CASE NO. 20-1620

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

JOANN D. BRITT,

Plaintiff - Appellant,

v.

LOUIS DEJOY, Postmaster General,

Defendant - Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND AT BALTIMORE

BRIEF FOR THE APPELLATE LITIGATION CLINIC AT THE UNIVERSITY OF VIRGINIA SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*

The Appellate Litigation Clinic at the University of Virginia School of Law is composed of approximately a dozen third-year law students who have met the Virginia bar's qualifications for third-year practice, and undersigned counsel, the Clinic's director. The Clinic represents clients *pro bono* in this Court and other federal courts of appeals, including in recent years the Third, Sixth, Eleventh and District of Columbia Circuits. The Clinic frequently serves as counsel before this Court, and accordingly is interested in the adoption of sensible, fair, and easily administrable rules of appellate procedure and jurisdiction. This brief reflects the views of the Clinic's director and the students who worked on it, not the views of the Law School, the University, or the Commonwealth.

RULE 29(a)(4)(E) STATEMENT

No counsel for any party authored this brief in whole or in part, and no party, party's counsel, or person other than *amicus curiae*, its members, and its counsel contributed money to the preparation or submission of this brief.

INTRODUCTION

In *Domino Sugar Corp. v. Sugar Workers Loc. Union 392*, this Court recognized a circuit split between courts holding that "an order which dismisses a complaint without prejudice" is "appealable as a matter of right," and others holding that "[a]n order which dismisses a complaint without expressly dismissing the action is [generally] not . . . an appealable order," unless "the grounds of the dismissal make clear that no amendment could cure the defects in the plaintiff's case." 10 F.3d 1064, 1066 (4th Cir. 1993) (citations omitted). This Court adopted the latter view, holding that judicial economy would be better served by a rule that orders dismissing a complaint without prejudice are presumptively non-final.

In the decades since *Domino Sugar*, application of that standard has become complicated by decisions holding that appellate jurisdiction also may be supported by language dismissing the "case" (as opposed to just the "complaint"), and/or by the plaintiff-appellant's decision to stand on the complaint. Because the case law has not clearly explained how those factors interact, it can convey the impression of a case-specific and somewhat subjective balancing test.

Amicus curiae respectfully submits that jurisdictional rules should draw straightforward and bright lines. But there are only a few realistic alternative rules in this area, and the differences among them shrink upon close inspection. Because many procedural dismissals are necessarily "without prejudice" even though they

are unambiguously final, some review of the grounds for dismissal is inevitable unless the Court adopts the alternative rejected in *Domino Sugar* and recognizes appellate jurisdiction over all dismissals without prejudice. We believe that the *Domino Sugar* rule has considerable advantages over that alternative. It promotes judicial economy by minimizing interlocutory appeals, and ensures that plaintiffs make a considered decision before relinquishing their right to amend.

But the *Domino Sugar* rule was never intended to stand alone as the sole test for appellate finality. Modest clarifications of this Court's existing precedent would establish clear and easily administrable standards.

First, the Ninth and Seventh Circuit rule embraced by *Domino Sugar* was always directed at cases in which the district court dismissed the *complaint* but not the entire action. The Seventh Circuit has clarified that a judgment dismissing all claims in the case and entered as a separate document compliant with Rule 58 should be regarded as final, even if the district court confuses the matter with "without prejudice" language. *See Hoskins v. Poelstra*, 320 F.3d 761, 763-64 (7th Cir. 2003). We think that rule has much to recommend it. A Rule 58 judgment triggers the jurisdictional time limit for filing a notice of appeal, and closes off the possibility of amendment unless the plaintiff files a motion to reopen.

Second, appellate jurisdiction over dismissals for pleading insufficiency should be recognized when the plaintiff clearly elects to stand on the complaint,

either in the district court or on appeal. We recognize that there is something unsettling about a rule that leaves appellate jurisdiction, in part, up to the appellant. But plaintiffs can always obtain clear finality by asking the district court to enter a dismissal with prejudice, and forcing them back to the district court to make that election does not serve judicial economy. The Eleventh Circuit has adopted a rule that filing a notice of appeal constitutes an election to stand on the complaint. *See Schuurman v. Motor Vessel Betty K V*, 798 F.2d 442, 445 (11th Cir. 1986). That approach is somewhat simpler, but essentially collapses into the rule that this Court rightly rejected in *Domino Sugar*. Electing to appeal rather than amend exchanges Rule 15's liberal amendment regime for a posture in which future amendment will depend on leave from the court of appeals and a showing of unusual equities. The jurisdictional rules should ensure that plaintiffs make a considered choice.

