NO.

IN THE

Supreme Court of the United States

DIANA LOUISE HOUCK

Petitioner

v.

LIFESTORE BANK, and GRID FINANCIAL SERVICES INC.

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Cumulative Finality: When a Plaintiff has *not* requested cumulative finality for an interlocutory appeal, the Circuit Court of Appeals did *not* determine that it would not be unjust to find cumulative finality, the determination of cumulative finality would cause the Plaintiff to lose her right to appeal orders dismissing other Defendants, the orders dismissing other Defendants came during the pendency of the interlocutory appeal, and the orders dismissing other Defendants were confusing to the Plaintiff and the Fourth Circuit Court of Appeals, can the Fourth Circuit Court of Appeals find cumulative finality for the interlocutory appeal?
2. Rule 58: Can a case be closed when there is no final judgment on a separate document that dismisses all claims against all parties?
3. Vacatur: When a judgment is vacated, can the vacated judgment still have a preclusive effect for a party's right to appeal the judgment?

PARTIES TO THE PROCEEDING

DIANA LOUISE HOUCK, PETITIONER

LIFESTORE BANK N.S.A. and
GRID FINANCIAL SERVICES, Inc., RESPONDENTS

RELATED PROCEEDINGS

1. *Diana Louise Houck, et. al., v. Lifestore Bank, et al.,* No. 5:13-CV-66, U.S. District Court for the Western District of North Carolina – Order granting Defendant Substitute Trustee Services, Inc.'s motion to dismiss, entered October 1, 2013.

2. *Diana Louise Houck, et. al., v. Lifestore Bank, et al.,* No. 5:13-CV-66, U.S. District Court for the Western District of North Carolina – Order granting in part and denying in part Defendants' motion to dismiss, entered January 15, 2014.

3. *Diana Louise Houck, v. Lifestore Bank, et al.,* No. 5:13-CV-00066-DSC, U.S. District Court for the Western District of North Carolina – Memorandum and Order Granting Grid Financial Services, Inc.'s Motion to Dismiss, entered February 20, 2014. Judgment entered February 20, 2014.

4. *Diana Louise Houck; Steven G. Tate, v. Substitute Trustee Services, Inc., and Lifestore Bank; Grid Financial Services, Inc.*, No. 13-2326, United States Court of Appeals for the Fourth Circuit – Opinion dismissing appeal as interlocutory, entered August 27, 2014.

5. *Diana Louise Houck; Steven G. Tate, v. Substitute Trustee Services, Inc., and Lifestore Bank; Grid Financial Services, Inc.,* No. 13-2326, United States Court of Appeals for the Fourth Circuit – Order recalling mandate, entered December 17, 2014. (Unpublished)

6. *Diana Louise Houck; Steven G. Tate, v. Substitute Trustee Services, Inc., and Lifestore Bank; Grid Financial Services, Inc.*, No. 13-2326, United States Court of Appeals for the Fourth Circuit – Opinion Vacating February 20, 2014, judgment, Reversing in part and Remanding October 1, 2013 order, entered July 1, 2015.

7. *Diana Louise Houck, v. Lifestore Bank, et al.,* No. 5:13-CV-00066-DSC [Consolidated with Civil Action No: 5:18-CV-22-MOC], U.S. District Court for the Western District of North Carolina – Order Adopting and Affirming the findings of fact and conclusion of law of the United States Bankruptcy Court for the Western District of North Carolina, entered March 8, 2021. Judgment entered March 8, 2021

8. *Diana Louise Houck v. Lifestore Bank; Grid Financial Services, Inc.,* No. 21-1280, United States Court of Appeals for the Fourth Circuit – Order denying Defendants' motion to dismiss, entered August 13, 2021. (Unpublished)

9. *Diana Louise Houck v. Lifestore Bank; Grid Financial Services, Inc.,* No. 21-1280, United States Court of Appeals for the Fourth Circuit – Opinion dismissing appeal for lack of jurisdiction, entered July 19, 2022. Judgment entered July 19, 2022.

10. *Diana Louise Houck v. Lifestore Bank; Grid Financial Services, Inc.,* No. 21-1280, United States Court of Appeals for the Fourth Circuit – Order denying petition for rehearing *en banc*, entered August 17, 2022. (Unpublished)

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JURISDICTION

The Judgment of the Court of Appeals was entered on July 19, 2022. App. 2a. The Court of Appeals denied the Petitioner's timely petition for rehearing/hearing *en banc* on August 17, 2022. App. 85a. This Court granted an extension of time to file the petition for a writ of certiorari on November 10, 2022, extending the time to file the petition to January 14, 2023. App. 86a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

Federal Rules of Appellate Procedure Rule 4(a)(2) – *Cumulative Finality*

> (2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

Federal Rules of Appellate Procedure Rule 27(b) – *Vacatur*

> (b) Disposition of a Motion for a Procedural Order. The court may act on a motion for a procedural order—including a motion under Rule 26(b)—at any time without awaiting a response, and may, by rule or by order in a particular case, authorize its clerk to act on specified types of procedural motions. A party adversely affected by the court's, or the clerk's, action may file a motion to reconsider, vacate, or modify that action. Timely opposition filed after the motion is granted in whole or in part does not constitute a request to reconsider, vacate, or modify the disposition; a motion requesting that relief must be filed.

