack of finality of the previous judgment: (1) a Motion to Set Status Conference (App. 224a – 228a) and (2) a Motion or for Leave to File Plaintiff's Second Amended Complaint (App. 229a – 233a). As set forth in both motions, CBX sought only to reassert its previously-dismissed statutory claims and then dismiss them again, this time with prejudice, thus stepping over the finality trap. (App. 224a – 228a; 229a – 233a). Nevertheless, the district court denied both motions, holding that it "lack[ed] jurisdiction to reopen this case and convert the voluntary dismissal without prejudice into a voluntary dismissal with prejudice." (App 234a – 241a). The finality trap was shut on CBX once and for all.

REASONS FOR GRANTING THE PETITION

A. The Courts of Appeals Are in Conflict Regarding the Finality of a Judgment When a Party Has Dismissed Unadjudicated Claims Without Prejudice

The Fifth Circuit's creation and application of the finality trap is in square conflict with other courts of appeals. Whereas some circuits reject the so-called trap outright and consider a judgment final anytime a party has dismissed unadjudicated claims without prejudice, others evaluate the application of § 1291 in such a scenario on a case-by-case basis, looking principally for any intent to manufacture appellate jurisdiction. Further, even if they hold that such judgments technically are not final, some circuits allow parties to unspring the trap by converting their dismissals without prejudice to dismissals with prejudice. Rather than implement any of these practical solutions, the Fifth Circuit continues to cling to an impractical, technical application of § 1291 based on the perceived effects of dismissals without prejudice. Resolving this conflict will create certainty and assure uniformity across the circuits, while consigning the judicially-created[3] finality trap to the dustbin of history.

[3] *See* Lammon, *supra* n.2, at 13 ("The rule that creates the finality trap—that voluntary dismissals without prejudice are generally not appealable—is itself a judicial construction.")

1. The Fifth Circuit's Creation, Application, and Reaffirmation of the Finality Trap

The finality trap has its genesis in the Fifth Circuit's 1978 decision in *Ryan v. Occidental Petroleum Corp.* 577 F.2d 298. After the district court granted a Rule 12(b)(6) motion to dismiss portions of Ryan's complaint, he voluntarily dismissed the remaining allegation in the complaint without prejudice, then filed his appeal. *Id.* at 300. The Fifth Circuit dismissed the appeal for lack of jurisdiction. *Id.* Citing § 1291, the Court held that because Ryan had dismissed the remaining portion of his complaint without prejudice, he was free "to pursue [the] same action in the same court," thus there was "strictly speaking, no final judgment." *Id.* at 301. Although it gave lip service to this Court's mandate in *Eisen* that finality under § 1291 should be given a "practical rather than a technical construction," and even though it recognized that the inquiry required "some evaluation of the competing considerations . . . [between] 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other,'" the Fifth Circuit ostensibly created a bright line rule against finality. *Id.* at 300 – 301 (quoting *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511

(1950)); *see also* Shah, *supra* n.1, at 52 (describing the "*Ryan* rule" against finality). Thus, the finality trap was built and set.

Over two decades later, the Fifth Circuit addressed the finality trap in *Marshall v. Kansas Cty. Southern R. Co.* 378 F.3d 495. Discussing the final judgment rule under § 1291, the Fifth Circuit again quoted this Court in stating that appellate jurisdiction exists only after a decision that "ends the litigation on the merits and leaves nothing for the court to do but execute on the judgment." *Id.* at 499 (quoting *Firestone Tire & Rubber Co. v. Risjord*, 499 U.S. 368, 373 (1981)). The Fifth Circuit then stated expressly that it was the "settled rule in [our] Circuit that appellate jurisdiction over a non-final order cannot be created by dismissing the remaining claims *without prejudice*. And, a Rule 41(a) dismissal without prejudice is not deemed to be a 'final decision' for the purposes of § 1291." *Id.* at 500-501 (internal citations omitted). Most troubling, however, was the Court's admission that the plaintiffs had "***unwittingly stepped into*** the so-called 'finality trap,' thereby forfeiting altogether their right to appeal the district court's . . . decision." *Id.* at 499 (emphasis added). Under the Fifth Circuit's precedent then, even

parties with no malicious intent to subvert § 1291 and skirt around the final judgment rule could be caught in the Court's trap.