This Court has jurisdiction in this case, both because the district court entered a Rule 58 judgment dismissing all claims and because counsel made a clear election to stand on the complaint at the conclusion of argument before the panel.

ARGUMENT

I. A DISMISSAL WITHOUT PREJUDICE IS PRESUMPTIVELY NON-FINAL UNLESS THE GROUNDS FOR DISMISSAL REVEAL THAT NO AMENDMENT COULD CURE THE DEFECT

This Court has jurisdiction over "all final decisions of the district courts." 28 U.S.C. § 1291. A final decision is one that "end[s] the litigation on the merits and

leave[s] nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). Although *Domino Sugar* did not address this question, a clear denial of leave to amend should be regarded as ending the case even if the district court used "without prejudice" language. *See generally* 15A Wright, Miller & Cooper, Federal Practice & Procedure § 3914.1 at nn. 14-15 (2d ed. April 2021 update). A "with prejudice" dismissal also should make clear that a district court is done with the case, even though courts have sometimes found that language ambiguous. *See Albiero v. City of Kankakee*, 122 F.3d 417, 418 (7th Cir. 1997) (observing that the district court's dismissal with prejudice that also granted leave to amend was not "a dismissal with 'prejudice' in any ordinary sense.").

The difficult cases arise when the district court has not expressly granted or denied leave to amend, and has used "without prejudice" language that conveys "an implicit invitation to amplify the complaint," *Borelli v. City of Reading*, 532 F.2d 950, 951 (3d Cir. 1976), and "naturally leave[s] open the possibility of further litigation in some form," *GO Computer v. Microsoft Corp.*, 508 F.3d 170, 176 (4th Cir. 2007). In such cases, *Domino Sugar* charts a middle path between undesirable or unavailable extremes.

A rule making appellate jurisdiction dependent on the district court's compliance with the final judgment requirements of Rule 58 would foster clarity and simplicity by aligning finality under § 1291 with the Civil Rules and with the

trigger for the jurisdictional time limit to file an appeal. But the Supreme Court eliminated that option by holding in *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978), that Rule 58's requirement that final judgments should be reflected in a separate document is not jurisdictional and can be waived by appellants. The Supreme Court thought that "nothing but delay would flow from requiring the court of appeals to dismiss the appeal" because of non-compliance with Rule 58. *Mallis*, 435 U.S. at 385. "Upon dismissal, the district court would simply file and enter the separate judgment, from which a timely appeal would then be taken. Wheels would spin for no practical purpose." *Id.*

A rule that dismissals denominated as "without prejudice" are never final would be impossible, since many procedural dismissals (such as for lack of jurisdiction, or improper venue) are not on the merits and are properly "without prejudice" for *res judicata* purposes even though they are unquestionably final and ready for appellate review. *See generally* Wright, Miller & Cooper, § 3914.6 at nn. 19-21; Fed. R. Civ. P. 41(b). District courts also may dismiss claims without prejudice "[t]o avoid complicating any future actions with issues of collateral estoppel or claim preclusion" when they perceive that evolving circumstances may allow the plaintiff to plead a valid claim in the future. *See De'Lonta v. Angelone*, 330 F.3d 630, 630 (4th Cir. 2003). Even where the district court *could* convert a dismissal without prejudice into a dismissal with prejudice, a rule that forced

additional motions practice in the district court would involve the same wheel-spinning the Supreme Court rejected in *Mallis* if the grounds for dismissal already make clear that there is nothing the plaintiff could do to salvage her case there.

As *Domino Sugar* recognized, several circuits hold that dismissals without prejudice are *always* final and appealable. *See, e.g., Acevedo-Villalobos v. Hernandez*, 22 F.3d 384, 387 (1st Cir. 1994) (describing split); *Weisman v. LeLandais*, 532 F.2d 308, 309 (2d Cir. 1976); *Quartana v. Utterback*, 789 F.2d 1297, 1299-1300 (8th Cir. 1986); Wright, Miller & Cooper, § 3914.1 at n. 26 (endorsing that view). The Eleventh Circuit's rule that filing an appeal constitutes an election to stand on the complaint is, as a practical matter, the same rule. *See Schuurman,* 798 F.2d at 445.