Federal Rules of Civil Procedures Rule 58(a) – *Entering Judgment*

(a) Separate Document. Every judgment and amended judgment must be set out in a separate document

STATEMENT

This petition will demonstrate that Ms. Houck's right to appeal was stripped from her improperly and that the lower courts have not followed clear precedence from this Court and statutory law. The determination of this case will require consideration of the timeline in the courts below and this Statement necessarily contains many references to dates. The reason for this will become clear *infra.*

I. The Bankruptcy Case.

This case sprang from September 12, 2011, when Diana Houck filed her first *pro se* bankruptcy petition to save her family farm from foreclosure, after, as she has alleged, her lender Lifestore Bank, (Lifestore) caused her to enter into a loan modification scheme that ultimately cost her the farm. That bankruptcy case failed, and she quickly filed a second, also *pro se*. During the pendency of that bankruptcy estate, Lifestore, Substitute Trustee Services, Inc. (STS), and Grid Financial Services, Inc. (Grid) foreclosed on her farm in clear violation of bankruptcy and North Carolina collection laws.

II. District Court Orders.

The case *sub judice* was filed April 26, 2013, in the Western District of North Carolina, because the bankruptcy case was closed. This was never a bankruptcy case; it has always been a *lawsuit* for violation of 11 U.S.C. § 362 and North

Carolina collection statutes. What followed was a string of confusion and misinterpreted law that has lasted over nine years, including a twenty-six month wait for the bankruptcy court to determine whether it had jurisdiction. Eventually the Bankruptcy Court heard only the § 362 claim.

In District Court, the parties consented to proceed before the Magistrate. STS moved to dismiss based on the *Iqbal/Twombley* doctrine. [1] The Magistrate Court initially determined, over Ms. Houck's objection, that it did *not* have jurisdiction over 11 U.S.C. § 362 claims, despite 28 U.S.C. § 1334 instructing that it does. App. 13a. The dismissal included a drastic misinterpretation of the *Iqbal/Twombley* doctrine, as the Fourth Circuit later found, and there were other aspects to the Magistrate's opinion that were overturned. At any rate, the Magistrate Court dismissed STS.

Meanwhile, Lifestore and Grid filed partial motions to dismiss under Federal Rule of Civil Procedure, Rule 12(b)(6). Ms. Houck objected to those motions while on October 28, 2013, simultaneously filing an interlocutory appeal of the STS dismissal.

On January 15, 2014, the Magistrate Court partially dismissed Grid and Lifestore based on their *Iqbal/Twombley* arguments. App. 32a. On January 22, 2014, Grid moved for dismissal under subject matter jurisdiction, based on the same argument made by STS, that somehow the District Court did not have jurisdiction over bankruptcy cases. Lifestore did not join this motion to dismiss.

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[1] This references the cases of *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

On February 20, 2014, the Magistrate Court entered an order dismissing the case based on Grid's motion. App. 27a. The order did not mention Lifestore. Ms. Houck moved to reconsider, since an appeal would be interlocutory, and she already had an interlocutory appeal before the Fourth Circuit on the same grounds. She knew she could use the impending order from the Fourth Circuit to correct the errors the Magistrate Court was making. On February 27, 2014, the Magistrate Court denied the motion to reconsider.

III. Interlocutory Appeal.

On August 27, 2014, the Fourth Circuit dismissed Ms. Houck's appeal stating that it was interlocutory. App. 33a. At that point in the proceedings that was the law of the case – that the appeal was interlocutory because there were still claims outstanding against Lifestore. Any action by the District Court should have comported with this ruling, yet it did not. Two days later Ms. Houck moved to reopen the case, which had been closed without warning, to file motions, since the Fourth Circuit had ordered that the case was still pending. On September 15, 2014, Ms. Houck filed a motion to reconsider the February 20, 2013, order.

Even after the Fourth Circuit dismissed the STS appeal as interlocutory, the Magistrate Court denied Ms. Houck's motion to reopen the case so that Ms. Houck could file motions. The law of the case held that the case was still open, and Ms. Houck should have been allowed to file motions. Not knowing what else to do when the Magistrate Court ignored the Fourth Circuit, she then filed a "Motion for Clarification" with the Fourth Circuit on October 16, 2014. App. 36a. On December

17, 2014, the Fourth Circuit found cumulative finality and took up the appeal. App. 44a.

IV. Fourth Circuit Opinion.

On July 1, 2015, the Fourth Circuit reversed and remanded the Magistrate's order dismissing STS on October 1, 2013. App. 46a. It took the further step of vacating the judgment entered on February 20, 2014, the only judgment in the case at that time. The Fourth Circuit did not have to do this and the effect of that *vacatur* is extremely important in this case. The ensuing Circuit Court battles after this opinion have revolved mostly around this vacatur.

V. Bankruptcy Court.

At this point, the District and Bankruptcy Courts considered the only remaining claim to be the § 362 claim against STS. The District Court sent the STS claims to the Bankruptcy Court against Houck's objections. Ms. Houck's contention is that there was no jurisdiction for the § 362 claims because there was no "related to" jurisdiction in the Bankruptcy Court pursuant to *New Horizon of NY LLC v. Jacobs*, 231 F.3d 143 (4th Cir. 2000). After deliberating for twenty-six months the bankruptcy court entered an order sending the case back to District Court. The District Court dismissed all state claims against STS and sent the case back to Bankruptcy Court. Ms. Houck still fought jurisdiction there. Eventually, the Bankruptcy Court granted summary judgment to Ms. Houck on her § 362 claim and awarded damages at trial.

VI. District Court.

After the Bankruptcy Court trial, findings of fact and conclusions of law were sent to the District Court. The District Court closed the case again sometime in March of 2021, without affirming the order from the Bankruptcy Court. Ms. Houck attempted to file motions in the District Court, and this is how she was noticed that the case was closed again, and again without a final judgment. On March 5, 2021, Ms. Houck moved the District Court to reopen the case and requested a final judgment pursuant to Rule 58, since the Fourth Circuit had vacated the only other judgment in the case to that point. In fact, the District Court had previously stayed the case and had never lifted that stay. Instead, on March 8, 2021, the District Court entered an order (App. 79a) which lifted the stay but only affirmed the Bankruptcy Court order. The District Court then entered a judgment on that order. App. 82a.

