No. _____

In the Supreme Court of the United States

STARLINE TOURS OF HOLLYWOOD, INC.,
Petitioner,

vs.

EHM PRODUCTIONS INC. DBA TMZ and WARNER BROS. ENTERTAINMENT INC.
Respondents.

On Petition for a Writ of Certiorari to the
United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The district court dismissed without leave to amend all of Petitioner's claims against one of two defendants, leaving a single claim against the other defendant. Petitioner and Respondents later voluntarily dismissed all remaining claims in the action at the suggestion of the district court to avoid further appearances and terminate the action. The case was closed. Petitioner timely appealed to the Ninth Circuit but fell into what is often called the "finality trap." The Ninth Circuit dismissed the appeal solely based on its determination that the district court's involvement was insufficient participation in the dismissal, even though there was no evidence of appellate manipulation or piecemeal litigation. The question presented is:

Whether the Ninth Circuit's undefined requirement for meaningful judicial participation impermissibly abandons this Court's longstanding mandate that "finality is to be given a practical rather than a technical construction," *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 171 (1974) (internal quotation marks omitted), and broadens the snare of the "finality trap."

PARTIES TO THE PROCEEDING

Petitioner Starline Tours of Hollywood, Inc., a California corporation, was defendant and cross-complainant in the District Court and appellant in the Court of Appeals.

Respondents are Warner Bros. Entertainment Inc. and EHM Productions Inc. dba TMZ. Respondents were plaintiffs and counter-defendants in the District Court and appellees in the Court of Appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioner Starline Tours of Hollywood, Inc. is a privately owned California corporation, whose parent Starline USA Holdings is also entirely privately owned. No publicly held corporation owns any stock of Starline, its parent, or its sister companies.

RELATED CASES

Petitioner submits that the following cases involving Petitioner and Respondent TMZ may be considered related under Supreme Court Rule 14.1(b)(iii):

- Respondent TMZ's petition to confirm an arbitration award: App. 19-20.
  EHM Productions Inc., *dba TMZ v. Starline Tours of Hollywood*, *Inc.*, No. 2:18-cv-00369-AB-JC, United States District Court, Central District of California.
  Judgment entered October 21, 2019.
- Starline's appeal of the above judgment confirming arbitration award:
  EHM Productions Inc. v. Starline Tours of Hollywood, *Inc.*, No. 20-55426, United States Court of Appeals for the Ninth Circuit.
  Argued and Submitted.

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Starline Tours of Hollywood, Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit dismissing Starline's appeal for lack of appellate jurisdiction.

OPINIONS BELOW

The Ninth Circuit's memorandum opinion dismissing Starline's appeal may be found at *EHM Prods., Inc. v. Starline Tours of Hollywood, Inc.*, 818 F. App'x 773 (9th Cir. Aug. 28, 2020) and is reproduced in the Appendix hereto at App. 1.

The Ninth Circuit's order denying rehearing and rehearing en banc is reproduced at App. 5.

The Ninth Circuit's order denying Respondents' motion to dismiss is reproduced at App. 9.

The district court's orders granting Respondent Warner Bros. Inc.'s motion to dismiss and denying Petitioner Starline Tours of Hollywood, Inc.'s motion to amend may be found at *Warner Bros. Ent. Inc. v. Starline Tours of Hollywood, Inc.*, No. CV 16-02001 (SJO)(GJS), 2018 WL 5862919, (C.D. Cal. Oct. 11, 2018) and *Warner Bros. Ent. Inc. v. Starline Tours of Hollywood, Inc.*, No. CV 16-02001 (SJO)(GJS), 2018 WL 5885527, (C.D. Cal. Oct. 19, 2018), respectively and are reproduced at App. 11 and App. 36.

BASIS FOR JURISDICTION IN THIS COURT

The Ninth Circuit entered its memorandum opinion on August 28, 2020, dismissing Petitioner's appeal for lack of finality. The Ninth Circuit denied Petitioner's request for rehearing and rehearing en banc on November 4, 2020. On March 19, 2020, this Court issued an order extending the deadline to file a petition for writ of certiorari to 150 days due to the public health concerns surrounding Covid-19. Starline now files its timely petition for certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Section 1291, Title 28 of the United States Code and Rule 41 of the Federal Rules of Civil Procedure are reproduced at App. 67.

