No. 20-1083

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Anthony Kelly,

Plaintiff-Appellant,

v.

City of Alexandria, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia at Alexandria
Case No. 1:19-cv-553, Hon. Liam O'Grady

REPLY BRIEF FOR APPELLANT ANTHONY KELLY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Rules

Other Authority

INTRODUCTION

Kelly's proposed second complaint sets out detailed allegations of disparate treatment and retaliation, a racially hostile work environment, and a denial of equal protection under Section 1983 against his firehouse superiors in their individual capacities, and against the City of Alexandria. Defendants nowhere contest the factual sufficiency of these claims. Defendants instead challenge the timeliness of Kelly's appeal and the legal sufficiency of his second amended complaint. They also defend the district court's refusal to equitably toll Kelly's Title VII claims. None of these arguments has merit.

First, Defendants relitigate this Court's denial of their motion to dismiss on timeliness grounds. They argue that the district-court docket entry noting the decision below was detailed enough to be a separate document under Rule 58(a), thereby starting the 30-day clock for Kelly to appeal. But as Rule 4(a)(7)(A)(ii)'s text and decades of binding precedent make clear, a docket entry—no matter how worded—can never satisfy the separate-document requirement. *See, e.g.*, *Caperton v. Beatrice Pocahontas Coal Co.*, 585 F.2d 683, 688 (4th Cir. 1978). Without a separate document, Kelly's notice of appeal—filed within 180 days of the district court's decision—was timely.

Second, Defendants point to only one supposed deficiency in Kelly's complaint: his inaccurate citation to Section 1981. This mistake is irrelevant on a motion to dismiss. Federal pleading rules require only a factual showing supporting a plausible claim for relief, and, as the Supreme Court has instructed, a plaintiff is not required to identify

any legal theory at all. *See Johnson v. City of Shelby*, 574 U.S. 10, 12 (2014) (per curiam). This Court should therefore reverse and instruct the district court to accept Kelly's second amended complaint.

Third, Defendants contend that Kelly was not entitled to equitable tolling on his Title VII claims. But a court must grant equitable tolling where, as here, "extraordinary circumstances" prevent a timely filing. *United States v. Sosa*, 364 F.3d 507, 512 (4th Cir. 2004).

ARGUMENT

I. Kelly's appeal is timely.

Despite this Court's earlier rejection of Defendants' motion to dismiss, *see* Doc. 15 (May 5, 2020), Defendants persist in arguing that Kelly's appeal is untimely. As we now explain, Defendants are wrong.

A. Kelly timely filed his notice of appeal under Rule 4(a).

Absent exceptions not relevant here, when a district court issues a "judgment"—that is, "any order from which an appeal lies," Fed. R. Civ. P. 54(a)—the Federal Rules of Appellate Procedure provide two distinct appeal deadlines.

First, when the district court issues a "separate document," a prospective appellant generally has 30 days from entry of that separate document on the docket to file a notice of appeal. *See* Fed. R. App. P. 4(a)(1), (a)(7)(A)(ii) (first bullet); *see also* Fed. R. Civ. P. 58(a), (c)(2)(a). Second, when the district court does not issue a separate document, the 30-day appeal period still applies, but that period does not start

running until 150 days after entry of the judgment. Fed. R. App. P. 4(a)(7)(A)(ii) (second bullet).

On July 30, 2019, the district court issued, and the clerk entered on the docket, a four-page opinion explaining why the district court was dismissing the case. *See* JA 118-21. The district court never issued a separate document. *See* JA 1-3; *Caperton v. Beatrice Pocahontas Coal Co.*, 585 F.2d 683, 688 (4th Cir. 1978). Given the absence of a separate document, Kelly was not required to file his notice of appeal until 180 days after July 30, 2019. Kelly timely filed a notice of appeal 176 days later, on January 22, 2020. *See* JA 122.

B. The docket entry noting the July 30, 2019 opinion was not itself a separate document.

Defendants do not deny that Kelly's appeal would be timely in the absence of a separate document. Instead, Defendants contend that the docket entry accompanying the district court's July 30, 2019 opinion—docket entry 23, *see* JA 2—was itself a separate document that triggered the 30-day appeal period. *See* Resp. Br. 1.