VII. Second Appeal.

On March 15, 2021, Ms. Houck timely appealed the March 8, 2021, order, even though it was not a final order, because it might eventually ripen into a final judgment and there was no other judgment against Grid and Lifestore. On June 7, 2021, Grid and Lifestore moved to dismiss the appeal on jurisdictional grounds, arguing that Ms. Houck's right to appeal ripened with the first judgment, despite the fact that it had been vacated. The Fourth Circuit had the opportunity to determine jurisdiction at that point. On August 13, 2021, the Fourth Circuit denied Grid's and Lifestore's motion to dismiss and the appeal continued. App. 84.

After briefing and oral arguments, on July 19, 2022, the Fourth Circuit found that it had earlier brought the case up on cumulative finality and Ms. Houck's appeal was dismissed. App. 2a. The Fourth Circuit did not make a finding that this would not be unjust. Ms. Houck had not moved the Court for cumulative finality, the Circuit Court did this *sua sponte*.

VIII. Motion for Rehearing/Hearing *en banc*.

On August 2, 2022, Ms. Houck filed a combined motion pursuant to Federal Rules of Appellate Procedure, Rules 35 and 40. These were denied on August 17, 2022, (App. 86a), and the mandate was entered on August 25, 2022.

REASONS FOR GRANTING THE PETITION

The problems in this case are threefold. First, the Fourth Circuit found cumulative finality where the appellant had not requested it but had only filed for an interlocutory appeal. Pursuant to precedence, cumulative finality is an equitable measure. Given that, Circuit Courts must engage in an equity analysis to determine if cumulative finality would prejudice a party. Finally, cumulative finality is permissive, to be requested by the appellant, and not mandatory, to the shock and surprise of a party which did not request it. This Court should resolve a strong circuit split and establish procedures for finding cumulative finality, including enforcing the equity analysis and only granting cumulative finality when requested by the appellant.

Next, Rule 58 demands a separate document judgment for finality in a case. This is not at issue. The problem lies when a judgment is vacated. Rule 58 should still

demand a separate document judgment on all claims against all parties. In this case, vacatur means that there is no final separate document judgment to this date.

Finally, there is a circuit split about the effect of *vacatur*. According to this Court, it should mean that the vacated document has no effect and that *vacatur* relates forward and back. When a judgment is vacated and has no effect, it cannot be relied on for any reason, including the finding of cumulative finality. This Court should resolve the circuit split and instruct all lower courts on the effect of *vacatur*.

CUMULATIVE FINALITY

a. The Case Sub Judice.

The relevant analysis starts with this Court's establishment of the doctrine of cumulative finality.

> In our view, Rule 4(a)(2) permits a notice of appeal from a nonfinal decision to operate as a notice of appeal from the final judgment only when a district court announces a decision that would be appealable if immediately followed by the entry of judgment.

FirsTier Mortg. Co. v. Invs. Mortg. Ins. Co., 498 U.S. 269, 276 (1991). The language of the Court is permissive. Nowhere has this Court held that cumulative finality is mandatory. It allows an *appellant* to create appealability from a judgment that could have been appealed. There is no statute mandating, and petitioner's counsel has unearthed no argument in any case, that cumulative finality is required to be found. Cumulative finality has to do with relating forward a premature attempt to appeal a decision that is final; not, as the Fourth Circuit did in the case at bar, to create finality that forecloses appeal to a party who neither wanted finality nor asked for it at a time when there was no finality.

In this case, Ms. Houck reserved her right to appeal any other orders by filing only an interlocutory appeal on the STS dismissal only, and she is the master of her case. She knew that the Fourth Circuit would find that the Magistrate Court's opinion dismissing STS was fatally flawed, and it did exactly that.

Despite this, the Fourth Circuit held that:

> we did not, in the prior appeal, have jurisdiction to review the judgment dismissing LifeStore and Grid Financial. That appeal was taken from only the October 1, 2013 order dismissing the Substitute Trustee, which became a judgment on February 20, 2014 under the cumulative finality doctrine.

App. 8a. Where the Fourth Circuit had initially determined that there was no final order in the case below, it then found cumulative finality to consider the October 1, 2013, order.

But Ms. Houck had appealed the STS order as interlocutory and had not appealed the order dismissing claims against Grid and Lifestore because she thought, as did the Fourth Circuit, that claims were still pending. The Fourth Circuit chose to make the appeal final knowing that Ms. Houck had not appealed Grid and Lifestore and undertook no fairness analysis, as required by precedence. This will be discussed *infra*. Grid and Lifestore were both dismissed based on the same reasoning as the order dismissing STS: that there is no jurisdiction in federal district court for an 11 U.S.C. § 362 claim, and an improper interpretation of the *Iqbal/Twombley* doctrine, among others. The entire reasoning for the dismissal of STS was overturned by the Fourth Circuit, and the Magistrate Court dismissed Grid and Lifestore using the

same flawed reasoning. Obviously, Ms. Houck would have appealed the Grid and Lifestore dismissals as well if she thought the appeal was ripe.

The Fourth Circuit did exactly as she expected, and what it should have done. It reversed everything important in the Magistrate Court's order and vacated the only judgment in the case (the judgment on the Grid/Lifestore dismissal) so that the case could continue. Then, at the end of all claims, Ms. Houck's ability to appeal ripened in 2021. Now the Fourth Circuit has found that it ripened an appeal Ms. Houck did not request (against Grid and Lifestore) and that ended her right to appeal.