Motivated at least in part by this potential inequity, the Fifth Circuit recently granted rehearing en banc from a panel decision in *Williams v. Taylor Seidenbach, Inc.*, 935 F.3d 358 (5th Cir. 2019) ("*Williams I*"), which had dismissed an appeal for lack of jurisdiction based on the finality trap. *Williams*, 958 F.3d at 341 ("*Williams II*"). Indeed, in the panel decision, Judge Haynes encouraged the Court to take the case en banc in order to "correct [the] egregious mess" created by its finality trap precedent which, she argued, "at best is muddled, and at worst is simply wrong and illogical." *Williams I*, 935 F.3d at 361 (Haynes, J., concurring). Quoting a recent decision of this Court, Judge Haynes concluded that "the very fact of a 'trap' should 'tip us off that [the finality trap] rests on a mistaken view of the law.'" *Id.* (quoting *Knick v. Township of Scott*, 139 S. Ct. 2162, 2167 (2019)).

Nevertheless, rather than tackle the finality trap head on—much less seriously analyze its pitfalls and inequities—a majority of the en banc Court instead dodged the issue altogether, relying on a convoluted

use of Rule 54(b) to "avoid the need to resolve [the finality trap] issues."[4] *Williams II*, 958 F.3d at 349; *see also* Lammon, *supra* n.2, at 2 (describing both the majority's opinion and use of Rule 54(b) in *Williams II* as "odd and unnecessary."). But like Judge Haynes in *Williams I*, Judge Willett's concurring opinion in Williams *II* separately addressed the "legal oddity" known as the finality trap, "which has plagued the federal circuits for decades." *Id.* at 355 (Willett, J. concurring). More specifically, Judge Willett offered "a modest proposal for untangling [the Fifth Circuit's] muddled . . . wrong and illogical precedent that leaves parties mired in litigation limbo" by permitting parties to stipulate to the dismissal of claims with prejudice to preserve appellate jurisdiction. *Id.* Despite those lamentations and proposals, *Williams II* and the Fifth Circuit's decision in this case leave the finality trap fully operational, set, and waiting to catch unwary litigants in its jaws. But while the Fifth Circuit continues to abide by its antiquated and inequitable finality trap, other courts of appeals have either rejected the trap outright or devised ways to loosen its grasp.

[4] Given the need for brevity, a detailed discussion of the *Williams II* opinion and the Court's reliance on Rule 54(b) is beyond the scope of this Petition.

2. The Eighth and Eleventh Circuits Reject the Finality Trap Altogether, Holding that a Party's Dismissal of Unadjudicated Claims *Without Prejudice* Constitutes a Final Judgment for Purposes of § 1291.

Two courts of appeals—the Eighth and Eleventh—consider a dismissal *without prejudice* of remaining unadjudicated claims to constitute a final judgment for purposes of § 1291. *Chrysler Motors Corp. v. Thomas Auto Co.*, 939 F.2d 538, 540 (8th Cir. 1991); *Corley v. Long-Lewis, Inc.*, 965 F.3d 1222, 1231 (11th Cir. 2020). In so holding, both courts have heeded this Court's admonitions toward practicality and, unlike the Fifth Circuit, have crafted sensible rules that avoid inequitable results created by the finality trap.

For instance, the Eighth Circuit rejected the finality trap as early as 1991. *Chrysler Motors Corp.*, 939 F.2d at 540. In procedural facts almost identical to the present case, after the district court granted defendant's motion for partial summary judgment, the parties filed a joint stipulation of dismissal *without prejudice* of all remaining claims. *Id.* On appeal, the Court never doubted the existence of jurisdiction, stating that "[t]he effect of that action was to make the judgment granting partial summary judgment a final judgment for purposes of

appeal, even though the district court had not so certified under [Rule] 54(b)." *Id.*[5]

Fifteen years later, in *Hope v. Klabal*, the Eighth Circuit confirmed its rejection of the finality trap with more analysis and more forceful language. 457 F.3d 784, 788-90. Again with strikingly similar procedural facts to those here, the plaintiff dismissed all remaining claims *without prejudice* after the district court had granted two motions for partial summary judgment in favor of the defendant. *Id.* at 788. This time, the Eighth Circuit choose to analyze the issue of jurisdiction more robustly. *Id.* Importantly, the Court first recognized that it was guided by the mandate for practicality in construing § 1291. *Id.* at 789 (quoting *Cohen*, 337 U.S. 541). Moreover, the Eighth Circuit recognized that this Court "long ago established that a dismissal without prejudice can create an appealable final order if it ends the suit so far as the district court is concerned." *Id.* (citing *United States v. Wallace & Tierman Co.*, 336 U.S. 793, 794 n. 1 (1949)).

