No. 20-478

IN THE

# Supreme Court of the United States

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

v.

ACE AMERICAN INSURANCE COMPANY, ET AL.,
*Respondents*.

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

## BRIEF IN OPPOSITION


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## QUESTION PRESENTED

Whether the court of appeals correctly held that a litigant cannot appeal from a district court order resolving fewer than all of its claims where the litigant fails to seek the entry of a final judgment under Federal Rule of Civil Procedure 54(b) and instead voluntarily dismisses its remaining claim without prejudice.

## PARTIES TO THE PROCEEDING

Petitioner, plaintiff-appellant below, is CBX Resources, L.L.C. Respondents, defendants-appellees below, are ACE American Insurance Company and ACE Property and Casualty Insurance Company.

## CORPORATE DISCLOSURE STATEMENT

Respondents ACE American Insurance Company and ACE Property and Casualty Insurance Company are wholly-owned subsidiaries of INA Holdings Corporation. INA Holdings Corporation is a wholly-owned subsidiary of INA Financial Corporation. INA Financial Corporation is a wholly-owned subsidiary of INA Corporation. INA Corporation is a wholly-owned subsidiary of Chubb INA Holdings Inc. Chubb INA Holdings Inc. is owned 80% by Chubb Group Holdings Inc. and 20% by Chubb Limited. Chubb Group Holdings Inc. is a wholly-owned subsidiary of Chubb Limited. Chubb Limited is publicly traded on the New York Stock Exchange. No publicly held corporation owns 10% or more of Chubb Limited's stock.

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## INTRODUCTION

Petitioner seeks review of an issue that presents no meaningful disagreement among the circuits and has no meaningful consequences for litigants and the litigation process. This case itself illustrates the point.

After the district court entered a partial summary judgment ruling against petitioner on all but one of its claims, petitioner sought to appeal the ruling before reaching finality on the remaining claim. As every federal circuit agrees, the Federal Rules of Civil Procedure provide a litigant in that position numerous ways to seek an appeal from such an interlocutory ruling. The litigant can seek a partial final judgment from the district court under Rule 54(b). The litigant can request an appeal certification under 28 U.S.C. § 1292(b). Or the litigant can dismiss any remaining claims with prejudice under Rule 41(a) and obtain true finality.

All these options—and more—were available to petitioner here under Fifth Circuit precedent, just as they would have been under any other circuit's precedent. Yet petitioner chose none of them. Instead, petitioner elected to dismiss its remaining claim *without* prejudice, then sought to treat the case as final and appealable, even though the remaining claim was not conclusively resolved. Unsurprisingly, the court of appeals dismissed for lack of jurisdiction, ruling that precisely because petitioner sought to keep its remaining claim alive, the judgment could not fairly be deemed final and appealable. That unexceptionable ruling was manifestly correct and did not ensnare petitioner in a procedural "trap" of any kind. Pet. 5. Petitioner could have pursued other

mechanisms for appeal, but did not. It was petitioner's own choice to venture outside the written procedural rules to pursue an awkward mechanism that creates a clear problem of non-finality and non-reviewability.

There is no basis for granting certiorari to relieve petitioner of the consequences of its own actions and sanction an unwritten procedure for obtaining immediate appeal of certain otherwise non-final orders. Petitioner does not and cannot explain why existing procedural mechanisms are inadequate to the task. Nor does petitioner explain why, if there is a pressing need for a new alternative, it should come in the form of the Rube Goldberg scheme petitioner now favors, rather than through a proper rulemaking by policymaking bodies with broader perspectives on litigation concerns and greater resources to investigate them. Nor, finally, can petitioner explain why the Court should accept review and adopt the particular alternative mechanism petitioner now favors, when petitioner itself never invoked that procedural mechanism in the courts below, despite multiple opportunities to do so.

The petition should be denied.