This cannot be fair notice to a party of her right to appeal. Either allow cumulative finality and preserve her right to appeal by vacating the judgment (which is what happened, though it is not being recognized as such) or determine that cumulative finality would abrogate her right to appeal and deny the interlocutory appeal. The judgment of the Fourth Circuit has unexpectedly taken away Ms. Houck's right to appeal. The Fourth Circuit admits that "a degree of complexity is added by our prior application of the doctrine of cumulative finality." App. 10a. That is quite an understatement. The case should not be made so complex as to deprive a party of her right to appeal.

Initially, when Ms. Houck filed her interlocutory appeal, it was rejected by the Fourth Circuit. "The order appellants seek to appeal is neither a final order nor an appealable interlocutory or collateral order.* Accordingly, we dismiss the appeal for lack of jurisdiction." App. 35a. The Fourth Circuit then added this footnote:

> We note that, after the notice of appeal was filed, the district court entered orders dismissing claims against the remaining two defendants.

> Under the doctrine of cumulative finality, see Equip. Fin. Grp., Inc. v. Traverse Computer Brokers, 973 F.2d 345, 347-48 (4th Cir. 1992), it is possible to cure the jurisdictional defect resulting from the appeal of a non-final order if the district court enters final judgment prior to this court's consideration of the appeal. However, because at least some claims against defendant Lifestore Bank are still pending in the district court, a final order has not yet been entered.

Id. It is important that the Fourth Circuit does not say that it is *mandatory* to "cure the jurisdictional defect," but that it is "possible." *Id*. Still, there is no instruction to Ms. Houck that the clock could possibly be running at that time, though the Fourth Circuit later determined that it was. In fact, it tells her the opposite; that the clock is not running and the case against Grid and Lifestore is still open. The Fourth circuit also undertook no prejudice analysis, which precedence says is mandatory.

When Ms. Houck attempted to make motions in the District Court, including a motion to set aside the order dismissing Grid and Lifestore based on the law of the case, the District Court would not allow motions to be filed, which is a further abrogation of her rights. She was forced to file a "motion for clarification" with the Fourth Circuit (App. 36a) to force the District Court to allow her to file motions. Instead, the Fourth Circuit dropped a bombshell on the Appellant:

> But the February 20, 2014 judgment "saved" Houck's once-premature appeal because the October 1, 2013 order became a final judgment when LifeStore and Grid Financial were removed from the case and thus all claims as to all parties were resolved. *Id*. at 478–79. Thus, February 2014 judgment established the cumulative finality needed for Houck to appeal the court's dismissal of her claims against the Substitute Trustee.

App. 10a. But by "saving" an intentionally interlocutory appeal, this Court deprived Ms. Houck of her right to appeal Grid and Lifestore. A party does not need this kind

of help. "Our application of the cumulative finality doctrine, however, did not somehow open our appellate review to consideration of the judgment dismissing LifeStore and Grid Financial." App. 11a. It is for exactly that reason that the Fourth Circuit, knowing the intent of Ms. Houck, should either have not found cumulative finality and sent the case back down, or it should have done what it did and vacate the judgment so that the appeal was never ripe. Ms. Houck did not ask for, and certainly did not "benefit" (*Id.*) from, cumulative finality. That was the Fourth Circuit's decision and should have been used to preserve her right to appeal, not decimate it. No one asked Diana Houck if she wanted cumulative finality; she would have refused it.

When discussing Rule 58 this Court has said, "The rule should be interpreted to prevent loss of the right of appeal, not to facilitate loss." *Bankers Tr. Co. v. Mallis,* 435 U.S. 381, 386 (1978). The opposite has happened in this case; Rule 58 was used against Ms. Houck to strip her of her right to appeal. "The Federal Rules of Civil Procedure are to be construed to secure the just, speedy, and inexpensive determination of every action." *Id.*, at 386–87. Justice cannot be disregarded.

> The fact that the February 2014 judgment was a final judgment sufficient to grant cumulative finality means that Houck's appeal of that judgment was subject to the time requirements of § 2107(a), which she failed to satisfy.

App. 11a. But Ms. Houck could not fail to satisfy requirements she was not aware of because those requirements only applied after the Fourth Circuit made them apply without warning. Note that the Fourth Circuit is reticent about notice and whether the Feb. 20, 2014, judgment put Ms. Houck on notice. It is never mentioned in any

opinion below. It is shocking that the Fourth Circuit has found that Ms. Houck slept on her right to appeal, but never stated that she had notice, which is why Rule 58 is so important. Ms. Houck never slept on her right to appeal. She did not wait all these years and attempt to create an appeal that did not exist. She has known since July 1, 2015, that she would eventually appeal Grid and Lifestore and she is utterly shocked that her right to appeal was taken without her knowledge.

When the Fourth Circuit first adopted the doctrine of cumulative finality, it did so under a fairness analysis:

> We are particularly disposed to this view under the circumstances of this case. There is no indication that Traverse was prejudiced by the dismissal. In fact, Traverse neither objected to nor appealed the dismissal. Furthermore, we perceive no violence to the rationale underlying Rule 54(b). Synchronized neither appeared nor participated in the proceedings, and because the action against it was ultimately dismissed, it is not vulnerable to judgment. There are no overlapping claims or issues of joint liability, nor are there any outstanding motions.

Equip. Fin. Grp., Inc. v. Traverse Computer Brokers, 973 F.2d 345, 348 (4th Cir. 1992). The Tenth Circuit also undertakes a fairness determination in such a matter. "Neither have the parties identified any prejudice anyone would suffer by taking up the appeal now." *In re Woolsey*, 696 F.3d 1266, 1269 (10th Cir. 2012). Cumulative finality is meant to be an act that, *when requested*, advances the rights of parties through economy, not a means to take away the party's right to appeal. And in this case the Fourth Circuit never asked any party if there would be any prejudice to them. There was never any notice that cumulative finality was a consideration until after it was done.