Defendants' argument runs headlong into Rule 4(a)'s text. The separate-document requirement is satisfied only after "the judgment or order is entered in the civil docket" "*and* when the earlier of [two] events occurs": either "the judgment or order is set forth on a separate document," or "150 days have run from entry of the judgment or order in the civil docket." Fed. R. App. P. 4(a)(7)(A), (a)(7)(A)(ii) (emphasis added). It is not enough for the appealable order alone to be "entered in the civil docket" for the 30-day period to run. Defendants ask this Court to stop

reading before the conjunctive "and," thereby omitting the second half of the Rule's requirements. This Court should reject this antitextual argument.

Just like the Rule's text, courts carefully differentiate between docket entries and separate documents. In holding that a jury verdict alone did not trigger the appeal period, the Supreme Court observed that, "notwithstanding the instructions of the court," the docket entry evidencing the jury's verdict "was not recorded on a separate document," indicating the Court's understanding that a docket entry itself cannot function as a separate document. *United States v. Indrelunas*, 411 U.S. 216, 221 (1973).

Two decisions of this Court follow the Supreme Court's lead. In *Caperton v. Beatrice Pocahontas Coal Co.*, this Court examined a "notation" on the district court's docket that "refer[red] to the district court's ten-page opinion." 585 F.2d 683, 689 (4th Cir. 1978). The docket entry included the date of the district court's opinion and described it as "dismissing these four cases for lack of subject matter jurisdiction." But that entry nonetheless did not constitute a separate document that could trigger the running of the appeal period. *Id.* Even more pointedly, *United States v. Little* ruled that habeas petitions, because they are civil actions, are subject to the separate-document requirement, and then held that a "district court's failure to place the civil judgment on a separate document, *even though the judgment was entered on the court's docket*, precludes the beginning of an appeal period under the Federal Rule of Appellate Procedure 4(a) for one-hundred and fifty days." 392 F.3d 671, 680 (4th Cir. 2013) (emphasis added). *Caperton* and *Little* reaffirm what we know from reading Rule 4(a)(7)(A)(ii): The separate-document requirement cannot be satisfied by a docket entry alone.

This Court practices what it preaches. In a dozen decisions cited in the footnote, this Court held that the district court had issued an appealable order or opinion, but had not issued a separate document that would trigger the running of the appeal period.[1] In each of these decisions, this Court had before it a district-court docket entry that did exactly what the July 30, 2019 docket entry did here: It described and reiterated the relief granted by the district court in the dispositive order or opinion. In each case, this Court held that no separate document had been issued. *See, e.g.*, *Perry v. Clarke*, 739 F. App'x 199, 200 n.* (4th Cir. 2018) (holding that no separate document had been issued). And yet, in each, docket entries quite similar to the one Defendants rely on here (of course) existed. *See, e.g.*, *Perry v. Clarke*, 1:17-cv-00664, Dkt. 5 (E.D. Va. Aug. 14, 2017) (district court docket entry stating in part that it is "ORDERED that respondent's Motion to Dismiss (Dkt. No. 17) be and is GRANTED; and the

[1] *Perry v. Clarke*, 739 F. App'x 199, 200 n.* (4th Cir. 2018); *Emrit v. Nev. Dep't of Motor Vehicles*, 692 F. App'x 707, 708 n.* (4th Cir. 2017); *Wade v. United States*, 599 F. App'x 115, 115 (4th Cir. 2015); *In re Head*, 309 F. App'x 705, 706 (4th Cir. 2009); *Asmani v. Gov't of Islamic Republic of Iran*, 299 F. App'x 291, 292 (4th Cir. 2008); *Lynch v. Johnson*, 178 F. App'x 225, 225 n.* (4th Cir. 2006); *Haleivi v. Congress and President*, 115 F. App'x 132, 132 n.* (4th Cir. 2004); *Timmons v. Short*, 63 F. App'x 717, 718 n.1 (4th Cir. 2003); *United States v. Shanton*, 53 F. App'x 697, 697 n.* (4th Cir. 2003); *Mitchell v. Rooks*, 232 F.3d 888, at *1 (4th Cir. 2000) (table decision); *Block v. Allstate Ins. Co.*, 202 F.3d 257, at *1 (4th Cir. 1999) (table decision); *Farley v. Pittston Coal Co.*, 47 F.3d 1164, at *1 n.* (4th Cir. 1995) (table decision).