## STATEMENT OF THE CASE

Petitioner CBX Resources, L.L.C. ("CBX") filed this insurance coverage action against respondents ACE American Insurance Company and ACE Property and Casualty Insurance Company (together, "ACE") in an attempt to recover on a $105 million default judgment CBX obtained in a Texas state court action against Espada Operating, LLC ("Espada"), the insured under two ACE insurance policies. Pet. App. 12a, 63a-207a. In the underlying action,

CBX sued Espada for negligence in drilling and operating an oil well. Pet. App. 63a, 135a. Espada defaulted, and the state court entered judgment against Espada for $105 million. Pet. App. 64a, 136a.

CBX then initiated this action in federal court to recover the default judgment from ACE. Pet. App. 12a, 63a-207a. The district court granted partial summary judgment in favor of ACE, first in an order holding that CBX's claims against Espada were excluded from coverage under the ACE policies, Pet. App. 7a-40a, and second in an order holding that the state court judgment was neither binding nor admissible against ACE, Pet. App. 41a-59a.

Following those orders, the parties agreed that only one of CBX's many claims—asserting a violation of the Texas Insurance Code—remained viable. Pet. App. 208a-210a. That statutory claim, however, was far less lucrative without the claims CBX had lost, and so CBX did not want to pursue the claim alone. Pet. App. 209a. CBX accordingly sought to make appealable the partial summary judgment orders adjudicating its more profitable claims.

Because CBX's statutory claim was still viable, the district court's orders were not final orders appealable under 28 U.S.C. § 1291. *See* Fed. R. Civ. P. 54(b); *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 435 (1956). Federal rules and statutes nevertheless provided CBX several avenues to pursue an interlocutory appeal as to the claims that had been resolved. CBX could have moved the district court for a partial final judgment under Federal Rule of Civil Procedure 54(b). That rule authorizes the district court—if it finds "there is no just reason for delay"—to "di-

rect entry of a final judgment as to one or more, but fewer than all, claims or parties," to facilitate an appeal as to those claims. Fed. R. Civ. P. 54(b). CBX also could have moved the district court to certify its partial summary judgment ruling for interlocutory appeal under 28 U.S.C. § 1292(b). *See* Pet. App. 3a, 5a-6a. Or CBX could have moved to dismiss its Texas Insurance Code claim with prejudice, ensuring that all claims were conclusively terminated and the matter was truly final.

CBX instead chose a different route. To create the appearance of finality, CBX dismissed its Texas Insurance Code claim, but *without* prejudice, ensuring that it could pursue the claim later. Pet. App. 209a. CBX also secured an agreement from ACE that, if the Fifth Circuit reversed and remanded, ACE would not object to CBX's moving for leave to amend its complaint to reassert the statutory claim, and would waive any statute of limitations defense applicable to that claim. Pet. App. 209a. After CBX voluntarily dismissed its remaining claim, Pet. App. 214a-215a, the district court purported to issue a "Final Judgment" against CBX, Pet. App. 60a-61a.

CBX appealed. After briefing in the ordinary course, the Fifth Circuit directed the parties to submit supplemental briefs addressing "whether CBX's dismissal of [its] remaining claim[] without prejudice preclude[d] [the Fifth Circuit's] appellate jurisdiction" in light of *Marshall v. Kansas City Southern Railway Co.*, 378 F.3d 495 (5th Cir. 2004), and *Ryan v. Occidental Petroleum Corp.*, 577 F.2d 298 (5th Cir. 1978). Pet. App. 217a.

Following that supplemental briefing, the Fifth Circuit placed CBX's appeal in abeyance pending the

court's en banc decision in *Williams v. Taylor-Seidenbach, Inc.*, 958 F.3d 341 (5th Cir. 2020) (en banc). In *Williams*, the plaintiff had asserted claims against multiple defendants. After the district court granted summary judgment for certain defendants, the plaintiff voluntarily dismissed its claims against the others without prejudice, and sought to appeal the court's partial summary judgment ruling. A panel dismissed the appeal based on the Fifth Circuit's longstanding rule that a litigant cannot create "appellate jurisdiction over a non-final order" by "dismissing the remaining claims without prejudice." *Williams v. Taylor-Seidenbach, Inc.*, 748 F. App'x 584, 587 (5th Cir. 2018) (internal quotation marks omitted). On remand, the plaintiff obtained an order under Rule 54(b) certifying the partial summary judgment ruling as final, and then appealed again. A panel dismissed the second appeal too, but the en banc court reversed. The full court explained that (among many other options in the Federal Rules of Civil Procedure) the natural way to appeal a ruling concerning fewer-than-all parties or claims is through Rule 54(b). *Williams*, 958 F.3d at 348. And because the *Williams* plaintiff had obtained a Rule 54(b) certification on remand from its first appeal, the court held that the plaintiff's second appeal could proceed.