More recently, the Fourth Circuit discussed how other Courts, including this Court, view the complexities of cumulative finality:

> [The Supreme] Court held that Rule 4(a)(2) "permits a notice of appeal from a nonfinal decision to operate as a notice of appeal from the final judgment only when a district court announces a decision that *would* be appealable if immediately followed by entry of judgment."

In re Bryson, 406 F.3d 284, at 288 (4th Cir. 2005) (citing *FirsTier Mortg. Co.*, 498 U.S., at 276). But the *Bryson* Court immediately qualified who would create finality in that order:

> a notice of appeal from an order disposing of all claims of one party "filed before the district court disposes of all claims is nevertheless effective if the appellant obtains either certification pursuant to [Rule] 54(b) or final adjudication before the court of appeals considers the case on its merits." *Ruiz v. McDonnell,* 299 F.3d 1173, 1179 (10th Cir.2002).

Id., at 289 (emphasis supplied). This is because it is fair to create cumulative finality if the appellant requests finality. When that cumulative finality comes as a surprise to the appellant, she is severely prejudiced. Especially in a case such as this, where even the Fourth Circuit was confused as to whether claims were still pending:

> The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

Foman v. Davis, 371 U.S. 178, 181–82 (1962). The confusion came because only Grid moved the District Court for dismissal. Ms. Houck did not see a dismissal of Lifestore coming from that motion. Nor did the Fourth Circuit; the basis for the motion was without merit.

This Court warned against such surprise and confusion:

> In our view, Rule 4(a)(2) permits a notice of appeal from a nonfinal decision to operate as a notice of appeal from the final judgment only when a district court announces a decision that would be appealable if immediately followed by the entry of judgment. In these instances, a litigant's confusion is understandable, and permitting the notice of appeal to become effective when judgment is entered does not catch the appellee by surprise. Little would be accomplished by prohibiting the court of appeals from reaching the merits of such an appeal.

FirsTier Mortg. Co., 498 U.S., at 276. Ms. Houck did not file a notice of appeal. This rule has to do with the petitioner filing a notice of appeal that is out of time, not creating a notice of appeal from whole cloth. It is the permissive act of making the appellant's notice of appeal valid where it was not valid before. Ms. Houck did not file a premature notice of appeal for Grid and Lifestore that the Fourth Circuit could use to create cumulative finality. The Fourth Circuit had no notice of appeal to relate forward. It had nothing to correct. Ms. Houck intentionally filed an interlocutory appeal to resolve the issues with the STS dismissal. When the Fourth Circuit overturned the dismissal of STS, the case remained open and there was no final order until the end, because the previous final order was vacated, as it should have been, and therefore had no preclusive effect in any way for anything.

Except that the District Court never truly entered a final order, even when moved to do so by Ms. Houck. Even the seminal *Hodge v. Hodge*, 507 F.2d 87, 89 (3d Cir. 1975), *abrogated by Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56 (1982), to which *FirsTier* refers, held that "Notice of appeal to the court of appeals was filed in the district court on March 11, 1974. Judge Hoffman's written order was filed March 14, 1974. The appeal was thus premature." *Hodge*, 507 F.2d, at 89. A notice

was filed in *Hodge* and *FirsTier*. No such notice was filed in *Houck* because her appeal was interlocutory, and she wanted it heard as such.

Ms. Houck is only asking for a determination on the merits. She cannot lose her right to appeal by accident, as the Supreme Court has held. Indeed, this case was so confounded and convoluted that Ms. Houck had to file a motion for clarification with the Circuit Court to get the case back on track. This is not how a case should proceed. "A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, at 25 (1994).

The case law creating cumulative finality has its basis in *Curtiss-Wright Corp. v. Gen. Elec. Co.,* 446 U.S. 1 (1980). This is the most important aspect of this issue. "Once having found finality, the district court must go on to determine whether there is any just reason for delay." *Id.*, at 8. Neither court determined that there was no just reason for delay. Neither court followed the direction of this Court. Indeed, justice would have called for a delay if the Court's decision caused Ms. Houck to lose her right to appeal Grid and Lifestore, but neither lower court undertook the required analysis to make sure that injustice would not occur. The Fourth Circuit simply vacated the only judgment in the case, and that would have operated to allow the second appeal if the law had been followed. No injustice would have been worked if Fourth Circuit had simply followed the binding precedence and applicable statutes.

In every case where cumulative finality is raised, it is discussed as permissive. The Court is "allowed" to exercise jurisdiction. But that is tempered with this Court's requirement that the district court determine that cumulative finality would not be unjust. But no such determination was made in this case. Our precedent does not *require* cumulative finality whenever it can be raised despite all policy against its use. And it should not have been determined in this case.

Petitioner's counsel has not found a single case where a circuit court is required to find cumulative finality. Such would create a forced appeal, and there is nowhere in the law for this. Ms. Houck filed an interlocutory appeal in 2014, clearly designated as an interlocutory appeal, and that was all. She did not request cumulative finality and never expected her filing to be a final appeal on all claims for all parties. She never intended, or expected, that interlocutory appeal to be her only shot at an appeal. She did not ask for the case to be over; she asked specifically for it not to be.

It begs the question at what point Ms. Houck should have expected that her interlocutory appeal would become a final appeal. She had no notice that her right had ripened until after the Fourth Circuit determined it had passed. It is not fair or just to be foreclosed from appeal based on a technical glitch that is ill-defined at law and about which circuits disagree.

> Again, we construe [Rule 3(c)(1)(B)] liberally and take a functional approach to compliance, asking whether the putative appellant has manifested the intent to appeal a specific judgment or order and whether the affected party had notice and an opportunity fully to brief the issue.

Jackson v. Lightsey, 775 F.3d 170, 176 (4th Cir. 2014). Ms. Houck manifested no intent to appeal anything but the STS dismissal and is being punished severely for filing an interlocutory appeal.

