No. 20-478

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

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Mark A. J. Fassold
WATTS GUERRA LLP
4 Dominion Drive, Bldg. 3 - Suite 100
San Antonio, Texas 78257
Telephone: (210) 447-0500
Fax: (210) 447-0501
Email: mfassold@wattsguerra.com

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

Respondents' Brief in Opposition is nothing more than an elaborate exercise of hand-waving in order to distract the Court from the gravamen of the issue at hand. Rather than directly address the question presented, Respondents instead invoke an ineffective "move along, nothing to see here" approach by focusing on irrelevant legal rabbit trails for which, naturally, this Court would have no interest in granting certiorari. At bottom, however, Respondents' attempts at distraction cannot overcome the undeniable fact that a Circuit split exists as to the finality, or lack thereof, of a judgment when a party appeals an adverse partial adjudication after voluntarily dismissing any non-adjudicated claims without prejudice. This Court should grant the Petition to resolve the "egregious mess" caused by the so-called finality trap.

REASONS FOR GRANTING THE PETITION

A. Respondents' Opposition Never Denies that the Courts of Appeals Are in Conflict Regarding the Finality of a Judgment When a Party Has Dismissed Unadjudicated Claims Without Prejudice

Respondents' first sleight of hand argument points to the various ways in which litigants can "obtain immediate appeal of otherwise non-final orders," including Rule 54(b), 28 U.S.C. § 1292(b), and a voluntary

dismissal *with prejudice* under Rule 41(a). (Opp. 7 – 10). But there is no conflict among the courts of appeals regarding finality or appealability of a judgment in any of those instances. Here, however, there is a multi-faceted split among the circuits—and even within some circuits—as to whether a dismissal *without prejudice* under Rule 41(a) constitutes a final judgment under § 1291. Despite Respondents' efforts at distraction, this is a reality they never explicitly deny.

For the sake of brevity, Petitioner will not rehash in detail the history and extent of the inter and intra circuit conflicts. To summarize, however, while the Fifth Circuit holds to a bright-line rule against finality following a dismissal of claims *without prejudice*, the Eighth and Eleventh Circuits hold just the opposite, considering 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). Also rejecting the Fifth Circuit's rigid application, the Ninth and Federal Circuits utilize a case-by-case approach, holding 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). Meanwhile, the District of Columbia, Fourth, and Sixth Circuits have ongoing intra-circuit conflicts on the issue at hand. *Compare Blue v. District of Columbia Pub. Schs.*, 764 F.3d 11, 17 (D.C. Cir. 2014), *with Dukore v. District of Columbia*, 799 F.3d 1137, 1141 (D.C. Cir. 2015); *compare Waugh Chapel South, LLC v. United Food and Comm. Workers Union Local 27*, 728 F.3d 354, 359 (4th Cir. 2013), *with Affinity Living Group, LLC v. Starstone Specialty Ins. Co.*, 959 F.3d 634, 637 – 39 (4th Cir. 2020); *compare Hicks v. NLO, Inc.*, 825 F.2d 118, 120 (6th Cir. 1987), *with Page Plus of Atlanta, Inc. v. Owl Wireless, LLC*, 733 F.3d 658, 660 – 62 (6th Cir. 2013), and *Innovation Ventures, LLC v. Custom Nutrition Labs., LLC*, 912 F.3d 316, 329 (6th Cir. 2018). Finally, the Second, Third, Seventh, and Tenth Circuits expressly allow parties to 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).

Other than offering platitudes and conclusory assertions such as the issue "presents no meaningful disagreement among the circuits" (Opp. 1), Respondents' Opposition does not even attempt to argue that these circuit conflicts do not exist. Instead, Respondents brazenly assert that the Fifth Circuit's ruling against finality "was manifestly correct." (Opp. 1). But this merely begs the question. Indeed, if the Fifth Circuit's ruling here was right, then the Eighth and Eleventh Circuits' precedent regarding finality following a dismissal of unadjudicated claims without prejudice is manifestly wrong, or vice versa. Likewise, the Federal and Ninth Circuits' case-by-case approach is wrong. And the District of Columbia, Fourth, and Sixth Circuits get it right in some cases and wrong in others. As such, Respondents' argument is incoherent. One would be hard pressed to come up with a more divergent circuit split on the application of any federal statute, particularly one as important as § 1291—the gatekeeper of appellate jurisdiction.