After issuing the en banc decision in *Williams*, the Fifth Circuit dismissed CBX's appeal for lack of jurisdiction. Pet. App. 1a-6a. The judgment was non-final, the court held, because the partial summary judgment orders had left one claim unresolved, and CBX's without-prejudice dismissal of that claim left it open and hence non-final. Pet. App. 2a-3a. The court of appeals emphasized that CBX could

have obtained an appeal through the direct route of Rule 54(b) certification, but did not do so. Pet. App. 3a. And allowing an appeal absent such certification, the court explained, would enable CBX to make an "end-run around the final judgment rule" and obtain a "quasi-interlocutory appeal" in violation of the well-established scheme for interlocutory appeals set out in the Federal Rules of Civil Procedure. Pet. App. 2a-4a (internal quotation marks omitted).

Following dismissal of its appeal, CBX returned to the district court and moved for a status conference and leave to file an amended complaint, in an effort to reinstitute and then dismiss *with prejudice* its Texas Insurance Code claim. Pet. App. 224a-233a. The district court denied CBX's motions on the ground that CBX's appeal had deprived the court of jurisdiction. Pet. App. 234a-241a. Although the Fifth Circuit's en banc decision in *Williams* suggested that the district court's conclusion was incorrect, CBX did not appeal the ruling, and the time for it to do so has now passed. *See* Fed. R. App. P. 4(a)(1)(A). CBX instead filed this petition seeking review of the earlier court of appeals' ruling dismissing its appeal for lack of jurisdiction.

## REASONS FOR DENYING THE PETITION

CBX's petition raises the basic question whether a party may seek to appeal a partial summary judgment ruling that resolves fewer than all claims in the case. In all circuits, the answer is yes, so long as the party follows the Federal Rules of Civil Procedure governing how to do so consistent with the final-decision rule. In fact, the rules give conscientious litigants numerous means of perfecting an appeal in precisely these circumstances. That CBX

chose to pursue none of them does not justify this Court's review here. The alternative scheme CBX did pursue is both unnecessary and at odds with longstanding finality rules, as the Fifth Circuit recognized. And the different scheme CBX *now* proposes is *not* one the Fifth Circuit considered, because CBX never invoked it. If there is nevertheless some sound policy argument for sanctioning that scheme, the argument should be directed to Congress or the Judicial Conference, not this Court.

## I. PROCEDURAL RULES ALREADY PROVIDE MULTIPLE MECHANISMS FOR PARTIES TO OBTAIN IMMEDIATE APPEAL OF OTHERWISE NON-FINAL ORDERS

CBX is not a "victim" of any "judicially created trap" barring appellate review of partial summary judgment orders. Pet. 5. Rather, CBX faces a problem of its own making that rules-following litigants in every circuit can easily avoid.

"Every circuit permits a plaintiff, in at least some circumstances, voluntarily to dismiss remaining claims … from an action as a way to conclude the whole case in the district court and ready it for appeal." *Blue v. D.C. Pub. Sch.*, 764 F.3d 11, 17 (D.C. Cir. 2014); *see ITOFCA, Inc. v. MegaTrans Logistics, Inc.*, 235 F.3d 360, 365 (7th Cir. 2000) (similar). As the Fifth Circuit itself has emphasized, "established rules of civil procedure provide many tools to avoid th[e] alleged [finality] 'trap'" when a plaintiff seeks to immediately appeal a ruling that resolves some, but not all, of its claims. *Williams v. Taylor-Seidenbach, Inc.*, 958 F.3d 341, 344 (5th Cir. 2020) (en banc). In fact, there are at least *five* different

ways CBX could have sought to perfect an appeal here.