Ms. Houck never objected to cumulative finality because the Court vacated the only judgment in the case, paving the way for a second appeal and obviating injustice. At that point there was no need to object to cumulative finality because the *vacatur* meant there was no problem for Ms. Houck.

The foundation of the right to appeal is a combination of notice and fairness. This Court should establish bright line rules for cumulative finality. At present, the concept of cumulative finality is a wash of various opinions; there is no rule. Cumulative finality is not mentioned anywhere in the Federal Rules of Appellate procedure. This is the first place a lay person will go to know their rights. If Congress will not benefit the practice of law by establishing clear guidelines, this Court can instruct. This situation should never have happened and should never happen again.

b. The Circuit Split

In re Woolsey, 696 F.3d 1266 (10th Cir. 2012), discussed the limits of Rule 4(a)(2) set out in *FirsTier Mortgage Co. v. Investors Mortgage Insurance Co.*, 498 U.S. 269 (1991). The *Woolsey Court* found that "*FirsTier'*s cryptic and arguably tangential discussion about the limits of Rule 4(a)(2) is open to many different understandings." *In re Woolsey*, 696 F.3d, at 1271.

After *FirsTier*, the circuits devised three different analyses regarding cumulative finality. [2] Cases like *Miller v. Special Weapons, L.L.C.*, 369 F.3d 1033, 1035 (8th Cir. 2004) have determined that appeals only from decisions that resolve all outstanding issues in the district court can be saved by the entry of a final judgment. *Outlaw v. Airtech Air Conditioning & Heating, Inc.*, 412 F.3d 156, 161–62 (D.C. Cir. 2005) (Roberts, J.) found that Rule 4(a)(2) will also save notices filed after decisions that could have been certified for an intermediate appeal under Rule 54(b)). *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581, 587 (3d Cir. 1999) holds that nearly any district court decision, no matter how interlocutory, can be saved by a subsequent judgment.

There is also a split on whether cumulative finality has its current source in common law or Rule 4(a)(2): *Outlaw*, 412 F.3d at 160 (cumulative finality come only from Rule 4(a)(2)); *Lazy Oil*, 166 F.3d at 587 (the common law doctrine coexists with Rule 4(a)(2)). This Court has the opportunity to instruct lower courts on how they can determine whether cumulative finality is appropriate for any case, and Ms. Houck would suggest that common law should always be considered when interpreting a statute unless precedence is explicitly overturned by new legislation.

There are also splits within circuits. *Hill v. St. Louis University*, 123 F.3d 1114, 1120–21 (8th Cir. 1997) allows for cumulative finality, but subsequent to that, the Eighth Circuit determined that cumulative finality does not exist. *See, Miller*, 369 F.3d at 1035.

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[2] *See* Lammon, Bryan, *Cumulative Finality* (February 26, 2018). 52 Georgia Law Review 767 (2018).

Other cases seem to attempt to narrow cumulative finality. *See, Stoney Point Prods., Inc. v. Underwood*, 15 F. App'x 828, 830–31 (Fed. Cir. 2001); *Meade Instruments Corp. v. Reddwarf Starware, LLC*, No. 99-1517, 2000 WL 987268, at *3 (Fed. Cir. June 23, 2000); *Fireman's Fund Ins. Co. v. England*, 313 F.3d 1344, 1348–49 (Fed. Cir. 2002); *Amgen Inc. v. Amneal Pharmaceuticals LLC*, 945 F.3d 1368 (Fed. Cir. 2020).

The Fifth Circuit's precedence seems to be the most confusing. Compare *Alcorn County v. U.S. Interstate Supplies, Inc.*, 731 F.2d 1160, 1165–66 (5th Cir. 1984) and *Tower v. Moss*, 625 F.2d 1161, 1164–65 (5th Cir. 1980) with *United States v. Taylor*, 632 F.2d 530, 531 (5th Cir. 1980). The First, Third, Ninth, and Tenth Circuits all have issued cumulative-finality decisions that are in conflict with their own previous opinions. This Court's guidance is needed to resolve many issues on this matter.

Finally, and almost as an aside, it appears the Fourth Circuit's July 19, 2022, Opinion also discussed the appeal as if it were filed against STS. App. 9a-10a. As counsel informed the Fourth Circuit during oral argument, STS filed an appeal of the Bankruptcy Court order only to preserve its rights in state court to ensure that Ms. Houck would dismiss the claims against STS in the related state court action. Ms. Houck never repudiated her settlement agreement, and this is not part of any facts in the case. She has never attempted to appeal the Bankruptcy Court judgment against STS. Initially STS was in the caption but that was removed because STS was not a party to the appeal. App. 83a.

RULE 58

"Every judgment and amended judgment must be set out in a separate document" F.R.Civ.P. Rule 58. This is not a suggestion: "[W]e recognized that the separate-document rule must be 'mechanically applied' in determining whether an appeal is timely. Technical application of the separate-judgment requirement is necessary in that context to avoid the uncertainties that once plagued the determination of when an appeal must be brought." *Bankers Tr. Co.*, 435 U.S., at 386. This requirement was not waived pursuant to *Hughes v. Halifax Cnty. Sch. Bd.*, 823 F.2d 832 (4th Cir. 1987). The Circuit has not explained how this mandatory requirement does not apply to Ms. Houck's case. To this day there is no final judgment that has not been vacated.