Respondents also seem to contend that, in reality, there is no such thing as a "finality trap," and in any event, CBX's "unforced error" in stepping into the supposedly non-existent trap is "unworthy of this Court's review." (Opp. 10). Both assertions are false and do not provide a basis for this Court to deny the Petition.

First, that a finality trap does not exist would be news to the Fifth Circuit and many of its judges, not to mention every other circuit court of appeals that has spilled untold amounts of ink on the issue[1]. Indeed, the Fifth Circuit itself used the term "finality trap" as far back as 2004—a trap into which "unwitting[]" plaintiffs could step. *Marshall v. Kansas City S. Ry. Co.*, 378 F.3d 495, 499 (5th Cir. 2004). More recently, Fifth Circuit jurists such as Judge Haynes and Judge Willett have written extensively on the finality trap and the need to reform or reject it outright. *See Williams v. Taylor Seidenbach, Inc.*, 935 F.3d 358 (5th Cir. 2019) ("*Williams I*"); *Williams v. Seidenbach,* 958 F.3d 341, 343 (5th Cir. 2020) (en banc) ("*Williams II*"). Indeed, in *Williams I*, Judge Haynes

[1] Such an assertion would also surprise the commentators that have written extensively on the finality trap. *See, e.g.* 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); 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.

encouraged the Fifth Circuit 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). She also stated that the Fifth Circuit's precedent, "under the 'finality trap' does not follow logically," and "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)).

Likewise, in *Williams II*, Judge Willett described the finality trap as having "plagued the federal courts for decades," and as a result, the Fifth Circuit should "remedy the finality trap's egregious mess." *Williams II*, 958 F.3d 355 (Willett, J., concurring) (internal quotations omitted). Any honest onlooker of the circuit split described above cannot but reach the same conclusion.

Finally, also in *Williams II*, Judge Oldham, joined by Judges Smith, Costa, and Duncan, lamenting that the majority opinion "gave up the ghost," reminded the Fifth Circuit that it took the case en banc "to address the so-called 'finality-trap,'" in order to "exorcise the 'ghostly magic' that prevents certain dismissals from becoming appealable." *Id.*

at 359 (Oldham, J., dissenting). That so many Fifth Circuit judges would write specifically as to the existence and need to reform the finality trap belies Respondents' contention that it either does not exist or is unimportant to federal civil procedure and appellate jurisdiction.

Second, Respondents' fixation on—and mischaracterization of—CBX's actions at the district court that led to this Petition does nothing to lessen the need for this Court's review of the larger issue—resolving the circuit split over the finality trap. To begin, Respondents ignore the fact that CBX chose its course of action—dismissing its remaining Texas insurance claims without prejudice—in coordination with, if not the express encouragement of, the district court. Indeed, after the parties conferred and submitted their joint status report following the second summary judgment order, 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). Contrary to Respondents' assertion then, every party involved—CBX, Respondents, ***and the district court***—believed that the procedural mechanisms agreed upon would result in a final, appealable judgment. This was not simply a matter of an "unforced error" (Opp. 10) by CBX.

In any event, Respondents' argument also turns a blind eye to the fact that, blameworthy or not, litigants in every federal circuit continue to find themselves caught in the finality trap. For example, just last year, the Eleventh Circuit resolved its 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 (internal citations omitted). Tellingly, the Eleventh Circuit never focused on any supposed "error" the plaintiff may have made in choosing to dismiss the remaining claims without prejudice.