STATEMENT OF THE CASE

A. The Ninth Circuit's Recently-Adopted Requirement for Meaningful Judicial Participation Improperly Replaces the Long-Standing Pragmatic Evaluation of Finality for Determination of Appellate Jurisdiction.

This case concerns the proper standard for determination of finality to establish appellate jurisdiction. Section 1291 of Title 28 of the United States Code, the codification of the finality rule, is a simple expression of an important rule designed to preserve the efficiency and efficacy of judicial administration. The finality rule gives appellate courts jurisdiction to review final decisions of district courts. As with many rules, however, the finality rule is often easier to state than apply. What counts as a final decision? One would expect this question to be answered using a uniform standard in federal courts in New York, Chicago, and Los Angeles. But the reality is otherwise.

The circuit courts for years have wrestled with applying the finality rule to balance the needs of courts and litigants. As a result of the varied and shifting standards, many litigants in federal court have found themselves ensnared in what has been aptly called the "finality trap." This trap is sprung when a party dismisses claims without prejudice: "A party that concludes an action in the trial court, without finally disposing of any parties'

voluntarily-dismissed claims, may be banished from the appellate court without opportunity to revive the case below." Terry W. Schackmann & Barry Pickens, *The Finality Trap: Accidentally Losing Your Right to Appeal (Part II)*, 58 J. Mo. B. 138, 138 (2002); *Perry v. Schumacher Grp. of Louisiana*, 891 F.3d 954, 959 n. 3 (11th Cir. 2018) (noting finality trap).

It is this finality trap that is on full display in the present case, exposing a flawed and mechanistic application of the finality rule resulting in the unjust denial of appellate review. The Ninth Circuit's approach to the finality rule set forth in *Galaza v. Wolf*, 954 F.3d 1267 (9th Cir. 2020), and applied in this case, does not permit a pragmatic consideration of finality. In *Galaza*, the Ninth Circuit held that "when a party that has suffered an adverse partial judgment subsequently dismisses any remaining claims without prejudice, and does so without the approval and meaningful participation of the district court, this court lacks jurisdiction under 28 U.S.C. § 1291." *Id.* at 1271. This rule applies "[d]espite the lack of evidence of any attempt to manufacture appellate jurisdiction through manipulation...." *Id.* In essence, the Ninth Circuit made the means the end. What once was a factor in establishing the absence of appellate manipulation, *i.e.*, judicial approval of the dismissal, has been converted into a mandate for a higher but undefined level of "meaningful judicial participation."

Here, the Ninth Circuit initially denied Respondents' motion to dismiss the appeal for lack of appellate jurisdiction without prejudice to renewing such argument in the answering brief. App. 9. After the case was fully briefed, the Ninth Circuit specifically requested supplemental briefing on the effect of *Galaza*, which had been decided after the court's denial of the motion to dismiss, on the court's appellate jurisdiction. Following additional briefing and oral argument, the Ninth Circuit dismissed Starline's fully-briefed appeal for lack of finality under *Galaza*, holding that "[b]ecause the district court played no role in the parties' voluntary dismissal of the claims, that dismissal did not produce a final, appealable order." App. 3.

The Ninth Circuit, however, acknowledged that some judicial involvement by the district court existed in this case, but it was not enough. It noted that while "the joint stipulation stated that the voluntary dismissal was 'at the suggestion of the Court,' [the stipulation] also noted that this suggestion was 'to avoid an unnecessary appearance at the pre-trial conference....'" App. 3. The Ninth Circuit concluded this was not "meaningful district court participation" because it did not constitute "a substantive direction as to the remaining claims." App. 3. The Ninth Circuit then created further doubt as to what would be sufficient participation by stating: "In any event, even if 'the district court approved the stipulation to . . .

dismiss, such approval cannot be said to involve meaningful consideration or participation by the district court inasmuch as the parties were entitled to do so without leave of the court.'" App. 3 (quoting *Am. States Ins. Co. v. Dastar Corp.*, 318 F.3d 881, 888 (9th Cir. 2003)). In the end, the Ninth Circuit dismissed a fully-briefed appeal despite the absence of any appellate manipulation or the threat of piecemeal litigation in contravention of the prevailing standard for practicality set forth by this Court.