We believe this Court was correct in *Domino Sugar* that in the long run it will better serve "judicial economy," 10 F.3d at 1066, to encourage plaintiffs to improve their complaints in the district court when the circumstances suggest that amendment could resolve the district court's concerns. If that effort is successful, and the plaintiff would have won her appeal, the amendment saves an unnecessary appeal that would have turned out to be interlocutory. If the effort is successful and the plaintiff would have *lost* her appeal, the interests of justice have been served by guiding the plaintiff toward amendment. The cost of securing those advantages is that some attempts at amendment will fail in the district court and prove to be

wasted effort. But *Domino Sugar* minimizes those costs by accepting appellate jurisdiction when the grounds for decision make amendment futile.

The critical, but not always examined, reality underlying the choice of jurisdictional presumptions is that a plaintiff who wishes to forego amendment and take an immediate appeal should—and, we think, inevitably must—pay a price for doing so. In the district court, Rule 15's amendment regime is quite liberal. If the plaintiff takes an appeal and the district court did not offer leave to amend, the court of appeals can hold that failing to do so was an abuse of discretion. But if the district court offers an opportunity to amend and the plaintiff deliberately declines it to take an appeal instead, post-appeal amendment will be available only at the discretion of the court of appeals and only when special equities have been shown. *See, e.g., Chao v. Rivendell Woods, Inc.*, 415 F.3d 342, 345 (4th Cir. 2005); *see also* Wright, Miller & Cooper § 3914.1 at n. 34. That permission should be granted when the interests of justice support it, but surely a litigant's failure to understand that taking an appeal replaces a regime liberally favoring amendment with a stricter rule will not, on its own, supply the necessary equitable circumstances. *Domino Sugar* gently steers plaintiffs away from that trap and forces a considered decision.

We also believe that the *Domino Sugar* rule should not be difficult to apply or require extensive case-specific analysis. Appellate jurisdiction is obvious when

the district court's decision rests on a legal defect made apparent by the undisputed facts. In *Domino Sugar*, the district court had dismissed on the ground that the terms of the parties' contract required arbitration. 10 F.3d at 1066-67. The terms of the contract were undisputed, the district court refused to consider extrinsic evidence, and the arbitrability holding presented a clean question of law. *Id.* at 1066. Similarly, in *GO Computer* the defect was that GO's claims were "based on injuries to Lucent that GO never had a right to allege," as a matter of law. 508 F.3d at 176. And in *Young v. Nickols*, 413 F.3d 416 (4th Cir. 2005), this Court held that dismissal without prejudice of a 42 U.S.C. § 1983 action was final because that dismissal was based on the plaintiff's conceded failure to first secure the expungement of the criminal judgment he challenged, as required by *Heck v. Humphrey*, 512 U.S. 477 (1994). In all these cases it was clear that pleading additional facts would have been futile.

On the other hand, the panel in *Goode v. Central Va. Legal Aid Society, Inc.* correctly recognized that the *Domino Sugar* test clearly denies jurisdiction (without more) when a Rule 12(b)(6) dismissal of the complaint without prejudice rests on a simple failure to plead facts sufficient to give rise to a reasonable inference of liability. 807 F.3d 619, 624 (4th Cir. 2015) (collecting cases). If the problem is factual insufficiency, the plaintiff can, in theory, always plead more facts. Some of those cases are nonetheless final enough for appellate review, but the solution lies

in recognizing two bright-line exceptions discussed below: that a judgment that fails to satisfy *Domino Sugar* is still final if it complies with Rule 58, or if the plaintiff has elected to stand on her complaint.