[5] Of all the courts of appeals, the First Circuit has the least developed body of law on the finality trap. Nevertheless, in at least one opinion, the First Circuit—like the Eighth Circuit in *Chrysler*—never questioned its jurisdiction even though the appellee had dismissed its counterclaims without prejudice. *J. Geils Band Emp. Benefit Plan v. Smith Barney Shearson, Inc.*, 76 F.3d 1245, 1250 (1st Cir. 1996).

Although recognizing that the Eighth Circuit had been "less than clear in establishing rules for finality when parties dismiss some of their claims without prejudice," the Court reaffirmed *Chrysler*, concluding that "the voluntary dismissal of the remaining claims made the two earlier summary judgment orders final for purposes of appeal." *Id.* 789-90. Indeed, "[a]fter the voluntary dismissal, there was nothing left for the district court to resolve, and the suit ended as far as that court was concerned, thereby creating a final judgment." *Id.* at 790; *see also Gannon Int'l, Ltd. v. Blocker*, 684 F.3d 785, 791-92 (8th Cir. 2012) (dismissal without prejudice of remaining claims constituted a final judgment because there was no attempt to manipulate appellate jurisdiction).

Similarly, the Eleventh Circuit—less than three months ago—resolved a long-running intra-Circuit conflict regarding the finality (or non-finality) of judgments when parties dismiss remaining, unadjudicated claims without prejudice. *Corley*, 965 F.3d at 1226 – 1231. Like this case, the plaintiffs in *Corley* dismissed unadjudicated claims without prejudice and the district court entered a "final judgment with respect to all claims asserted in this action." *Id.* at 1226-27. On appeal,

the Eleventh Circuit considered its jurisdiction, recognizing that its "precedent splinters in multiple directions on whether voluntary dismissals without prejudice are final." *Id.* at 1228 (collecting cases). After a lengthy discussion of the court's conflicting decisions regarding finality in such a scenario, the Eleventh Circuit ultimately decided that it was bound by its earliest precedent in favor of finality, holding that "an order granting a motion to voluntarily dismiss [without prejudice] the remainder of a complaint under Rule 41(a)(2) 'qualifies as a final judgment for purposes of appeal.'" *Id.* at 1231 (quoting *McGregor v. Bd. of Comm'rs*, 956 F.2d 1017, 1020 (11th Cir. 1992)). Thus, unlike the Fifth Circuit in *Williams II*, the Eleventh Circuit in *Corley* tackled the finality trap head on, effectively removing it from its jurisprudence in favor of the more flexible rule recognizing the finality of a judgment when a party has dismissed remaining claims without prejudice.

3. The Ninth and Federal Circuits Soften any Inequitable Results of the Trap by Rejecting the Finality of Judgments Procured After the Dismissal of Claims without Prejudice only When there Is Evidence that the Parties Attempted to Manipulate Appellate Jurisdiction

The Ninth and Federal Circuits have not abolished the finality trap, but have softened or eliminated the harsh results of its rote application

by considering a judgment final—even after a dismissal of remaining claims without prejudice—unless there is evidence that one or more of the parties attempted to manipulate appellate jurisdiction. *James v. Price Stern Sloan, Inc.*, 283 F.3d 1064, 1070 (9th Cir. 2002); *Doe v. United States*, 513 F.3d 1348, 1352-54 (Fed. Cir. 2008). In *James*, the district court entered a final judgment after it had granted partial summary judgment on some claims and granted a voluntary dismissal without prejudice as to the claims remaining. *James*, 283 F.3d at 1065. The Ninth Circuit observed that it had "always regarded evidence of . . . manipulation as the necessary condition for disallowing an appeal where a party dismissed its claims without prejudice." *Id.* at 1066. Applying that notion to the facts of *James,* the Ninth Circuit pointed out:

> The [final] judgment summarized the court's two interim dispositions: the partial summary judgment . . . and the dismissal of James's remaining claims. As to form, then, the judgment comports with finality by disposing of all pending claims; after entry of this judgment, James had no claims left for the district court to hear.