petition (Dkt. No. 7) be and is DISMISSED, AS MOOT. Signed by District Judge Liam O'Grady on 03/30/2018").[2]

Defendants ignore Rule 4(a)(7)(A)(ii)'s text and the Supreme Court's decision in *Indrelunas*. They also fail to do business with this Court's precedents, discussed above, which reject the proposition that a docket entry evidencing a judicial opinion can be a separate document. Instead, they cite three out-of-circuit cases that stand for undisputed but irrelevant propositions. *See Beaudry Motor Co. v. Abko Properties, Inc.*, 780 F.2d 751, 755 (9th Cir. 1986) (a physical document "noted in the civil docket" and mailed to plaintiff's counsel satisfied the separate-document requirement); *Herrera v. First No. Sav. and Loan Ass'n*, 805 F.2d 896, 898-99 (10th Cir. 1986) (the time for appeal runs from the date of the entry on the civil docket of a separate document evidencing a grant of summary judgment);[3] *Ctr. for Nuclear Responsibility, Inc. v. U.S. Nuclear Regulatory Comm'n*, 781 F.2d 935, 938-39 (D.C. Cir. 1986) (the time for appeal runs

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[2] The district court docket entries corresponding to this Court's decisions cited in footnote one are available on PACER. Kelly submitted copies of those docket entries when he moved to file a surreply in response to Defendants' motion to dismiss this appeal. *See* Doc. 13-2, Exhs. A-L (Feb. 11, 2020).

[3] Indeed, *Herrera* followed this Court's decision in *Caperton*, emphasizing that an appeal's timeliness depends on "when the essentials of a judgment or order are set forth in a written document separate from the court's opinion and memorandum *and* when the substance of this separate document is reflected in an appropriate notation on the docket sheet assigned to the action in the district court." *Herrera*, 805 F.2d at 899 (quoting *Caperton*, 585 F.2d at 688).

from the date of the entry on the civil docket of a separate document evidencing a dismissal for lack of subject-matter jurisdiction).

Defendants also observe that two circuits seemingly permit docket entries to serve as separate documents in some circumstances. *See Witasick v. Minnesota Mut. Life. Ins. Co.*, 803 F.3d 184, 188 (3d Cir. 2015) (suggesting, in dicta, that a docket entry accompanying an appealable order sometimes can function as a separate document); *Brown v. Fifth Third Bank*, 730 F.3d 698, 701 (7th Cir. 2013) (Posner, J., in chambers) (criticizing and then distinguishing Seventh Circuit precedent allowing some docket entries to satisfy the separate-document requirement).

These out-of-circuit decisions flout Rule 4(a)(7)(A)(ii)'s text and Supreme Court precedent and, as already explained, are flatly contradicted by this Court's precedent. They also undermine the purpose of the separate-document requirement. If docket entries "can, in certain circumstances" (but not others) satisfy the separate-document requirement, *Witasick*, 803 F.3d at 188 (3d Cir. 2015), *see* Resp. Br. 1-2, every docket entry noting a judgment would cause litigants to "wonder … whether the 30-day period for filing an appeal had yet begun to run." *Brown*, 730 F.3d at 701. But the separate-document requirement is designed to "eliminate these uncertainties" about "what actions of the District Court would constitute an entry of judgment." *Indrelunas*, 411 U.S. at 220. Defendants' proposed word-by-word parsing of docket entries would contravene the separate-document requirement's purpose by introducing unnecessary ambiguity into its "mechanical[]" and "formalis[t]" operation, with no countervailing benefit. *Id.*; *see Caperton*, 585 F.2d at 689.