The *en banc* Court should, however, take this opportunity to clarify ambiguous language that threatens to take the *Domino Sugar* analysis off course. This Court has said several times that "*Domino Sugar* requires us to examine the appealability of a dismissal without prejudice *based on the specific facts of the case* in order to guard against piecemeal litigation and repetitive appeals." *Chao*, 415 F.3d at 345 (emphasis added); *see also, e.g., Goode*, 807 F.3d at 623 (quoting *Chao*); *GO Computer*, 508 F.3d at 176 (same). Both the *Goode* and *Bing* opinions contain language that might be misunderstood as implying that jurisdiction depends on whether the record suggests that the plaintiff probably will, or will not, be able to plead additional facts sufficient to satisfy the district court's concerns. In our view, the jurisdictional rule should not put appellate judges in the position of having to guess about facts outside the record. The *Domino Sugar* test focuses solely on the legal grounds for the dismissal, and thus is never satisfied when the grounds of dismissal are a failure to plead sufficient facts, regardless of what the record suggests about whether the plaintiff can do better. One great virtue of the *Domino Sugar* rule (supplemented with the exceptions discussed below) is that it forces the plaintiff to decide not only whether it is possible to plead additional

facts, but whether doing so is worthwhile when it might preserve only a portion of the case that may not be worth litigating. Appellant's supplemental briefing suggests that whether it makes sense to attempt amendment is a strategically complex issue in this case. The jurisdictional rules should put such decisions directly to the plaintiff.

Appellant's supplemental brief also raises concerns that application of *Domino Sugar* in this case could force her to bifurcate claims that should be tried together and poses a risk of waiver or *res judicata*. To some extent these concerns do not appear to be directed at *Domino Sugar* but at the long-settled rule that an order resolving only some but not all of the claims in a case is not final, absent entry of a separate judgment under Rule 54(b). If Ms. Britt filed an amended complaint limited to the retaliation claim and litigated that claim, a timely appeal from the final judgment would permit her to appeal all previous orders in the case. The potential inefficiency of that course, and the risks potentially posed by collateral estoppel if a portion of the claims are litigated unsuccessfully to judgment, are the price of adherence to the final judgment rule. In any event, we believe that there is appellate jurisdiction now for the reasons discussed below.

II. A RULE 58 JUDGMENT IS ALWAYS FINAL

This Court should recognize that a judgment that dismisses the entire case and is compliant with Rule 58 is always final, notwithstanding the district court's use of "without prejudice" language.

That distinction is clear on the face of *Domino Sugar* and the cases it cited. *Domino Sugar* embraced the Ninth Circuit's view that "[a]n order which dismisses a complaint without expressly dismissing the action is [generally] not . . . an appealable order." 10 F.3d at 1066 (quoting *Ruby v. Secretary of the Navy*, 365 F.2d 385, 387 (9th Cir. 1966)). As the language from *Ruby* indicates, the Ninth Circuit has attempted for several decades to draw a distinction between "without prejudice" orders that dismiss the *action* (final) and orders that dismiss only *the complaint* (potentially non-final). *See generally* Wright, Miller, & Cooper § 3914.1 at n. 22. That distinction has been influential nationwide. *See id.* at notes 24, 25. But although the courts of appeals have often implored the district courts to eliminate ambiguities about finality by clarifying their intentions, *see, e.g., Borelli*, 532 F.2d at 951 n.1; *Hoskins*, 320 F.3d at 764, the district courts have persisted in dismissing "complaints" without prejudice even in circumstances where it is clear that the grounds for dismissal foreclose any possibility of amendment. To avoid needless dismissals followed by inefficient motions practice in the district courts,

the Ninth Circuit and other courts recognized the exception that this Court adopted in *Domino Sugar*.

The case law endorsed in *Domino Sugar* always recognized that a judgment unambiguously dismissing *the entire case* is final. For example, the Seventh Circuit noted that "[t]he district judge granted the motion and ordered the complaint dismissed, but did not order the entry of a judgment dismissing the lawsuit," and reasoned that "[t]he dismissal of a complaint is not the dismissal of a lawsuit." *Coniston Corp. v. Vill. of Hoffman Ests.*, 844 F.2d 461, 463 (7th Cir. 1988). In the passage quoted partially by *Domino Sugar*, the Seventh Circuit explained that nonetheless when "the grounds of the dismissal make clear that no amendment could cure the defects in the plaintiff's case, the order dismissing the complaint is final in fact and we have jurisdiction *despite the absence of a formal judgment under Fed. R. Civ. P. 58*." *Id.* (emphasis added). The Seventh Circuit noted that "it would have been a lot simpler if either the plaintiffs or the defendants had asked the district court to enter a Rule 58 judgment order," and admonished future parties to do so. *Id.* The Seventh Circuit's reasoning clearly indicated that a formal judgment under Rule 58 would have sufficed, and subsequent cases have made that principle explicit. *See Hoskins*, 320 F.3d at 763-64.