Ms. Houck did not know that her time to appeal had ripened; it was decided for her without her knowledge. This conflicts with every principle of justice. Only Grid had moved to dismiss (and on improper grounds as the Fourth Circuit determined later in the STS appeal). The District Court's Order was unclear that Grid's motion applied to all defendants. This is the law, but it was unclear notice. If it fooled the Fourth Circuit panel, with its cadre of experienced clerks, it cannot be fair notice to Ms. Houck, or any future *pro se* litigant. This is where this Court's call for fairness is relevant:

> The sole purpose of the separate-document requirement, which was added to Rule 58 in 1963, was to clarify when the time for appeal under 28 U.S.C. § 2107 begins to run. According to the Advisory Committee that drafted the 1963 amendment:
>
> > "Hitherto some difficulty has arisen, chiefly where the court has written an opinion or memorandum containing some apparently directive or dispositive words, * * * The

> amended rule eliminates these uncertainties by requiring that there be a judgment set out on a separate document—distinct from any opinion or memorandum—which provides the basis for the entry of judgment." 28 U.S.C.App., p. 7824.
>
> The separate-document requirement was thus intended to avoid the inequities that were inherent when a party appealed from a document or docket entry that appeared to be a final judgment of the district court only to have the appellate court announce later that an earlier document or entry had been the judgment and dismiss the appeal as untimely. The 1963 amendment to Rule 58 made clear that a party need not file a notice of appeal until a separate judgment has been filed and entered.

Bankers Tr. Co., 435 U.S., at 384–85. In the case at bar, the District Court's Order was vague enough that the Fourth Circuit rejected the appeal as untimely. The judgment for the order dismissing Grid was a cursory statement that added no clarity, and in fact failed to notice the Plaintiff that the case was closed. What follows is the entirety of the judgment: "DECISION BY COURT. This action having come before the Court by Motion and a decision having been rendered; IT IS ORDERED AND ADJUDGED that Judgment is hereby entered in accordance with the Court's February 20, 2014 Memorandum and Order." App. 32a. The District Court never noticed the Plaintiff that the case was closed, and it was not. The judgment does not alert the Plaintiff that the clock is running on her appeal. It is patently unjust to find that this confusing order, and a cursory statement in the judgment, gave notice that Ms. Houck would lose her right to appeal, especially an order that was so out of step with the law that the identical order for STS was overturned on every issue.

There is an argument that a final judgment existed for a brief period of time, though the Fourth Circuit's Order conflicts with that idea. App. 46a. Ms. Houck knew

that this judgment would be, and was, vacated. So, Ms. Houck received no clear and plain notice that her case was dismissed with finality. She had filed an interlocutory appeal and did not request or want cumulative finality because it would confuse the case, as it did. This Court should enforce the requirement of a separate document judgment in this case.

VACATUR

When the Fourth Circuit vacated the February 20, 2014, judgment, that judgment ceased to exist, and it could have no binding effect on anything. This is well-established. Instead, the Fourth Circuit recently ignored all binding precedence and held that this judgment had the effect of ending the case for Grid and Lifestore and that the time for appeal ran from February 20, 2014. But if that judgment "never existed," [3] there could be no running of a statute from that date, because the judgment does not exist. This is a simple issue and the Fourth Circuit should not be allowed to push binding precedence aside.

In fact, Ms. Houck could have moved the Fourth Circuit to vacate the judgment below for the very purpose of making the ruling reviewable, but the Fourth Circuit did that for her. App. 46a. Now the Fourth Circuit denies the effect of the thing it did. It would be helpful to know why the Fourth Circuit vacated the February 20, 2014, judgment when reversing the October 1, 2013 order. App. 78a. It is an extra step that was not requested and was unnecessary if the Fourth Circuit wanted to settle the

[3] See, *Rice v. Alpha Sec., Inc.*, 556 F. App'x 257, 260 (4th Cir. 2014).

issue about appealability. All this did was create the ability to appeal by removing the only judgment in the case.

"The point of *vacatur* is to prevent an unreviewable decision 'from spawning any legal consequences * * * *Vacatur* rightly 'strips the decision below of its binding effect' and 'and clears "the path for future relitigation,"' *Camreta v. Greene*, 563 U.S. 692 (2011). The vacated judgment that dismissed Grid and Lifestore cannot have any binding effect. "The general, legal understanding of *vacatur* is that it renders the original judgment null and void." *United States v. Bethea,* 841 F. App'x 544, 550 (4th Cir. 2021). The *vacatur* of the judgment in this case stripped the judgment of its binding effect, yet the Fourth Circuit bound Ms. Houck to the effect of the judgment. The Seventh Circuit has found that vacatur gives a losing appellant the ability to appeal again. *See Harris v. Bd. of Governors of Fed. Rsrv. Sys*., 938 F.2d 720, 724 (7th Cir. 1991). The Federal Circuit has held that a vacated judgment has no preclusive effect. *See U.S. Philips Corp. v. Sears Roebuck & Co*., 1992 WL 296361, at *3 (N.D. Ill. Oct. 14, 1992), *aff'd*, 55 F.3d 592 (Fed. Cir. 1995). The 6th Circuit follows this reasoning. "[T]he general rule is that a judgment which is vacated, for whatever reason, is deprived of its conclusive effect as collateral estoppel." *Dodrill v. Ludt,* 764 F.2d 442, 444 (6th Cir.1985). The Third Circuit agreed in *Consol. Exp., Inc. v. New York Shipping Ass'n, Inc.*, 641 F.2d 90, 93–94 (3d Cir. 1981). The First Circuit found that "[a] judgment that has been vacated, reversed, or set aside on appeal is thereby deprived of all conclusive effect, both as *res judicata* and as collateral estoppel."

Fredyma v. AT & T Network Systems, Inc., 940 F.2d 647 (TABLE), 1991 U.S.App. LEXIS 13699 at *2 (1st Cir.1991).

A vacated opinion *cannot* be relied on as precedence, where a reversed opinion can. *See Cent. Pines Land Co. v. United States,* 274 F.3d 881, 893 n.57 (5th Cir., 2001). "[A] general order of the Supreme Court vacating the judgment of the Court of Appeals deprives [the Court of Appeals's] opinion of precedential effect." *Simon v. Republic of Hungary*, 579 F. Supp. 3d 91, 138, N. 38 (D.D.C. 2021), *appeal dismissed*, No. 22-7010, 2022 WL 7205036 (D.C. Cir. Oct. 12, 2022).