The finality rule was not designed to punish those who have imperfectly brought their claims to completion or inadvertently failed to do so. It was designed to guard against those who would attempt to manipulate the trial and appellate procedures to seek a premature appeal and to insulate the appellate courts from multiple appeals on the same matter. *See Dannenberg v. Software Toolworks Inc.*, 16 F.3d 1073, 1074 (9th Cir. 1994) (section 1291 "forbid[s] piecemeal disposition on appeal of what for practical purposes is a single controversy") (quoting *Cobbledick v. United States,* 309 U.S. 323, 325 (1940)).

The Ninth's Circuit's "meaningful participation" requirement, however, takes too rigid an approach to the finality rule's gatekeeping function without providing sufficient notice to litigants of what precise judicial involvement will satisfy the requirement.

Review by this Court is necessary to ensure the finality rule is properly and fairly applied by the Ninth Circuit, and indeed across all the circuits, so that litigants who did not engage in manufacturing appellate jurisdiction will not be prevented from obtaining appellate review while still preserving the proper functioning of judicial administration.

B. Brief Factual and Procedural Background

Petitioner Starline is one of the oldest bus-tour operators in Los Angeles, California. For decades, Starline has provided a wide variety of sightseeing tours, including tours of movie star homes, movie studios and locations, beaches, amusement parks, and various cities. Its buses and other vehicles can be seen virtually everywhere throughout Los Angeles.

Starline joined forces with TMZ, the well-known tabloid website and television show, to create a bus tour in 2010. App. 12. The partnership tour operated under several different names, including the "TMZ Tour," "TMZ Hollywood Tour Secrets & Celebrity Hot Spots," and "the TMZ Celebrity Tour." *See, e.g.*, App. 24, 29, 32. The joint venture's profits grew over the next several years.

Warner Bros. Entertainment Inc. ("WBEI"), the parent company of TMZ, realized the potential to keep all of the profits in-house, and together TMZ and WBEI developed a plan to terminate the partnership with Starline so they could run the tour on their own, despite having no prior tour bus

experience. TMZ terminated the parties' agreement and the partners ceased operating together. App. 16.

Following this breakdown of Starline and TMZ's partnership, TMZ and WBEI filed a civil complaint against Starline, alleging eight causes of action. App. 17. Starline answered and filed counterclaims against both TMZ and WBEI. App. 18. Starline filed its FACC on May 8, 2016, pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure. App. 18. The district court had jurisdiction over the parties' federal claims under 15 U.S.C. § 1121 and 28 U.S.C. § 1331, 1338(a) and (b). The district court had supplemental jurisdiction over the state law claims under 28 U.S.C. § 1367(a).

Upon a motion to compel arbitration by TMZ, the district court ordered to arbitration all of Starline's damages claims against TMZ. App. 19. The district court stayed the remaining claims pending arbitration, including Starline's declaratory relief claim against TMZ, all of Starline's claims against WBEI, and WBEI's previously filed Motion to Strike[1] and Motion to Dismiss Starline's Counterclaim. App. 19.

TMZ and Starline arbitrated their claims over a period of approximately 18 months. App. 19. Following the completion of arbitration and the

[1] WBEI's Motion to Strike is not at issue in this petition nor is the portion of the Court's order related thereto.

lifting of the stay, the district court entered a scheduling order in May 2018. App. 20. Starline filed a motion for leave to amend its pleadings on August 29, 2018. App. 37.

On October 19, 2019, the district court entered its order denying Starline's motion for leave to amend and its order granting WBEI's motion to dismiss, which had previously been stayed pending arbitration. App. 11-55. In its order granting WBEI's motion to dismiss, the court noted that the trial set for February 2019, was for Starline's claims against WBEI only: "At a scheduling conference on May 29, 2018, the Court set trial to resolve the remaining trademark matters against WBEI for February 26, 2019." App. 20.

Following the dismissal without leave to amend, Plaintiffs' claims against Starline for declaratory and injunctive relief remained (although they had become moot by the cessation of any alleged infringing conduct and had not been pursued in litigation). App. 61-63. Starline had a sole claim for declaratory relief against TMZ remaining, the substance of which had been resolved in arbitration. Therefore, the parties by joint stipulation dismissed all remaining claims as well as the entire action, albeit without prejudice. App. 58.