The other cases cited in *Domino Sugar* are consistent with that rule. *See, e.g., Ruby*, 365 F.2d at 387 ("An order which dismisses a complaint without

expressly dismissing an action is not, except under special circumstances, an appealable order."); *Azar v. Conley*, 480 F.2d 220, 223 (6th Cir. 1973) ("There is a considerable body of case law, which appears to us to be well-founded, distinguishing between a judgment which dismisses the action and therefore is a final judgment and one that only dismisses the complaint without dismissing the action."). The Supreme Court's statement in *Mallis* that "[a] 'judgment' for purposes of the Federal Rules of Civil Procedure would appear to be equivalent to a 'final decision' as that term is used in 28 U.S.C. § 1291," 435 U.S. at 384 n.4, lends further support to the conclusion that a judgment satisfying Rule 58 should be *sufficient* for finality, although the holding of *Mallis* is that technical compliance with Rule 58 can be waived and is not always *necessary*.

This Court has repeatedly cited with approval the Sixth Circuit's statement in *Zayed v. United States*, 368 F.3d 902, 905 (6th Cir. 2004), that "[w]here an action, and not merely an amendable complaint (or petition), is dismissed without prejudice, the order of dismissal is final and appealable." *See, e.g., Chao*, 415 F.3d at 345 (quoting *Zayed*); *Goode*, 807 F.3d at 624 (same). With the refinement that this principle applies only when an actual judgment complying with Rule 58 has been entered, and not merely when the district court says "case dismissed" in a memorandum opinion, we think it is correct for at least two reasons.

First, this Court has held that a Rule 58 judgment cuts off the district court's ability to grant a motion to amend a complaint, unless the judgment is vacated pursuant to Rule 59(e) or Rule 60(b). *See Laber v. Harvey*, 438 F.3d 404, 427-28 (4th Cir. 2006) (*en banc*) (collecting authorities). A Rule 58 judgment therefore satisfies, by definition, the *Domino Sugar* rule that a dismissal is final if the grounds of decision make clear that amendment is impossible.

Second, a Rule 58 judgment disposing of all claims triggers the deadline for filing a notice of appeal, which is itself jurisdictional. *See Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13, 17 (2017) (noting that "a provision governing the time to appeal in a civil action qualifies as jurisdictional . . . if Congress sets the time."). Judge Easterbrook observed in *Hoskins* that when a Rule 58 judgment has been entered "[i]t seems best to take the judgment on its own terms" even if in some sense "the district court's resolution looks both ways," both because "[a]ppellate jurisdiction ought to be determined mechanically, without guessing at the district judge's expectations" and because any other alternative "lays a trap for unwary (or even wary) litigants, who may forego appeal in reliance on 'without prejudice' language only to learn later, and to their sorrow, that the original order was appealable and the time for appellate review has lapsed." 320 F.3d at 763-64.

We think that the *Goode* panel was correct to be "unconvinced that the district court's use of the word 'case' rather than 'complaint' is determinative, or even highly probative," of the appealability of a mere memorandum opinion. 807 F.3d at 629. The appellant in *Goode* repeatedly directed this Court's attention to the language and reasoning of the district court's memorandum opinion, rather than to the separate Rule 58 judgment that appears to have been entered. *See* Reply Br. of Appellant in No. 14-1939 (January 23, 2015), available at 2015 WL 295742; Case No. 3:14-cv-00281-HEH (E.D. Va.), Dkt. 25. But we believe the Court should clarify that a separate Rule 58 judgment dismissing the entire case is final. And it appears to us from a quick review of PACER dockets that several of this Court's prior decisions might have been resolved more easily and simply on the ground that a Rule 58 judgment had been entered—including at least *GO Computer* and *Bing v. Brivo Systems, LLC*, 959 F.3d 605 (4th Cir. 2020).