C. Kelly did not waive the separate-document requirement.

In arguing that Kelly waived the separate-document requirement, Defendants rely on doctrine concerning a now-obsolete situation in which a party had filed a notice of appeal in the absence of a separate document. *See* Resp. Br. 2-3 (citing *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1987) (per curiam)). Today, this "waiver" situation cannot arise because of two post-*Bankers Trust* amendments to the Rules. First, under Rule 4(a)(7)(B), the failure of the district court to issue a separate document does not affect the validity of an already-filed appeal. Second, in the absence of a separate document, the 30-day appeal period begins to run 150 days after the entry of an appealable order, Fed. R. App. P. 4(a)(7)(A)(ii) (second bullet), imposing a separate 180-day deadline. (Prior to the 150-day rule, in the absence of a separate document, the appeal period *never* began to run.) Because there was no separate document issued here, the 180-day deadline applied, and Kelly met it. There's simply no other rule that Kelly could have waived.

II. The denial of Kelly's motion for leave to amend as futile should be reversed.

A. This Court's review is de novo.

"A district court may deny a motion to amend when the amendment would be prejudicial to the opposing party, the moving party has acted in bad faith, or the amendment would be futile." *Equal Rights Ctr. v. Niles Bolton Assocs.*, 602 F.3d 597, 603 (4th Cir. 2010). A denial of a motion to amend for prejudice or bad faith is reviewed for abuse of discretion. *See Chaudhry v. Gallerizzo*, 174 F.3d 394, 404 (4th Cir. 1999)

(prejudice); *Laber v. Harvey*, 438 F.3d 404, 428-29 (4th Cir. 2006) (en banc) (prejudice and bad faith). But as this Court has observed on many occasions, a denial of a motion to amend on the basis of futility is reviewed de novo. *See, e.g.*, *Davidson v. Randall*, 912 F.3d 666, 690 (4th Cir. 2019); *U.S. ex rel. Ahumada v. NISH*, 756 F.3d 268, 274 (4th Cir. 2014).

Defendants nonetheless assert that this Court should review for abuse of discretion the district court's futility holding, citing *Foman v. Davis*, 371 U.S. 178 (1962), and *Laber v. Harvey*, 438 F.3d 404 (4th Cir. 2006) (en banc). *See* Resp. Br. 15-16. But those decisions simply lump together district-court holdings on prejudice, bad faith, *and* futility, showing, at most, that courts are not always diligent about distinguishing between the correct standard of review applicable to holdings regarding prejudice and bad faith (abuse of discretion) and to futility (de novo). *See Foman*, 371 U.S. at 182; *Laber*, 438 F.3d at 428. When this Court has squarely addressed that distinction, it's been clear: "We review for abuse of discretion a district court's denial of leave to amend for prejudice, whereas we review de novo a district court's denial of leave to amend on the basis of futility," *Davidson*, 912 F.3d at 690, and the latter is the standard that applies here.

B. Defendants do not contest that Kelly's proposed second amended complaint states plausible claims for relief.

Defendants' answering brief nowhere contests the factual sufficiency of any of the claims in Kelly's proposed second complaint. As explained in our opening brief (at 17-30), these detailed allegations state plausible claims of disparate treatment and

retaliation, a racially hostile work environment, and a denial of equal protection under Section 1983 against Dube, McMaster, and Schultz, in their individual capacities, and allege plausible Section 1983 and Title VII claims against the City of Alexandria. *See* JA 83-106. Defendants have forfeited any challenge to the factual sufficiency of the second amended complaint. *See Continental Casualty Co. v. Amerisure Insurance Co.*, 886 F.3d 366, 375 n.9 (4th Cir. 2018); *Suarez-Valenzuela v. Holder*, 714 F.3d 241, 248-49 (4th Cir. 2013); *see also* Resp. Br. 15 n.3.

C. Kelly's mistaken reference to Section 1981a, instead of Section 1981 or 1981(a), does not render his second amended complaint futile.

Defendants rely on only one supposed deficiency in asserting that Kelly's amendment would have been futile: Kelly's mistaken citation to Section 1981a, instead of Section 1981 or Section 1981(a), as a statutory predicate for his Section 1983 claims. But federal pleading rules "do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted." *Johnson v. City of Shelby*, 574 U.S. 10, 11 (2014) (per curiam). Thus, the district court erred by denying Kelly's motion for leave to amend as futile.