Id. (internal quotations omitted).

Turning back to the issue of manipulation, the Court noted that a district court's "approval of the motion [to dismiss without prejudice] is usually sufficient to ensure that everything is kosher." *Id.* at 1066. And

the "record show[ed] that James requested—and the district court intended to grant—a final appealable judgment." *Id.* at 1068. Thus, in affirming the existence of appellate jurisdiction, the *James* Court held that:

> [W]hen a party that has suffered an adverse partial final judgment subsequently dismisses remaining claims without prejudice ***with the approval of the district court***, and the record reveals ***no evidence of intent to manipulate our appellate jurisdiction***, the judgment entered after the district court grants the motion to dismiss is final and appealable under 28 U.S.C. § 1291.

Id. at 1070 (emphasis added); *see also Snellers v. City of Bainbridge Island*, 606 F.3d 636, 638 (9th Cir. 2010) (quoting *James* and applying its holding to find appellate jurisdiction).

The Federal Circuit has adopted the Ninth Circuit's approach. *Doe*, 513 F.3d at 1353. In *Doe*, the Court explained that it had never "adopted [the] position" of denying finality when a party had dismissed unadjudicated claims without prejudice. *Id.* at 1352-53. Instead, relying in part on *James*, the Court set forth the "more flexible approach" recognizing appellate jurisdiction unless there was evidence showing an intent to create it improperly. *Id.* at 1353.

4. The Second, Third, Seventh, and Tenth Circuits—Even When They Hold to the Finality Trap in Principle—

Allow Parties to Convert Their Previous *without Prejudice* Dismissal to One *with Prejudice*, Removing Any Doubt as to Finality

Four other courts of appeals—the Second, Third, Seventh, and Tenth—have embraced an escape mechanism from the finality trap. In those circuits, parties can disclaim their prior dismissal without prejudice and convert it to a dismissal with prejudice, even after the appeal has been filed. *Jewish People for the Betterment of Westhampton Beach, v. Village of Westhampton* Beach, 778 F.3d 390, 394 (2d Cir. 2015); *Erie Cnty. Retirees Ass'n v. County of Erie, Pa.*, 220 F.3d 193, 201-02 (3d Cir. 2000); *JTC Petroleum Co. v. Piasa Motor Fuels, Inc.*, 190 F.3d 775, 776-77 (7th Cir. 1999); *Waltman v. Georgia-Pacific,* LLC, 590 Fed. App. 799, 803 (10th Cir. 2014).[6] Thus, by changing the dismissal to one with prejudice, the plaintiff accepts "the risk that if the appeal is unsuccessful, the litigation will end," thereby creating finality for purposes of § 1291. *Rabbi Jacob Joseph Sch. v. Province of Mendoza*, 425 F.3d 207, 210 (2d Cir. 2005). This "unspringing" of the finality trap is the solution Judge

[6] Although not expressly adopting this position, the Federal Circuit in *Doe* implicitly recognized its availability by noting that in their reply brief, the appellants had stated their intention to drop the claim previously dismissed without prejudice in the event the trial court's judgment on the adjudicated claims was affirmed. *Doe*, 513 F.3d at 1354.

Willett implored the Fifth Circuit to adopt through his concurrence in *Williams II*. 958 F.3d at 355-59 (Willett, J., concurring).

The Second Circuit first suggested this escape hatch to the finality trap in *Rabbi Jacob* when, although ultimately finding jurisdiction lacking because of the dismissal without prejudice, it stated that "at oral argument . . . in this Court, the [plaintiff] expressly declined to abandon the claim with prejudice." *Rabbi Jacob*, 425 F.3d at 211. The Court later expressly sanctioned this option in *Jewish People*. 778 F.3d at 394. Indeed, despite the fact that the plaintiffs had dismissed their unadjudicated claims at the trial court without prejudice, their reply brief in the court of appeals "disclaim[ed] any intent to revive their dismissed claim against [defendant]." *Id.* As a result, noted the Second Circuit, "that potential obstacle to appellate jurisdiction is removed." *Id.*