III. A PLAINTIFF'S CLEAR ELECTION TO STAND ON HER COMPLAINT CREATES FINALITY

This Court should clarify that a plaintiff's clear choice to stand on her complaint, and thus to presumptively waive the right to amend in the district court, suffices to create appellate jurisdiction in situations like these.

This Court has recognized several times that a plaintiff's election to stand on her complaint can create appellate jurisdiction that would otherwise be uncertain under *Domino Sugar*, including at least in *Chao*, 415 F.3d at 345, *In re GNC Corp.*

789 F.3d 505, 511 n.3 (4th Cir. 2015), *United States ex rel. Badr v. Triple Canopy, Inc.*, 775 F.3d 628, 633 n.2 (4th Cir. 2015), and *Bing*, 959 F.3d at 612. Many cases nationwide have followed a similar approach, although the Ninth Circuit dissents. *See* Wright, Miller & Cooper § 3914.1 at fn. 19; *WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) ("A plaintiff, who has been given leave to amend, may not file a notice of appeal simply because he does not choose to file an amended complaint. A further district court determination must be obtained.").

The *Goode* panel rejected arguments that Mr. Goode had created appellate jurisdiction in that case by standing on his complaint. Its holding appears to rest on both factual and legal conclusions. On the facts, apparently Mr. Goode was unwilling to make the same sort of "assurances" that the Secretary of Labor made in *Chao*, including a waiver of the right to later amend. 807 F.3d at 629. On the law, the panel held that *Chao* "does not stand for the general proposition that a plaintiff may choose not to amend a complaint in order to single-handedly render an order of dismissal final and appealable under all circumstances." *Id*. The panel reasoned that finality is "the province of the district court—not of the party seeking appeal," and read *Chao*'s holding as tethered to the particularly "weighty" "institutional interests of the Executive Branch" presented in that case. *Id.*

If Mr. Goode was unwilling to clearly stand on his complaint and accept the consequences of doing so, then we believe the decision was, to that extent, correct.

But we do not believe that weighty institutional interests should also be required. If appellate jurisdiction is denied, the plaintiff presumably could return to the district court, renounce any desire to amend there, and obtain a dismissal with prejudice that this Court would accept as final. We perceive no sound reason for refusing to accept a plaintiff's decision to stand on her complaint in the court of appeals, if the court of appeals would accept a dismissal with prejudice produced by her willingness to stand on her complaint in the district court.

We believe that prudence also suggests caution about adopting rules that could trap litigants in procedural limbo if, for any reason, they are unable to amend or to obtain a dismissal with prejudice from the district court. If the judgment has become effective under Rule 58, Rules 59 and 60 contain jurisdictional time limits for reopening or amending the judgment. The interaction between those rules and a misunderstanding about appellate finality trapped the litigants in a recent Eleventh Circuit case. *See Automotive Alignment & Body Service, Inc. v. State Farm Mutual Automobile Insurance Company*, 953 F.3d 707, 719-722 (11th Cir. 2020). Appellee's argument that any new complaint would be time-barred in this case suggests that Appellee may believe the present action is irretrievably concluded, such that Rule 15(c)'s relation-back principles would not apply. Whether or not that assumption is correct, it illustrates that plaintiffs remanded to district courts

after entry of judgment may face diverse procedural obstacles that are hard to fully anticipate.

Any sufficiently clear expression of a plaintiff's intent to waive the right to amend and stand on the complaint should suffice. This Court and others have accepted such decisions when they are apparent on the district court record, stated in appellate briefs, or given (as in *Chao* and *Bing*) at oral argument. *See generally* Wright, Miller & Cooper § 3914.1 n. 19. Judicial economy obviously favors minimizing the number of appeals in which this problem does not surface until oral argument. This Court could consider suggesting that such statements should be made routinely in the jurisdictional statement of the opening brief.