Vacatur is specifically designed to allow for an appeal that was previously foreclosed. "We explained that *vacatur* 'clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance.'" *U.S. Bancorp Mortg. Co.*, 513 U.S., at 22-23. There is no room for confusion on this issue. The Fourth Circuit has held that when the judgment was vacated, "it ceased to exist, and effectively, it never did." *Rice,* 556 F. App'x, at 259-60 [4]. The Fourth Circuit should follow its own precedence and that of this Court.

This is binding precedence that the Appellees raised no argument against. And *vacatur* was not necessary; the Fourth Circuit could have amended the judgment, but it did not. It chose to vacate judgment: "The judgment of the district court is vacated; the court's October 1, 2013 order dismissing Houck's § 362(k) claim against the Substitute Trustee is reversed; and the case is remanded for further proceedings."

[4] *See also United States v. Burke*, 863 F.3d 1355, 1359 (11th Cir. 2017) *United States v. Maxwell*, 590 F.3d 585; 589 (8th Cir. 2010); *Harris v. Bd. of Governors of Fed. Rsrv. Sys*., 938 F.2d 720, 723 (7th Cir. 1991); *Intercollegiate Broadcasting Sys., Inc. v. Copyright Royalty Bd*., 796 F.3d 111, 125 (D.C. Cir. 2015); *NLRB v. Goodless Bros. Elec. Co*., 285 F.3d 102, 110 (1st Cir. 2002), among many others.

App. 46a. The Fourth Circuit vacated any effect the February 20, 2014, judgment had and, according to binding precedence, that judgment never existed. It therefore cannot have any power to ripen the appeal.

In any other case if an appellant attempted to appeal a vacated order it would fail because a vacated order never existed. Vacatur "eliminates a judgment...." *U.S. Bancorp Mortg. Co*, 513 U.S., at 22 (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950)); *see also United States v. Garde*, 848 F.2d 1307, 1311 (D.C. Cir. 1988) (equating vacatur with having a court's decision "wiped from the book...."). So, the judgment that the lower courts are trying to enforce no longer exists. *See Texas Advanced Optoelectronic Sols., Inc. v. Renesas Elecs. Am. Inc.*, No. 4:08-CV-00451, 2020 WL 1495230, at *5 (E.D. Tex. Mar. 27, 2020).

And finally, "the determination [for *vacatur*] is an equitable one." *U.S. Bancorp Mortg. Co.*, 513 U.S., at 19. Given the fact that this Court did not determine if cumulative finality was a just course in this action, equity demands *vacatur* function as intended.

There appears to be a circuit split on this issue that this Court can resolve:

> None of these D.C. Circuit cases directly addresses the apparent contradiction with the Supreme Court's rule that "[o]f necessity [its] decision vacating the judgment of [a] Court of Appeals deprives that Court's opinion of precedential effect," *O'Connor* [*v. Donaldson*], 422 U.S. at 577 n.12, 95 S.Ct. 2486. This Court, however, must follow the Circuit's consistent line of authority on this issue.

Simon, 579 F. Supp. 3d 91, 138, n.37. See also the 11th Circuit aberration in the context of criminal law in *Burke*, 863 F.3d, at 1359. This split was recognized by the Seventh Circuit:

> Mr. Hopper acknowledges, however, that a majority of our sister circuits have reached the opposite view. *See United States v. Burke*, 863 F.3d 1355, 1359 (11th Cir. 2017) ("Unlike the effect of vacatur in the First Circuit, ... vacatur in our Circuit wipes the slate clean. And that clean slate requires a district court to consider pre-vacatur sentences because a district court conducts a resentencing as if no initial sentencing ever occurred." (citation omitted)); *United States v. Tidwell*, 827 F.3d 761, 763 (8th Cir. 2016) ("We decline to apply this reasoning because the 'context' in this case is distinguishable.

United States v. Hopper, 11 F.4th 561, 572 (7th Cir. 2021), *reh'g denied* (Dec. 3, 2021).

Finally, the equities of this case demand that the vacatur be enforced according to precedent. "Because vacatur is equitable in nature, we look to notions of fairness when deciding whether to use the remedy." *Sands v. Nat'l Lab. Rels. Bd.*, 825 F.3d 778, 785 (D.C. Cir. 2016). The same should be considered when the lower courts refuse to enforce the effect of vacatur. The Fourth Circuit made no attempt to consider the equities of its order dismissing Ms. Houck's appeal.

In the end, it only makes sense that a vacated judgment has no effect, because the issue of the Grid and Lifestore judgment's preclusive effect arises only because of the length of time of an appeal. If Ms. Houck's interlocutory appeal had been considered and an opinion rendered in a week, the Grid and Lifestore dismissals would not be final judgments because the case against STS would be open, and therefore no final judgment against all claims and parties. That is exactly the effect that all law on the matter demands: that the judgment dismissing STS was vacated, it never existed and can have no effect of any kind. This case should still be open, and this Court should so order and resolve the circuit split.

CONCLUSION

Because there is no final judgment in this case pursuant to Rule 58; because the only final judgment was vacated; because cumulative finality should not be used to destroy a party's right to appeal; because cumulative finality should never be determined without a fairness analysis; because the dismissal of Grid and Lifestore was based on unlawful reasons; because of the other equities involved in this case; and to resolve the circuit splits relevant to the issues presented herein, petitioner DIANA LOUISE HOUCK respectfully requests that the Court grant her petition for certiorari.

Respectfully submitted today, January 13, 2023.

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