Both the Third and Seventh Circuits have adopted this practice as well. *See Erie Cnty. Retirees Ass'n.*, 220 F.3d at 201-02 (holding that because plaintiff, in a letter brief to the court of appeals, had disclaimed their prior without prejudice dismissal and changed it to one with prejudice, "we have jurisdiction under 28 U.S.C. § 1291."); *JTC Petroleum Co.*, 190 F.3d at 776-77 ("But when we raised this point at argument, the

plaintiff's lawyer quickly agreed that we could treat the [without prejudice] dismissal of the two claims as having been with prejudice, thus winding up the litigation and eliminating the bar to our jurisdiction."); *see also IOTFCA, Inc. v. Megatrans Logistics, Inc.*, 235 F.3d 360, 365 (7th Cir. 2000) (noting that had appellee been willing at oral argument to disavow its prior without prejudice dismissal, the Court could have "treated the district court's dismissal . . . as having been made with prejudice, thus winding up the litigation and eliminating the bar to our jurisdiction."); *Nat'l Inspection & Repairs, Inc. v. George S. May Int'l Co.*, 600 F.3d 878, 883 (7th Cir. 2010) ("Our precedent provides that when the party's counsel explicitly agrees at oral argument to treat the dismissal of the claim as having been with prejudice, our bar to jurisdiction is lifted."). Similarly, the Tenth Circuit has tolled an appeal to permit a party to affirmatively change its previous without prejudice dismissal to a dismissal with prejudice. *Waltman*, 590 Fed. App. at 803.

As pragmatic as these holdings are in disarming the finality trap, Judge Willett's vigorous advocacy in *Williams II* for the Fifth Circuit to adopt this approach deserves further mention. To begin, Judge Willett highlighted the fact that the Federal Rules "were not adopted to set traps

and pitfalls by way of technicalities for unwary litigants." *Williams II*, 958 F.3d at 355-56 (Willett, J., concurring) (quoting *Hernandez v. Thaler*, 630 F.3d 420, 425 (5th Cir. 2011)). But that is exactly the result for judgments like this one: CBX is "stuck in finality-trap purgatory, unable to be fixed by the district court or appealed to us." *Id.* at 355.

Given this inequitable result, the "litigant-disclaimer solution"—permitting parties to convert a dismissal without prejudice to one with prejudice—adopted by the Circuits discussed above and advocated by Judge Willett "checks every box" by: (1) "unspring[ing] the trap"; (2) "honor[ing] finality principles"; and (3) "respect[ing] the text of the Rules." *Id.* at 356. Judge Willett's elaboration on those three points is worth quoting in full:

> A litigant who wants to appeal a finality-trapped judgment can affirmatively, bindingly, and permanently disclaim the right to reassert dismissed-without-prejudice claims. The Second, Third, and Seventh Circuits get this right. To avoid the trap's procedural cul-de-sac, plaintiffs simply disavow to the circuit court their right to revive the dismissed claims, which become barred by judicial estoppel and effectively "dismissed with prejudice." This approach—understandable, administrable, and practicable—is plug-and-play. No required action by the district court. No *ad hoc* subjectivity. No needless interpretive squabbles over governing statutes or Rules. Just satisfying finality, as the stipulation removes and specter of piecemeal appeals or protracted litigation. The litigant-disclaimer approach elegantly achieves what we set

> out to do by taking this case en banc. It unsprings the trap—fully, formally, and faithfully.

Id. at 357-58. Moreover,

> [a] litigant's binding disclaimer of voluntarily dismissed claims induces no trickery or gamesmanship—just the opposite. No reassertion means no recapturing of the merits. No serial litigation. No piecemeal appeals. None of the oft-cited debilitating burdens on judicial administration. The litigant-disclaimer approach in no way upends finality; it upholds it.

Id. at 358-59.

Although other options for dealing with the finality trap exist, the uniform adoption of the litigant-disclaimer approach would put an end to the Circuit conflict and, at the very least, unspring the trap "fully, formally, and faithfully." *Id.* at 358.