The Court may wish to consider whether merely filing a notice of appeal should be deemed a decision to stand on the complaint. In 1897, the Supreme Court decided in an admiralty case that the decree was final for appeal even though the appellant filed a notice of appeal during the 10 days the district court had given for amendment, because "the prosecution of the appeal, within that time, was an election to waive the right to amend . . . ." *United States v. The Three Friends*, 166 U.S. 1, 40 (1897). The Eleventh Circuit endorses that rule. *See Schuurman*, 798 F.2d at 445 ("Once the plaintiff chooses to appeal before the expiration of time allowed for amendment, however, the plaintiff waives the right to later amend the complaint, even if the time to amend has not yet expired."). Other decisions may

have applied a similar analysis implicitly, by not requiring any other significant evidence of the plaintiff's decision to stand on the complaint. *See* Wright, Miller & Cooper § 3914.1 n. 20.

The Seventh Circuit has considered and rejected that rule, holding that "[c]urrent rules make it impossible to carry forward the rationale of *The Three Friends*." *Albiero v. City of Kankakee*, 122 F.3d 417, 420 (7th Cir. 1997). The Seventh Circuit's point was that "Civil Rule 58 specifies how, by whom, and when, a final judgment will be entered" and that "[n]otices of appeal do not play any role in its operation." *Id.* We do not find that reasoning persuasive. The Supreme Court held in *Mallis* that Rule 58's requirement of a separate judgment *is not* essential to appellate jurisdiction and can be waived by taking an appeal, so the special role played by that Rule in the current framework should not implicitly prevent litigants from waiving other rights related to finality.

Nonetheless, we believe that the Court should require some affirmative manifestation of intent to stand on the complaint, beyond the mere filing of an appeal. A rule that treats every notice of appeal as an election to waive the right to amend would effectively abandon the *Domino Sugar* rule and align this Court instead with the circuits that hold that every dismissal without prejudice is appealable as of right. And it would, therefore, create precisely the trap for the unwary discussed *supra* at 8. As the Seventh Circuit observed when rejecting any

rule that the filing of a notice of appeal necessarily waives a time-limited right to amend in the district court, "[l]itigants, especially those without the aid of counsel, may be confused about the right means to secure appellate review, and deeming the notice of appeal a waiver of the opportunity to satisfy the condition may cause them to forfeit valuable entitlements." *Otis v. City of Chicago*, 29 F.3d 1159, 1168 (7th Cir. 1994). Requiring that appellants express an affirmative intent to stand on their complaints similarly ensures that valuable rights are not lost by misunderstanding and imposes few costs.

IV. APPELLATE JURISDICTION IS CLEAR IN THIS CASE

Under those principles we believe that appellate jurisdiction is clear in this case. The core *Domino Sugar* rule is not satisfied because the grounds of the district court's without prejudice dismissal of the retaliation claim do not make clear that no amendment could cure the defect. Nonetheless, the district court entered final judgment dismissing the entire case on a separate paper compliant with Rule 58, which should suffice for jurisdiction. *See* JA 124 (Dkt. 47). Appellant's counsel also made an unambiguous representation to the panel at the end of oral argument that she elected to stand on her complaint. *See* Oral Argument Recording in No. 20-1620, at 43:37-44:15.

Appellee argues in the alternative that this Court has jurisdiction because any amendment in the district court would now be barred by the statute of

limitations. We do not believe that contention supplies an independent basis for recognizing appellate jurisdiction. Appellee appears to be relying on precedent holding that dismissals for failure to effect service or for failure to prosecute under Rule 41 do not toll Title VII's statute of limitations. But if the district court's dismissal were otherwise regarded as non-final because of an implicit invitation to amend, and the judgment was reopened pursuant to Rules 59 or 60, then the contemplated amendment presumably would relate back to Appellant's original filing under Rule 15(c) because it would assert a claim arising out of the same conduct, transaction, or occurrence as the original filing. *See* Fed. R. Civ. P. 15(c)(1)(B); *see Moya v. Schollenbarger*, 465 F.3d 444, 452-53 (10th Cir. 2006) (rejecting a similar argument).

CONCLUSION

Amicus curiae respectfully submits that this Court should hold that it has jurisdiction over this appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman, 14 point.

2. Exclusive of the table of contents; disclosure statement, table of citations; certificate of compliance and the certificate of service, this Brief of *Amicus Curiae* contains 5,294 words.

3. I understand that a material misrepresentation can result in the court's striking the brief and imposing sanctions. If the Court so directs, I will provide an electronic copy of the word or line printout.

Dated: December 27, 2021

/s/ J. Scott Ballenger
J. Scott Ballenger