First and most obviously, CBX could have asked the district court to direct entry of partial final judgment on its non-statutory claims under Rule 54(b). That rule specifically authorizes a district court to make immediately appealable an order adjudicating fewer than all claims if it finds there is no just reason for delay. *See, e.g.*, *Williams*, 958 F.3d at 346; *Blue*, 764 F.3d at 18; *Waltman v. Georgia-Pac., LLC*, 590 F. App'x 799, 803 (10th Cir. 2014). While Rule 54(b) certification is discretionary, the district court here surely would have allowed the appeal, given its express approval of CBX's more complicated scheme, Pet. App. 213a, as well as its entry of judgment following the without-prejudice dismissal, *see infra* note 1. But instead of following the familiar and straightforward route of Rule 54(b) certification, CBX took the much-less-traveled road of without-prejudice dismissal, raising obvious doubts about finality and appellate jurisdiction.

Second, and relatedly, while CBX did unsuccessfully move for Rule 54(b) certification in the district court *after* its initial appeal was dismissed, CBX inexplicably did not appeal from the district court's denial of the motion for lack of jurisdiction. The Fifth Circuit's en banc decision in *Williams* indicates that when a non-Rule 54(b) appeal is dismissed for lack of finality, the litigant may return to the district court and seek the required certification. Indeed, that resolution is precisely what the en banc majority approved in *Williams*. 958 F.3d at 347-49; *see also Ashland Chem., Inc. v. Lombardino*, 15 F.3d 1079 (5th Cir. 1994) (per curiam) (dismissing appeal from non-final order for lack of jurisdiction but inviting

appellant to "refil[e] … another notice of appeal after a final judgment or partial final judgment under Rule 54(b) is entered by the court below"). CBX thus could have appealed from the Rule 54(b) denial and argued that the court erred by failing to follow *Williams*. CBX did nothing, however—it simply let the appeal period run, then sought relief directly from this Court by challenging the court of appeals' earlier dismissal order.

Third, CBX could have sought to have the district court's order certified as appealable under 28 U.S.C. § 1292(b). *See Ryan v. Occidental Petroleum Corp.*, 577 F.2d 298, 301 (5th Cir. 1978). But CBX chose not to seek such a certification either.

Fourth, CBX could have dismissed its remaining claim *with* prejudice under Rule 41(a). *See* Fed. R. Civ. P. 41(a); *see, e.g.*, *Waltman*, 590 F. App'x at 803; *Blue*, 764 F.3d at 17-19; *Marshall v. Kan. City S. Ry. Co.*, 378 F.3d 495, 500 (5th Cir. 2004). CBX instead chose to dismiss its claim *without* prejudice, while affirmatively expressing an intent to reassert the claim in the event of a remand on its other claims. CBX itself thus highlighted the lack of true finality inherent in its approach.

Finally, CBX could have attempted to secure appellate jurisdiction while on appeal by, in essence, retroactively transmuting its without-prejudice dismissal into a with-prejudice dismissal. Under that approach, litigants need simply "disavow to the circuit court their right to revive the dismissed claims." *Williams*, 958 F.3d at 357 (Willett, J., concurring in the judgment). That "litigant-disclaimer" procedure has been endorsed by circuits that CBX claims to be in conflict with the Fifth Circuit. Pet. 24-28; *see*, *e.g.*,

*Jewish People for the Betterment of Westhampton Beach v. Vill. of Westhampton Beach*, 778 F.3d 390, 394 (2d Cir. 2015) (obstacle to appellate jurisdiction removed where plaintiff's appeal brief specifically "disclaim[ed] any intent to revive their dismissed claim" and thereby "effectively[] convert[ed] it to a dismissal with prejudice"); *Nat'l Inspection & Repairs, Inc. v. George S. May Int'l Co.*, 600 F.3d 878, 883-84 (7th Cir. 2010) (jurisdictional bar lifted if party "unequivocal[ly]" agreed at some point on appeal "to treat the dismissal of the claim as having been with prejudice"). But there is no conflict: the Fifth Circuit has never addressed this mechanism for obtaining finality, and CBX itself did not even invoke the procedure this case. *See infra* at 13-14 (further discussing "litigant-disclaimer" procedure). CBX cannot seriously assert that the Fifth Circuit's decision creates a conflict over a procedural mechanism CBX did not invoke and the Fifth Circuit did not consider.