At bottom, despite Respondents' efforts to avoid the obvious, the Fifth Circuit's creation and application of the finality trap is in square conflict with other Circuit courts of appeals. Resolving this conflict will create certainty and assure uniformity across the circuits.

B. CBX Is Not Asking This Court "to Create Yet Another Mechanism for Appeal," But Instead to Resolve the Conflict Among the Circuits as to Whether Voluntary Dismissals of Unadjudicated Claims Without Prejudice Constitute a Final Judgment Under § 1291

Respondents' next bait and switch is to argue that CBX's Petition involves a policy matter that should be left to the procedural rule drafters rather than this Court judicially creating "yet another mechanism for appeal." (Opp. 11 – 13). Respondents' argument misses the mark entirely.

To begin, CBX is not asking this Court to create judicially another mechanism for appeal[2], but simply to resolve the circuit conflict over whether a voluntary dismissal of unadjudicated claims without prejudice pursuant to Rule 41(a) constitutes a final judgment within the meaning of 28 U.S.C. § 1291. Of course, this involves the Court interpreting and applying § 1291 to existing rules and various forms of litigation procedural conduct. But this is a task the Court has undertaken time and time again since almost immediately after § 1291's promulgation up until the present day. *See, e.g. Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545 (1949); *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 152 (1964); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974); *Microsoft Corp. v. Baker*, 137 S.Ct. 1702, 1712 (2017).

[2] Of course, as pointed out in the Petition, "[t]he rule that creates the finality trap—that voluntary dismissals without prejudice are generally not appealable—is itself a judicial construction." *See* Lammon, *supra* n.1, at 13.

The Court's granting of certiorari in *Microsoft* is particularly damning to Respondent's contention that simply interpreting and applying § 1291 implicates policy matters for the rule drafters. Indeed, the Court's statement of why it granted certiorari in *Microsoft* could not be more in line with what CBX seeks here: "We granted certiorari ***to resolve a Circuit conflict*** over this question: Do federal courts of appeals ***have jurisdiction under § 1291*** . . . to review an order denying class certification . . . after the named plaintiffs ***have voluntarily dismissed their claims*** with prejudice?" *Microsoft Corp.*, 137 S.Ct. at 1712 (emphasis added).

Respondents' attempt to distinguish *Microsoft* based on the fact that the underlying appellate court had gone *beyond* existing rules—specifically, Rule 23(f)—in finding jurisdiction is unavailing. First, although the Court's subsequent decision on the merits in *Microsoft* was based, in part, on the Ninth Circuit going beyond Rule 23(f) to find jurisdiction, the Court's granting of certiorari in the first place was based on the existing Circuit conflict as to whether such voluntary dismissals in the class action context constituted a final judgment under § 1291. *Id.* at 1712 – 15. And, in order to answer that question, the Court necessarily

had to interpret § 1291 in light of Rule 23(f). This is clear from the Court's holding: "We hold that the voluntary dismissal essayed by respondents does not qualify as a 'final decision' within the compass of § 1291." *Id.* at 1707. So too here, CBX seeks certiorari so this Court can resolve the circuit conflict over whether a voluntary dismissal of unadjudicated claims without prejudice under Rule 41(a) constitutes a final judgment within the meaning of § 1291. That the question also involves a federal rule of civil procedure does not negate this Court's right to decide the question in favor of a policy decision by rule makers.[3] *See id.*

C. The Litigant-Disclaimer Option Was Not Available for CBX to Invoke at the Fifth Circuit, and in any Event, Resolution of the Current Circuit Split Necessarily Requires the Court to Address that Option

Finally, Respondents argue that this case is an "unsuitable vehicle for review" because CBX purportedly "did not invoke the procedural