Despite the stipulation's inclusion of the language "without prejudice," the parties expressly noted in their dismissal that the district was aware

of their desire to avoid an unnecessary appearance at the pretrial conference. App. 58. None of the parties intended to pursue the remaining claims, as the court was well aware. In its pretrial Memorandum of Contentions of Fact and Law, Starline explicitly asked the district court to dismiss its single remaining claim for declaratory relief against TMZ because the substance of the claim had been addressed in the arbitration proceedings, the very arbitration proceedings previously ordered by the district court. App. 62-63. The parties clearly intended the stipulation of dismissal to end the litigation. The court entered the Report on the Filing or Determination of an Action Regarding a Patent or Trademark, which noted that the decision/judgment of a stipulated dismissal had been entered. The case was closed in February 2019. App. 57.

After Starline appealed to the Ninth Circuit and filed its opening brief, Respondents filed a motion to dismiss for lack of jurisdiction based on finality, which the Court denied on September 17, 2019, without prejudice to renewing the arguments in the answering brief, App. 9-10, which they did. After the parties had submitted their briefing in full, the Court ordered the parties to file letter briefs to address the effect on Starline's appeal, if any, of the recently decided case of *Galaza v. Wolf*, 954 F.3d 1267 (9th Cir. 2020). App. 7. *Galaza* was decided on April 8, 2020. Both parties submitted their

supplemental briefing, and the panel heard oral argument on August 10, 2020. App. 1.

The panel issued its memorandum decision on August 28, 2020, dismissing Starline's appeal for lack of jurisdiction. App. 1. Starline filed a petition for panel rehearing and rehearing en banc, which was denied on November 4, 2020. App. 5-6.

REASONS WHY CERTIORARI IS WARRANTED

I. This Court Should Hold That the Ninth Circuit's Undefined Meaningful Judicial Participation Requirement Impermissibly Abandons the Practical Approach to Finality Required by This Court.

The Ninth Circuit's decision in *Galaza* shifts the framework for determination of finality. It substitutes an undefined heightened judicial-participation requirement for the long-standing considerations regarding appellate manipulation and piecemeal litigation. In this case, the Ninth Circuit dismissed a fully-briefed appeal, despite having previously denied Respondents' motion to dismiss, without any evidence of appellate manipulation or any threat of piecemeal litigation. Under the pre-*Galaza* standard, Starline's appeal would have been heard on merit.

In balancing the importance of preserving proper judicial administration via the "finality rule" while ensuring that litigants are able to access

appellate review of their claims on the merits, this Court has chosen to give finality a "practical rather than a technical construction." *Microsoft Corp. v. Baker*, 137 S.Ct. 1702, 1712 (2017) (quoting *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 171) (internal quotation marks omitted). The Ninth Circuit's *Galaza* decision moves away from this practical approach to a technical construction of the rule without proper guideposts. The implementation of this rule provides no clarity for litigants, leaving confusion as to the parameters of "meaningful participation" by district courts while removing other safety-valve considerations, thereby tightening the finality trap.

The phrase adopted in *Galaza* of "approval and meaningful participation" is never defined. What is clear is that issuance of an order is in and of itself not enough to satisfy this requirement: "Meaningful participation means more than the court simply entering an order allowing (without necessarily approving) a voluntary dismissal ...." *E.R.E. Ventures, LLC v. David Evans and Assocs.*, 812 Fed. App'x 459, 460 (9th Cir. July 8, 2020). In its Memorandum Opinion in this case, and considering that the record reveals the dismissal was filed at the suggestion of the district court to avoid useless appearances and waste of judicial resources, the Ninth Circuit appears to have dropped the approval language in its analysis: "Here, 'there was no meaningful district court participation in' the parties' 'voluntary dismissal' of

their surviving claims. ... In any event, even if 'the district court approved the stipulation to ... dismiss, such approval cannot be said to involve meaningful consideration or participation by the district court inasmuch as the parties were entitled to do so without leave of the *court."* App. 3 (quoting *Am. States Ins. Co. v. Dastar Corp.*, 318 F.3d 881, 888 (9th Cir. 2003)). This approach implies that the district court's knowledge, suggestion, or even issuance of an order is an insufficient level of judicial involvement under *Galaza*. What is enough remains unknown.