All of the foregoing options, of course, require a party "to take certain steps to ensure [its] right to appeal." *Williams*, 958 F.3d at 343. Those requirements exist because federal appellate courts by law have "jurisdiction to review only certain types of district court decisions." *Id.* None involves a "trap" that will ensnare unwary litigants. Just the opposite—each constitutes a key to the appellate courthouse doors, available to any litigant willing to follow written rules and clear precedents. CBX could have invoked any of those procedures to pursue the immediate appeal it sought here. That CBX chose none of them is an unforced error unworthy of this Court's review.

## II. THE QUESTION WHETHER TO CREATE YET ANOTHER MECHANISM FOR APPEAL IS A POLICY MATTER FOR THE PROCEDURAL RULE DRAFTERS

As just explained, litigants in all circuits already have numerous ways to appeal in exactly the situation where CBX found itself here. CBX, however, seeks to create yet another option, which would enable parties to appeal partial summary judgment orders at their discretion—rather than with court approval under Rule 54(b) or § 1292(b)—and without having to permanently forgo their remaining claims. It is not even clear that CBX's approach actually differs in substance from Rule 54(b) as it exists, but to the extent it does, CBX's proposal is "one of policy" that should be directed to the judicial rule drafters. Terry W. Schackmann & Barry L. Pickens, *The Finality Trap: Accidentally Losing Your Right to Appeal (Part II)*, 58 J. Mo. B. 138, 145 (2002).

By statute, this Court has "the power to prescribe general rules of practice and procedure … for cases in the United States district courts … and courts of appeals." 28 U.S.C. § 2072(a). Congress likewise has authorized the Court to make rules that "define when a ruling of a district court is final for purposes of appeal under [§] 1291." *Id.* § 2072(c). But the Court does not prescribe such rules in litigation. Rather, the rulemaking authority is exercised by the Judicial Conference's Advisory Committee on the Federal Rules of Civil Procedure. Determining whether and when an order should be final and appealable involves analyzing numerous permutations of the issue and weighing various competing considerations. Thus, the Court has recognized, "changes with respect to the meaning of final decision 'are to

come from rulemaking … not judicial decisions.'" *Hall v. Hall*, 138 S. Ct. 1118, 1131 (2018) (ellipsis in original) (quoting *Microsoft Corp. v Baker*, 137 S. Ct. 1702, 1714 (2017)); *see Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 48 (1995) ("Congress' designation of the rulemaking process as the way to define or refine when a district court ruling is 'final' and when an interlocutory order is appealable warrants the Judiciary's full respect.").

Of course, Congress and the Judicial Conference have already prescribed the answer to the situation CBX faced in the district court: Rule 54(b). If there is any reason to supplement that mechanism by allowing parties to effectively certify their *own* appeals through without-prejudice dismissals,[1] that proposed rule change would be better addressed by Congress or the Judicial Conference. *See* Schackmann & Pickens, 58 J. Mo. B. at 145-46. After all, CBX itself warns that this issue involves so many competing considerations that CBX lacks "space" in its petition to "weigh the advantages and disadvantages of all the options in detail." Pet. 34. If the issues are so overwhelming, judicial rulemaking bodies are certainly much better equipped to study the full field of litigation and determine the actual nature and extent of the problem, if any, and to identify the best mechanism to address it. *See Microsoft*, 137 S. Ct. at

[1] It is not even clear that this approach would functionally differ from Rule 54(b) in allowing for unilaterally-created finality: the without-prejudice dismissal approach still requires the district court to acquiesce in the scheme by entering a final judgment after dismissal of the remaining claims. A court willing to secure faux finality by facilitating that scheme presumably would be willing to secure genuine finality through a Rule 54(b) certification.