1. A complaint states a claim when it provides "a short and plain statement of the claim showing that the pleader is entitled to relief." *Johnson*, 574 U.S. at 11 (quoting Fed. R. Civ. P. 8(a)). A plaintiff need not recite "detailed factual allegations" at this stage, but rather satisfies the pleading requirements simply by offering enough facts to make a claim "plausible." *ACA Fin. Guar. Corp. v. City of Buena Vista*, 917 F.3d 206, 211-12 (4th Cir. 2019). As noted, Defendants do not contest the complaint's factual

sufficiency. But they argue that, to provide a defendant with fair notice, a complaint must perfectly state the plaintiff's legal theory by correctly citing the statutory authority on which the claims rely. *See* Resp. Br. 20-21. No such requirement exists.

"[I]t is unnecessary to set out a legal theory" in a complaint. *Johnson*, 574 U.S. at 12 (quoting 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1219 (3d ed. 2004)). As our opening brief notes (at 30-31), the federal rules do not require a complaint to use "precise or magical words" or "legal labels" to adequately state a claim. *See King v. Rubenstein*, 825 F.3d 206, 222 (4th Cir. 2016) (first quoting *Stevenson v. City of Seat Pleasant*, 743 F.3d 411, 418 (4th Cir. 2014); then quoting *Labram v. Havel*, 43 F.3d 918, 920 (4th Cir. 1995)). Of particular importance here, and contrary to Defendants' contentions, *see* Resp. Br. 20-21, 23, legal labels are unnecessary to identify the underlying law or constitutional provision giving rise to a Section 1983 claim. *See King*, 825 F.3d at 222. If a plaintiff may prevail on a motion to dismiss without identifying *any* legal theory in the complaint, *see Johnson*, 574 U.S. at 12, it cannot be that Kelly's motion to amend his complaint was futile just because Kelly sometimes (but not always) referenced the wrong statute.

Defendants' attempt (at 21-22) to distinguish *Johnson* from this case because the plaintiffs there failed to invoke Section 1983, not the predicate violation, is beside the point. *See King*, 825 F.3d at 222; *Stevenson*, 743 F. 3d at 418-19. There is no functional difference between misciting the predicate rights-creating provision (as here) and omitting the vehicle through which a party brings claims under that provision (as in *Johnson*). In both situations, the plaintiff simply has not named a statute that is a

component of his legal theory. But, as already shown, that is not necessary to meet federal pleading standards. *See Johnson*, 574 U.S. at 11.

2. Defendants assert that a handful of decisions stand for the proposition that courts may dismiss complaints that cite Section 1983 but fail to identify a predicate rights-creating statute. *See* Resp. Br. 19, 22-23. Defendants' characterization of these decisions is simply wrong. Defendants' cases stand for no more than the truism that an official is not liable under Section 1983 when there is no underlying statutory or constitutional violation. *See, e.g.*, *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (holding a city and its officials could not be held liable under Section 1983 because the police did not inflict a constitutional injury); *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002) (holding that a university could not be held liable under Section 1983 for a violation of FERPA, because FERPA does not confer individual rights).

A plaintiff must (of course) adequately plead facts showing a violation of a statutory or constitutional provision that confers individual rights to state a claim under Section 1983. But none of Defendants' cases remotely suggests that the failure to perfectly cite the correct predicate statutory or constitutional provision underlying a Section 1983 claim is fatal where the plaintiff otherwise pleads facts showing an underlying violation. And as already noted, Defendants do not dispute that Kelly made that factual showing.

3. Defendants fault our opening brief for anticipating and preemptively responding to Defendants' argument that a complaint must perfectly identify a plaintiff's legal theory, asserting that we "waived" our "mistake-based theory" because

it is "presented for the first time on appeal." Resp. Br. 20-21; *see* Opening Br. 30-32. That makes no sense. Kelly's mistaken references to Section 1981a never came up in the district court because Defendants never raised them as a basis for denying Kelly's motion to amend. As our opening brief explains (at 13-14), Defendants did not oppose Kelly's motion to amend; rather, the district court denied Kelly's motion as futile, without explanation, just hours after it was filed.