Not only does the *Galaza* approach not provide any greater clarity for litigants, it weakens the recourse a party may have to remedy the problem on appeal. Under *Galaza*, no longer may a litigant appeal to his lack of intent to short cut the appellate procedures or circumvent the district court. Evidence of appellate manipulation is no longer required to deny access to appellate review. Thus, if a party inadvertently dismisses its claims without prejudice under Rule 41(a)(1) in the Ninth Circuit, it is irreparably caught in the finality trap. It will have no recourse. *See Commercial Space Mgmt. Co., Inc. v. Boeing Co., Inc.*, 193 F.3d 1074, 1076 (9th Cir. 1999) ("once a notice of voluntary dismissal is filed, the district court in which the action is pending loses jurisdiction and cannot exercise discretion with respect to the terms and conditions of the dismissal"); *Meeks v. Blazin Wings, Inc.*, 821 Fed. App'x 771, 775 (9th Cir. Jul.

30, 2020) (Miller, J. dissenting) (recognizing that dismissal of the appeal left the litigant in a "jurisdictional no man's land").

Despite the Ninth Circuit's statement to the contrary in its Memorandum Opinion in this case, the *Galaza* requirement for meaningful judicial participation is not merely a reemphasis of the Court's precedent in *James v. Price Stern Sloan, Inc.*, 283 F.3d 1064 (9th Cir. 2002). App. 2-3 ("We recently reemphasized that this exception applies only if the dismissing party secures 'the approval and meaningful participation of the district court.'") (*citing Galaza*, 954 F.3d at 1272)). *Galaza* elevates what was previously a factor in determining finality to a technical and dispositive requirement, and one that lacks clarity about what constitutes "judicial approval and meaningful participation" nonetheless. *See, e.g.*, *E.R.E. Ventures, LLC*, 812 F. App'x at 460 ("Our recent decision in *Galaza* requires that the district court 'meaningfully participate' in the voluntary dismissal of claims in order for this court to have jurisdiction over the appeal.").

Appellate manipulation, which has been the essential element to dismissing an appeal for lack of finality, *James*, 283 F.3d at 1066 ("We have always regarded evidence of such manipulation as the necessary condition for disallowing an appeal where a party dismissed its claims without prejudice. ... The district court's participation in the

process is an additional factor alleviating concerns about a possible manipulation of the appellate process"), is no longer necessary. *Galaza*, 954 F.3d at 1272 ("Despite the lack of evidence of any attempt to manufacture appellate jurisdiction through manipulation, the circumstances of this case emphasize the need for district court involvement in this sort of dismissal so that the district court can offer a 'clear indication of finality[,]' which would avoid 'confus[ing] the parties and the public.'").

Here, there was no attempt to take an appellate shortcut or to revive claims after the appeal or to work around a denial of a Rule 54(b) motion. The district court was aware of the parties' intent not to pursue their remaining claims for declaratory and injunctive relief. The parties did not surreptitiously try to dismiss their claims behind the district court's back nor did they ignore a court order.

The district court's prior order of dismissal noted that the scheduled trial was set to address only the remaining claims against WBEI, the very claims that the district court dismissed with prejudice. App. 20. Furthermore, Starline informed the district court in pretrial papers that its sole remaining claim for declaratory relief against TMZ had been addressed in arbitration and requested that the court dismiss that claim. App. 63. In addition, the court reached out to the parties days before a scheduled pretrial hearing. Upon being

informed that neither party intended to proceed, suggested that a dismissal would need to be filed to avoid an appearance at the pretrial hearing. App. 57. Upon the parties' stipulation, the court filed the Report on the Filing or Determination of an Action Regarding a Patent or Trademark and the case was closed. App. 58. Nothing remained before the district court. Under the Ninth Circuit's ambiguous requirement for meaningful judicial participation, a party who did not intend to subvert the appellate process nonetheless was prevented from having their appeal heard based on technicalities.

At the end of the day, the Ninth Circuit's *Galaza* rule does not comport with either the Ninth Circuit's prior emphasis on practicality or this Court's injunction requiring the same.

> While 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. We know, of course, that § 1291 does not limit appellate review to "those final judgments which terminate an action ... ," (citation), but rather that the requirement of finality is to be given a "practical rather than a technical construction." (citation).

Eisen, 417 U.S. at 170–71 (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-46 (1949)). *See also Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106, (2009) ("A 'final decisio[n]' is typically one 'by which a district court disassociates itself from a case.' (Citation). This Court, however, 'has long given' § 1291 a 'practical rather than a technical construction.'") (quoting *Swint v. Chambers County Comm'n,* 514 U.S. 35, 42 (1995) and *Cohen,* 337 U.S. at 546.).