1714 (rulemaking bodies can "stud[y] the data … weigh[] various proposals, receive[] public comment, and refine[] [a] draft rule").[2]

## III. THIS CASE IS AN UNSUITABLE VEHICLE FOR REVIEW BECAUSE CBX DID NOT INVOKE THE PROCEDURAL MECHANISM IT NOW FAVORS

Although review of this finality issue is unwarranted in any event, this case is an especially poor vehicle for review because CBX below did not even try to pursue the approach it now endorses for securing appellate jurisdiction over certain otherwise nonfinal orders.

CBX is initially cagey about the approach it favors, bemoaning a professed lack of "space" in its petition to properly evaluate "all the options" that might be considered. Pet. 34. But CBX then manages to suggest that the "litigant-disclaimer approach—at this point—seems the cleanest and most efficient" resolution. *Id.* As noted above, however, CBX has never invoked that "litigant-disclaimer approach," making CBX's petition a uniquely unsuitable vehicle for evaluating its merits. *See supra* at 10. Because this Court is "one of final review, not of first view," *FCC v. Fox Television Stations, Inc.*, 556 U.S.

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[2] It is true that the Court in *Microsoft* granted certiorari to address the similar policy-infused procedural question there, *see* Pet. 5, but certiorari in that case was needed precisely because the appellate court had gone *beyond* existing rules to sanction a procedure better suited for policymakers to consider, *Microsoft*, 137 S. Ct. at 1712, 1714-15. Here, by contrast, the Fifth Circuit has simply *enforced* existing rules and refused to sanction an unwritten procedure for circumventing finality requirements. *See infra* at 16-18.

502, 529 (2009) (internal quotation marks omitted), it is generally inappropriate "to allow a petitioner to assert new substantive arguments attacking, rather than defending, the judgment when those arguments were not pressed in the court whose opinion [the Court is] reviewing," *United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001); *see Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) (similar). If this general issue merits review at all, it would make far more sense to address it in the context of a decision that actually considers and rejects the "litigant-disclaimer" approach CBX now haltingly endorses.

Anticipating this objection to certiorari, CBX asserts that it never had the "option" below of disclaiming any intent to pursue its dismissed Texas Insurance Code claim. Pet. 32. Nonsense. The Fifth Circuit specifically asked the parties to brief the question of appellate jurisdiction, then held oral argument, and later allowed CBX to submit an additional letter brief after the case was held in abeyance for *Williams*. Pet. App. 1a, 217a, 223a; Ltr. Resp. to Abeyance Order, *CBX Resources, L.L.C. v. ACE Am. Ins. Co.*, No. 18-50740 (5th Cir. Dec. 3, 2019). CBX thus had multiple opportunities to invoke the "litigant-disclaimer" basis for securing jurisdiction over its appeal. It did not do so. CBX instead used those opportunities to distinguish Fifth Circuit precedent on grounds it does not raise in its petition. Because the "litigant-disclaimer" mechanism was neither pressed nor passed upon below, CBX cannot seek certiorari to consider the mechanism. *See United States v. Williams*, 504 U.S. 36, 41 (1992).

## IV. THE DECISION BELOW IS CORRECT

The Fifth Circuit correctly dismissed CBX's appeal for lack of jurisdiction. The federal courts "are courts of limited jurisdiction"—"possess[ing] only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). And by statute, the courts of appeals only have jurisdiction to review a district court's "final decisions." 28 U.S.C. § 1291. That finality requirement is based on a legislative judgment that "[r]estricting appellate review to 'final decisions' prevents the debilitating effect on judicial administration caused by piecemeal appeal disposition of what is, in practical consequence, but a single controversy." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170-71 (1974).

Enforcing that legislative judgment is why the Fifth Circuit does not allow parties to use the without-prejudice dismissal device to manufacture finality over orders that do not, in fact, conclusively terminate all claims in a case. Sanctioning that approach would allow "an end-run around the final judgment rule," *Marshall*, 378 F.3d at 499-500, and "would violate the long-recognized federal policy against piecemeal appeals," *Rabbi Jacob Joseph Sch. v. Province of Mendoza*, 425 F.3d 207, 210 (2d Cir. 2005); *see Dannenberg v. Software Toolworks, Inc.*, 16 F.3d 1073, 1077 (9th Cir. 1994) (without-prejudice dismissal approach reflects "clear, and impermissible, attempt to circumvent" finality rules).[3]