In any case, Defendants' assertion of waiver misunderstands our argument. Kelly maintains that his proposed second amended complaint *always* sufficiently pleaded workplace-discrimination claims actionable under Section 1981. These allegations contained ample factual material to establish the basis for Section 1983 liability under 42 U.S.C. § 1981, which, as noted above (at 10-12), is all that is necessary to survive a motion to dismiss. That Kelly did not explicitly acknowledge below that his references to Section 1981a were a mistake is irrelevant because his complaint speaks for itself: It is clear that Kelly was referencing rights that are protected by Section 1981 in Counts II, IV, VI, and VII of his proposed second amended complaint. JA 107-15 (¶¶ 153-208).

4. Defendants also contend that Kelly's incorrect reference to Section 1981a dooms Kelly's equal-protection claim. *See* Resp. Br. 23. But even on Defendants' mistaken view that a plaintiff's complaint must accurately cite the statutes under which they seek relief, Kelly's equal-protection claim was properly pleaded. Count VII incorporated by reference the substantial factual allegations made throughout the complaint, JA 115 (¶ 206), and Defendants do not contest their adequacy. Although

Count VII mistakenly refers to "Section 1981a" as a "predicate statute," JA 115 (¶ 207), it also correctly references Section 1983. And most importantly, it does exactly what Defendants maintain that Kelly failed to do on his Section 1981-based claims: It accurately names the underlying constitutional provision—the Equal Protection Clause—that is the "predicate" for Kelly's Count VII claim. JA 115 (¶ 207).

5. Defendants also argue that Kelly's motion to amend his complaint to add a Section 1983 claim against the City of Alexandria was futile because this Court does not recognize suits directly under the Fourteenth Amendment against municipalities or their agents. Resp. Br. 23-24. Defendants' understanding of this Court's decisions is accurate, but irrelevant. Kelly never pleaded a claim directly under the Fourteenth Amendment. Rather, he sought to bring his claim through Section 1983, JA 115 (¶ 207), and it is indisputable that equal-protection claims are enforceable under Section 1983. *See* 42 U.S.C. § 1983 (authorizing suit based on the "deprivation of any rights, privileges, or immunities secured by the Constitution"); *Price v. City of Charlotte*, 93 F.3d 1241, 1245 (4th Cir. 1996) (referencing *Carey v. Piphus*, 435 U.S. 247, 253 (1978)). And even assuming (counterfactually) that Kelly had failed to rely on Section 1983 in his complaint, *Johnson* makes clear that the omission would not have been fatal on a motion to dismiss. 574 U.S. at 11. Kelly's equal-protection claim was both factually sufficient and adequately pleaded to survive a motion to dismiss, and the district court erred in denying Kelly's motion to amend as futile.

D. The district court erred in denying Kelly's motion for leave to amend as futile without explanation.

"[T]he grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Foman v. Davis*, 371 U.S. 178, 182 (1962). Although a district court need not explain its decision at length, the rationale for a district court's denial must be "apparent." *Matrix Capital Mgmt. Fund, L.P. v. BearingPoint, Inc.*, 576 F.3d 172, 194 (4th Cir. 2009) (quoting *In re PEC Solutions*, 418 F.3d 379, 391 (4th Cir. 2005)). Even though the district court's order provided no explanation for its denial of Kelly's motion for leave to amend as futile, *see* JA 121, Defendants argue that the district court's rationale is "apparent." Defendants' attempts to divine the district court's unreasoned denial fail.

First, Defendants argue that the reasons for the district court's denial of Kelly's motion to amend as futile can be found in the district court's dismissal of Kelly's first amended complaint, which held that Kelly's "Title VII claims were time-barred." Resp. Br. 18; *see* JA 118-21. That's a non-sequitur, as Defendants do not argue (nor could they) that the Section 1983 claims in the second amended complaint were untimely.