This Court has recognized that there are some marginal cases that require the flexibility of a practical construction of the finality rule. *See Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964) ("[O]ur cases long have recognized that whether a ruling is 'final' within the meaning of s 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. Because of this difficulty this Court has held that the requirement of finality is to be given a 'practical rather than a technical construction.'") (quoting *Cohen*, 337 U.S. at 546).

To maintain a practical approach to the finality rule, courts should evaluate "the competing considerations underlying all questions of finality—'the inconvenience and costs of piecemeal review on

the one hand and the danger of denying justice by delay on the other.'" *Eisen*, 417 U.S. at 170–71 (quoting *Dickinson v. Petroleum Conversation Corp.*, 338 U.S. 507, 511 (1950)). An appeal should be allowed where "there did not appear to be any evidence of manipulation in the record, the reason for dismissal appeared legitimate, and the parties did not stipulate to waive the statute of limitations based on the outcome of the appeal," *Am. States Ins. Co*, 318 F.3d at 887-888 (*citing James*, 283 F.3d at 1066-69). Such an approach properly balances the concerns for protecting both judicial administration and litigants rights. The Ninth Circuit's approach in *Galaza* does not.

The concurrence in *Galaza* noted the Ninth Circuit's history of such consideration: "[W]e have adopted a 'pragmatic evaluation of finality,' [citation] and carved out exceptions under which voluntary dismissals without prejudice can effectively result in final decisions under section 1291 [citation]." *Galaza*, 954 F.3d at 1273-1274 (Paez, J. concurring) (examining several of the Ninth Circuit's prior approaches to determining finality). Other Ninth Circuit cases have also recognized some of the relevant factors to be considered. *See, e.g.*, *Dannenberg*, 16 F.3d at 1074-76 (considering whether the parties sought to reserve their claims following appeal); *Horn v. Berdon, Inc. v. Defined Ben. Pension Plan*, 938 F.2d 125, 126 n.1 (9th Cir. 1991) (considering whether the remaining claims were effectively no longer

before the court because they were entirely dependent on the dismissed claims).

Of course, whether the court participated in the dismissal has been considered a factor, even a substantial factor, in determining whether appellate manipulation is present. *Galaza*, 954 F.3d at 1272 ("This court has regularly expressed that a district court's involvement in the voluntary dismissal of a plaintiff's claims carries substantial weight in determining whether appellate jurisdiction is proper."). It has not, however, been a separate, standalone requirement to be met in the first place. *See James*, 283 F.3d at 1066 ("We have always regarded evidence of such manipulation as the necessary condition for disallowing an appeal where a party dismissed its claims without prejudice. ... The district court's participation in the process is an additional factor alleviating concerns about a possible manipulation of the appellate process.").

Review by this Court is necessary to ensure that litigants are not denied their right to appellate review over a technical violation of a judicially-created rule when there is no evidence of appellate manipulation or threat of a piecemeal appeal.

II. The Ninth Circuit's Approach to the Finality Rule Is Out of Line with the Other Circuits.

The Ninth Circuit has been described as "one of the strictest adherents to the finality rule." Terry

W. Schackmann & Barry L. Pickens, *The Finality Trap: Accidentally Losing Your Right to Appeal (Part II)*, 58 J. Mo. B. 138, 139-40 (2002). The Ninth Circuit's *Galaza* decision provides additional support for that assessment. Thus, a litigant in California under the authority of the Ninth Circuit might be denied an appeal when a litigant in New York or North Carolina would be permitted to proceed. A dissenting opinion in a recent Fourth Circuit case would have dismissed an appeal that was allowed to proceed, citing *Galaza's* approach to voluntary dismissals. *Affinity Living Grp., LLC v. StarStone Specialty Ins. Co.*, 959 F.3d 634, 643 (4th Cir. 2020) (King, J. dissenting).

While there is no uniformity among the circuits on how to determine finality, some circuits have arrived at far more practical approaches. The Eighth Circuit has permitted an appeal after a dismissal without prejudice focusing on the lack of appellate manipulation, as was the Ninth Circuit's previous practice. *Gannon Int'l, Ltd. v. Blocker*, 684 F.3d 785, 792 (8th Cir. 2012). That same circuit has also allowed an appeal, without any discussion of appellate manipulation, after a voluntary dismissal of remaining claims by stipulation. *Hope v. Klabal*, 457 F.3d 784, 790 (8th Cir. 2006) ("the Supreme 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," *citing United States v. Wallace & Tiernan Co.,* 336 U.S. 793, 794 n. 1 (1949).