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[3] This Court's decision in *United States v. Wallace & Tiernan Co.*, 336 U.S. 793 (1949), is not to the contrary. *Contra* Pet. 19. There, the dismissal was involuntary: the district

The Federal Rules of Civil Procedure already prescribe the circumstances in which appeals from partial summary judgment rulings are permitted. Those circumstances are limited and involve court supervision. Rule 54(b) is the principal mechanism, as already discussed. That rule empowers a district court to certify a partial summary judgment ruling for appeal, but requires the court "to balance the benefits of quick review of an order disposing of part of a case against the risks of multiple appeals." *Blue*, 764 F.3d at 18. Under Rule 54(b), in other words, "[t]he judge, not the parties, is meant to be the dispatcher who controls the circumstances and timing of the entry of final judgment." *Id.* Allowing litigants to take over the role of "dispatcher" and appeal from without-prejudice voluntary dismissals "would undermine Rule 54(b)'s careful limits on piecemeal appeals," by permitting parties to "periodically dismiss[] all remaining claims without prejudice" and pursue "fragmentary appeals [that] would burden courts and litigants, foster uncertainty, and undermine the salutary aims that Rule 54(b) and the final judgment rule promote." *Id.*; *see Page Plus of Atlanta, Inc. v. Owl Wireless, LLC*, 733 F.3d 658, 661-62 (6th Cir. 2013) (without-prejudice dismissal approach would permit parties to "sidestep[] the prerequisites and safeguards built into" Rule 54(b) and § 1292(b)).

This Court rejected a very similar approach to

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court dismissed the Government's entire case over the Government's objection. *Wallace & Tiernan*, 336 U.S. at 794 n.1. And in that circumstance, unlike here, "[t]hat the dismissal was without prejudice … d[id] not make the cause unappealable" because the district court's dismissal had "ended th[e] suit so far as the [d]istrict [c]ourt was concerned." *Id.*

creating appellate jurisdiction in *Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017). In *Microsoft*, the district court struck the plaintiffs' class allegations—an interlocutory ruling appealable under Rule 23(f) only by express leave of the court of appeals. When the court of appeals declined to permit a Rule 23(f) appeal, the plaintiffs tried a different tack, seeking to make the order final and immediately appealable under § 1291 by voluntarily dismissing all of their claims while reserving the right to revive the claims if the order striking class allegations were reversed on appeal.

This Court rejected the ploy and held that appellate jurisdiction was lacking. The Court explained that allowing the plaintiffs' "voluntary-dismissal tactic" would be an end-run around "Rule 23(f)'s careful calibration," *id.* at 1714, and would "subvert[] the final-judgment rule" as well, *id.* at 1712. To hold otherwise, the Court observed, would transform "Congress' final decision rule" into "a pretty puny one," fostering piecemeal litigation and undermining the established scheme for obtaining appellate review of interlocutory appeals. *Id.* at 1712-15 (internal quotation marks omitted).

The same rationale applies here. Just as Rule 23(f) governed the appeal in *Microsoft*, so too did Rule 54(b) properly govern an appeal here. Just as Rule 23(f) requires leave of the appellate court for appeal, so too did Rule 54(b) require leave of the district court here. And just as the device of dismissing claims without prejudice in *Microsoft* circumvented the final decision rule and fostered the piecemeal litigation that Rule 54(b) was adopted to avoid, so too would the same without-prejudice dismissal device have the same negative consequences here.

Enforcing the finality rule in cases like *Microsoft* and this one is far from unworkable, as CBX asserts. *See* Pet. 5-6. To the contrary, being strict and clear about finality provides much needed certainty to litigants, prevents piecemeal appeals, and honors the existing procedural framework, which already allows interlocutory appeals in similar circumstances where appropriate. The Court has "[r]epeatedly … resisted efforts to stretch § 1291 to permit appeals of right that would erode the finality principle and disserve its objectives." *Microsoft*, 137 S. Ct. at 1712-13 (collecting cases). The Fifth Circuit has correctly done the same.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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