In re PEC Solutions, Inc., 418 F.3d 379 (4th Cir. 2005), is no help to Defendants. There, the district court dismissed a complaint alleging securities fraud for insufficiently raising "a strong inference of scienter" and denied a motion to amend as

futile "for the reasons stated above [in the opinion]." *Id.* at 390-91. This Court affirmed because the amended complaint's allegations also failed to raise a strong inference of scienter. *Id.* at 391. But here, as just explained, the district court's reasons for dismissing the original Title VII complaint as untimely cannot justify denying Kelly's motion to amend a complaint to add timely Section 1983 claims.

Second, Defendants look to Kelly's second amended complaint and argue that the district court denied his motion for leave to amend because Kelly's second amended complaint mistakenly identifies Section 1981a, instead of Section 1981 or Section 1981(a), as the statutory predicate for his Section 1983 claims. *See* Resp. Br. 19. As discussed above (at 10-14), if that's true, the district court erred, demanding reversal. But the record contains no support for Defendant's speculation. Kelly first introduced his Section 1983 claims into the district-court litigation when he sought leave to file a second amended complaint. The district court did not indicate that it was motivated by *any* specific rationale, let alone Kelly's mistaken citations to Section 1981a, when it denied Kelly's motion to amend just hours after it was filed. *See Moore v. Equitrans, L.P.*, 2020 WL 3484067, at *5 (4th Cir. 2020).

III. The district court erred by dismissing Kelly's Title VII claims as time-barred.

The district court failed to grant Kelly equitable tolling after Kelly's attorney encountered circumstances beyond her control, causing Kelly's Title VII claims to be filed two minutes beyond the 90-day filing period. This was error.

A plaintiff is entitled to equitable tolling where "extraordinary circumstances … beyond [the plaintiff's] control or external to his own conduct … prevented him from filing on time." *United States v. Sosa*, 364 F.3d 507, 512 (4th Cir. 2004). Defendants contend that no extraordinary circumstances exist because "Kelly's lawyer waited until shortly before midnight on the last day for filing." Resp. Br. 13. But the record provides no insight into when Kelly's lawyer first attempted to file the complaint. The record does not indicate how long she struggled with "network connectivity" that impeded the "payment of the … filing fee." *See* JA 64-65. In any case, the technological barrier was outside of her control and entitles Kelly to equitable tolling.

At a minimum, the district court erred by resolving the timeliness of Kelly's Title VII claims at the motion-to-dismiss stage. Unless there are "no circumstances that would cause the petition to be timely," *McMillan v. Jarvis*, 332 F.3d 244, 247 (4th Cir. 2003) (quoting *Hill v. Braxton*, 277 F.3d 701, 706 (4th Cir. 2002)), a district court should deny a motion to dismiss on timeliness grounds and "conduct a thorough examination of the facts to determine if reasonable grounds exist for an equitable tolling of the filing period," *Harvey v. City of New Bern Police Dep't*, 813 F.2d 652, 654 (4th Cir. 1987); *see Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1206-07 (9th Cir. 1995).

Defendants contend that the district court adequately considered whether grounds for equitable tolling existed at the July 26, 2019 hearing. *See* Resp. Br. 14. Not so. The district court briefly inquired into whether Kelly's attorney received "actual notice" of the EEOC right-to-sue letter, JA 63, 64, 66, but did not examine whether equitable

tolling was proper. Because the district court could not have determined that "no circumstances" exist that "would cause the petition to be timely," the district court's dismissal of Kelly's Title VII claims at the motion-to-dismiss stage was reversible error.

CONCLUSION

The judgment of the district court should be reversed and the case remanded for proceedings on the merits of both Kelly's Section 1983 and Title VII claims.

Respectfully submitted,[*]

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September 10, 2020

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[*] Counsel gratefully acknowledges the work of Hannah Mullen, a Clinical Fellow at Georgetown Law's Appellate Courts Immersion Clinic, who played a key role in researching and writing this brief.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,477 words, as calculated by Word 2016, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in 14-point Garamond, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I certify that, on September 10, 2020, I electronically filed this Reply Brief for Appellant Anthony Kelly using the CM/ECF System, which will send notice of the filing to the following registered CM/ECF users: counsel for Defendants-Appellees' Michelle Gambino (gambinom@gtlaw.com), Laura Metcoff Klaus (klausl@gtlaw.com), and Michael A. Hass (hassm@gtlaw.com).

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