Several circuits follow the "litigant-disclaimer solution" or the "disavowal approach," which allows parties to disavow or disclaim dismissal without prejudice during the appellate proceedings, thereby allowing those dismissals to be treated as with prejudice to satisfy the finality rule. *See, e.g.*, *Jewish People for the Betterment of Westhampton Beach v. Village of Westhampton Beach*, 778 F.3d 390, 394 (2d Cir. 2015) ("a plaintiff may cure such a defect in appellate jurisdiction [*i.e.*, a stipulation of dismissal without prejudice] by disclaiming an intent to revive the dismissed claim (effectively, converting it to a dismissal *with prejudice,* for reasons of estoppel)."); *Erie Cnty. Retirees Ass'n v. County of Erie, Pa.*, 220 F.3d 193, 201-02 (3d Cir. 2000) ("Inasmuch as appellants are withdrawing with prejudice any ADEA claim not disposed of by the district court's September 30, 1999 order, we have jurisdiction under 28 U.S.C. § 1291"); *JTC Petroleum Co. v. Piasa Motor Fuels, Inc.*, 190 F.3d 775, 776-77 (7th Cir. 1999) ("plaintiff's lawyer quickly agreed that we could treat the dismissal of the two claims as having been with prejudice, thus winding up the litigation and eliminating the bar to our jurisdiction"). This approach is a welcome balance between preserving finality and protecting the rights of litigants to an appeal. *See Williams v. Seidenbach*, 958 F.3d 341, 357 (5th Cir. 2020) (Willett, J. concurring) (highlighting the benefits of the "litigant disclaimer solution").

The Ninth Circuit's *Galaza* rule, in contrast with these other circuits, fails to maintain the flexibility and balance necessary to fairly apply the finality rule in any given particular case. It is out of step with many of its sister circuits and with this Court's recognition of the need for practicality in analyzing those cases in which finality may not fit the "rule." *See Gillespie*, 379 U.S. at 152.

III. It Is Time to Expose and Excise the Finality Trap

This case illustrates how the finality trap can be sprung without notice even on appeal. Here, acting on the Court's prompting, all parties stipulated to dismiss the remaining claims to avoid further proceedings in the trial court without further waste of judicial resources and to end the case. The case then ended. When Starline appealed, Respondents filed a motion to dismiss the appeal for lack of jurisdiction to spring the trap in its favor. Under the applicable standard for finality at that time, the motion lacked merit because there was no intent for appellate manipulation and no threat of piecemeal litigation. The Ninth Circuit denied Respondent's motion without prejudice to renewing the arguments in its answering brief.

While the case proceeded to full briefing, the law in the Ninth Circuit shifted based on *Galaza,* moving from judicial participation as a factor demonstrating the lack of appellate manipulation

to meaningful judicial participation as a requirement. The Ninth Circuit then applied this standard to Starline's appeal and dismissed it. Starline found itself firmly locked in the finality trap.

This case is emblematic of the catch 22-effect of the finality trap. Litigants can be subjected to its snare even after an appeal is underway. The Eleventh Circuit has observed how a litigant can land in a circumstance where no court has jurisdiction to act:

> The finality trap happens when a district court disposes of some, but not all, claims on the merits, and the plaintiff then voluntarily dismisses the action without prejudice pursuant to Rule 41(a). A majority of circuits, including this Circuit, have held that when this occurs, the district court loses its jurisdiction to entertain a subsequent motion to enter final judgment on the previously disposed of claims. [Citation]. In turn, appellate review is permanently foreclosed because the dismissal of the action without prejudice is not a "final decision," and thus is not appealable under 28 U.S.C. § 1291, and there is no court left with jurisdiction to make the decision "final."

Perry, 891 F.3d at 959.

Petitioner submits the judicial system operates more efficiently when litigants are informed of the rules in advance to safeguard their interest as much as possible. Judicial participation has been but one factor in the evaluation of finality. Shifting the rules on finality, particularly during the appeal itself, violates basic standards of fair play and this Court's prior mandates for practical evaluation.

Petitioner submits this Court should remove the finality trap to create a fair and balanced approach for all litigants to have their appeals heard on merit when no evidence of appellate manipulation or piecemeal litigation is presented.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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