[3] Respondents also include a strawman in their argument, contending that because CBX stated in its Petition that it lacked the space to "weigh the advantages and disadvantages of all the options in detail," this *ipso facto* means that the issues are so complex and overwhelming as to require a judicial rulemaking body to address them. (Opp. 12). Of course, CBX was only pointing out the obvious—that because of the page limitations as set forth in this Court's rules, CBX's Petition was devoted primarily to explaining the circuit conflict and why it should be resolved, not the substantive merits issue of which circuit has the correct application of §1291 to voluntary dismissals without prejudice under Rule 41(a). Naturally, that question must be left to briefing on the merits if and when this Court grants certiorari. In all events, CBX's statement was not a tacit admission that resolution of the finality trap can only be accomplished by judicial rulemaking bodies.

mechanism it now favors." (Opp. 13 – 14). The "procedural mechanism" Respondents refer to here is the litigant-disclaimer option permitted in the Second, Third, Seventh, and Tenth Circuits, whereby parties can disclaim their prior dismissal without prejudice and convert it to a dismissal with prejudice, even after the appeal has been filed. *See, e.g. 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; *Waltman*, 590 Fed. App. at 803. This argument is erroneous for several reasons.

First, Respondents ignore that never once in the history of the Fifth Circuit's jurisprudence regarding the finality trap has it allowed a party, after appeal, to convert a prior dismissal without prejudice to one with prejudice. Stated simply then, the litigant-disclaimer option was not available to CBX when it was before the Fifth Circuit. To suggest that it was available makes little sense given Judge Willett's concurrence in *Williams II*, wherein he wrote an extensive exhortation as to why the Fifth Circuit should adopt the litigant-disclaimer approach used by some other Circuits. *Williams II*, 958 F.3d 355-59 (Willett, J., concurring). In other words, had the Fifth Circuit allowed—or even considered—such an

option before, then there would have been no reason for Judge Willett to write his impassioned concurrence.

Second, Respondents' ignore that CBX attempted to do at the district court would it could not do at the Fifth Circuit—convert its prior voluntary dismissal without prejudice to one with prejudice. Indeed, as explained in the Petition, CBX attempted (unsuccessfully) to reassert its previously-dismissed statutory claims and then dismiss them again, this time with prejudice, thus avoiding the finality trap. (App. 224a – 238a; 229a – 233a). As such, Respondents' quasi-waiver argument is unavailing.

But all that aside, Respondents' argument is irrelevant to the question of whether this Court should grant certiorari to resolve the current circuit conflict. Regardless of whether CBX did or did not invoke it in this case, the litigant-disclaimer option is an integral part of the current circuit split given that it has been countenanced expressly by the Second, Third, Seventh, and Tenth Circuits. Therefore, this Court's resolution of the circuit split as to the finality of judgments following a voluntary dismissal of unadjudicated claims without prejudice necessarily must include an analysis of the litigant-disclaim approach.

That CBX should have attempted such an approach heretofore unavailable in the Fifth Circuit has no bearing on this Court's ultimate determination on the merits of the question presented—whether the finality trap should be abolished—much less whether review should be granted in the first place.

CONCLUSION

Respondents' Opposition provides no compelling reasons for this Court not to grant review in order to resolve the circuit conflict over the finality trap. 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 without prejudice.

Respectfully submitted,

Mark A. J. Fassold
WATTS GUERRA LLP
4 Dominion Drive, Bldg. 3 - Suite 100
San Antonio, Texas 78257
Telephone: (210) 447-0500
Fax: (210) 447-0501
Email: mfassold@wattsguerra.com

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing has been served upon counsel for Respondent listed below, by U.S. First Class Mail, on this 22nd day of January 2021.

Daniel McNeel Lane, Jr.
NORTON ROSE FULBRIGHT US LLP
111 W. Houston Street, Suite 1800
San Antonio, TX 78205

Allison Goodman Gold
NORTON ROSE FULBRIGHT US LLP
799 9th Street, N.W.
Suite 1000
Washington, DC 20001

Jonathan D. Hacker
(Counsel of Record)
Bradley N. Garcia
Samantha M. Goldstein
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, DC 20006
Attorneys for Respondents

/s/ - Mark A.J. Fassold
Mark A.J. Fassold