5. The District of Columbia, Fourth, and Sixth Circuits Appear to Have Persisting Intra-Circuit Conflicts on the Issue of Finality When Unadjudicated Claims Have Been Dismissed without Prejudice

Finally, three courts of appeals—the District of Columbia, Fourth, and Sixth Circuits—seem to have ongoing intra-circuit conflicts on the issue at hand. More specifically, while they each appear to follow the Fifth Circuit's finality trap rule in some cases, in others they find ways to avoid it. For example, in the District of Columbia Circuit, as recent as

2014, the Court stated that "our Circuit treats voluntary but non-prejudicial dismissals of remaining claims as generally insufficient to render final and appealable a prior order disposing of only part of the case." *Blue v. District of Columbia Pub. Schs.*, 764 F.3d 11, 17 (D.C. Cir. 2014). But just a year later, the Court shifted to an approach more in line with the Ninth and Federal Circuits and held that a prior dismissal without prejudice did not run afoul of the final judgment rule because "the district court, not the parties, controlled the terms of the dismissal . . . and the final judgment dismissing the action in full in a single, dispositive order protects against manipulation of the court's jurisdiction." *Dukore v. District of Columbia*, 799 F.3d 1137, 1141 (D.C. Cir. 2015). [7]

The Fourth Circuit, while ostensibly following the *Ryan* rule, has nevertheless also found creative ways around it—declaring in one case that a prior dismissal without prejudice was actually one with prejudice, and in another case holding that the claim dismissed without prejudice was, in fact, subsumed within the adjudicated claims. *See Waugh Chapel*

[7] The district court's action in *Dukore* bears a striking resemblance to that of the district court in this case.

South, LLC v. United Food and Comm. Workers Union Local 27, 728 F.3d 354, 359 (4th Cir. 2013); *Affinity Living Group, LLC v. Starstone Specialty Ins. Co.*, 959 F.3d 634, 637 – 39 (4th Cir. 2020). The Sixth Circuit, meanwhile, appears to be going the opposite direction. Originally, the Court clearly rejected the finality trap, holding that "the district court's earlier grant of summary judgment was an involuntary adverse judgment against plaintiff. Therefore, we hold that plaintiff's dismissal with the concurrence of the court of the only count of her complaint which remained unadjudicated imparted finality to the district court's earlier granting summary judgment." *Hicks v. NLO, Inc.*, 825 F.2d 118, 120 (6th Cir. 1987). More recently, however, the Court stuck to a stricter application of the finality trap, dismissing for lack of jurisdiction appeals procured after unadjudicated claims were dismissed without prejudice. *See Page Plus of Atlanta, Inc. v. Owl Wireless, LLC*, 733 F.3d 658, 660 – 62 (6th Cir. 2013) (distinguishing *Hicks*); *Innovation Ventures, LLC v. Custom Nutrition Labs., LLC*, 912 F.3d 316, 329 (6th Cir. 2018) (stating bluntly that "parties may not appeal claims that were dismissed without prejudice.").

Whatever else one can say about these Circuits' treatment of the finality trap, they certainly give credence to Judge Willett's conclusion that the trap has "plagued the federal circuits for decades." *Williams II*, 958 F.3d at 355 (Willett, concurring in judgment). It is time for this Court to eradicate that plague.

B. That CBX's Appeal Likely Would Not Have Been Dismissed for Lack of Jurisdiction in at Least Eight of the Circuits Illustrates the Inequity of the Fifth Circuit's Continued Application of the Finality Trap

In the vast majority of other Circuit courts of appeals, CBX's case would have been decided on the merits and not dismissed for purported lack of jurisdiction. First, given that the Eighth and Eleventh Circuits either reject or no longer apply the finality trap at all, CBX's appeal almost certainly would have gone forward in those Courts. *See Chrysler Motors Corp.,* 939 F.2d at 540; *Corley*, 965 F.3d at 1231. Likewise, the Ninth and Federal Circuits' focus on whether a litigant intentionally manufactured appellate jurisdiction likely means that those courts also would not have dismissed CBX's appeal, either. *See James*, 283 F.3d at 1070; *Doe*, 513 F.3d at 1352-54. Indeed, the district court's approval (if not encouragement) of CBX's dismissal without prejudice (App. 214a – 215a), combined with its entry of a final judgment that it clearly

considered appealable (App. 60a – 61a), weigh heavily against any suggestion that CBX was attempting to manufacture finality. *See James*, 283 F.3d at 1070.

Finally, the litigant-disclaimer approach would have unsprung the trap for CBX had it been given it the option to do so. *See Jewish People*, 778 F.3d at 394; *Erie Cnty. Retirees Ass'n.*, 220 F.3d at 201 – 02; *JTC Petroleum Co.*, 190 F.3d at 776-77; *Williams II*, 958 F.3d at 358 (Willett, J., concurring). Rather than suffer dismissal of its appeal, CBX would have chosen to disclaim—either at oral argument or in its letter briefing to the Court—its Texas Insurance Code claim, converting the prior dismissal to one with prejudice. In fact, after the Fifth Circuit dismissed its appeal, disclaimer is exactly what CBX attempted to do in the district court by filing the two motions in its effort to reinstitute then dismiss with prejudice its Texas Insurance Code claim. (App. 224a – 233a).

But because CBX's claims just so happened to be filed in the Western District of Texas, its appeal was doomed by the Fifth Circuit's technical rather than practical construction of § 1291 and thus "stuck in finality trap purgatory." *Williams II*, 958 F.3d at 355 (Willett, J., concurring). Absent action by this Court, future unwary litigants may

find themselves in the same predicament based only upon the happenstance of the forum in which a case was filed.

C. Granting the Petition to Address the Finality Trap Would Resolve the Circuit Conflict, Increase Needed Access to the Appellate Courts, and Better Serve the Purpose of § 1291

As demonstrated above, the Fifth Circuit, although not standing alone in its adherence to the finality trap, is, without question, the most rigid in its application of the trap. Further, among the majority of the Circuits, there is a conflict as to whether the trap should exist at all, how it should be applied, and/or how it can be avoided. Thus, this Court has several options for addressing the ongoing conflict regarding the finality trap. It may—like the Fifth Circuit, and to some degree the Fourth, Sixth, and District of Columbia Circuits—keep the finality trap in place, despite the inequitable results to parties like CBX. It could—like the Eighth and Eleventh Circuits—abolish the finality trap altogether and consider dismissals of unadjudicated claims without prejudice to be final judgments under § 1291. It also might—like the Ninth and Federal Circuits—adopt a more discretionary, case-by-case approach focused on whether there is evidence of a party's attempt to manipulate appellate jurisdiction. And, of course—as the Second, Third, and Seventh Circuits

have—this Court could adopt the litigant-disclaimer approach, allowing parties to convert, while on appeal, their prior without prejudice dismissal to ones with prejudice, thereby unspringing the trap.

Abolishing the finality trap altogether, implementing the idiosyncratic assessment of intent as a check on jurisdiction, or adopting the litigant-disclaimer approach would create a better state of affairs than currently exists. Adoption of any of these approaches would serve to resolve the Circuit conflict, ensure consistent outcomes across the circuits, and fulfill the *Cohen* mandate for practicality. Although CBX does not have the space in this petition to weigh the advantages and disadvantages of all the options in detail, the litigant-disclaimer approach—at this point—seems the cleanest and most efficient way to jettison the trap's pitfalls. As one commentator advocating for the litigation-disclaimer approach has stated:

> It actually disarms the finality trap. Once parties disclaim their right to refile they are estopped from pursuing those claims any further. This approach thereby addressed the underlying concerns about refiling that drive the finality trap. This approach also keeps the appeal (which has often been fully briefed and even argued) moving along to a decision on the merits.

Lammon, *supra* n. 2, at 10-11.

Further, and in all events, granting this petition would give the Court the opportunity to "modernize the final judgment rule" in order to "align the federal judiciary with the new cost structure of litigation in today's world [and] increase much needed access to the appellate courts." Shah, *supra* n.1, at 50. Indeed, "[t]he resulting increase in access to the appellate courts will save federal court resources, provide a more level playing field for parties, and increase the quality and fairness of settlements which define today's high-stakes, complex, and international litigation playing field." *Id.* at 93.

Finally, the intent of § 1291—to avoid piecemeal appeals—has not been served by a judicially-created finality trap that punishes litigants who had every reason to believe their appeal flowed from a final judgment. Indeed, Congress did not codify § 1291 in order to create "overly harsh outcomes" caused by litigants "unknowingly falling into a 'finality trap.'" *Id.* at 74. This Court long ago instructed the federal courts to give § 1291 a "practical rather than a technical construction" for a reason: to help resolve, as much as possible, those "close questions" on the "finality of a particular judicial order." *Eisen*, 417 U.S. at 170. But the technical (rather than practical) construction handed down by the

Fifth Circuit slams the appellate door shut to litigants who deserve to have the merits of their often fully briefed appeals heard. Given the Circuit conflict, this Court should grant the petition in order to create uniformity among the federal courts in the application of § 1291 to appeals after a party has dismissed unadjudicated claims with prejudice.

CONCLUSION

The petition for writ of certiorari should be granted.