No. _____

IN THE
Supreme Court of the United States

SPOT RUNNER, INC., *et al.*,
Petitioners,
v.
WPP LUXEMBOURG GAMMA THREE SARL,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a district court dismisses claims under Rule 12(b)(6) without prejudice and grants the plaintiff leave to amend, the plaintiff sometimes decides to take an immediate appeal instead of amending its complaint. The procedure by which a plaintiff may forgo amendment and pursue an appeal in response to a dismissal without prejudice varies widely across the federal circuits. Here, the plaintiff requested and received a formal judgment of dismissal without prejudice in order to facilitate its appeal. The question presented is:

Whether the Ninth Circuit erred by holding that a district court may enter a judgment dismissing a claim without prejudice for the express purpose of enabling a plaintiff to appeal the 12(b)(6) dismissal of that claim instead of amending it.

PARTIES TO THE PROCEEDINGS

Petitioners in this Court are Spot Runner, Inc.; Nick Grouf; David Waxman; Peter Huie; Robert Pittman; Roger Lee; Danny Rimer; Battery Ventures VI, LP; Battery Investment Partners VI, LLC; Battery Ventures VII, LP; Battery Investment Partners VII, LLC; Index Ventures III (Jersey) LP; Index Ventures III (Delaware) LP; and Index Ventures III Parallel Entrepreneur Fund (Jersey) LP.

Respondent is WPP Luxembourg Gamma Three Sarl, on its own behalf and derivatively on behalf of Spot Runner, Inc.

RULE 29.6 DISCLOSURE

Spot Runner, Inc.; Battery Ventures VI, LP; Battery Investment Partners VI, LLC; Battery Ventures VII, LP; Battery Investment Partners VII, LLC; Index Ventures III (Jersey) LP; Index Ventures III (Delaware) LP; and Index Ventures III Parallel Entrepreneur Fund (Jersey) LP have no parent corporations, and no publicly held corporation owns 10 percent or more of their stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 655 F.3d 1039, and is reprinted in the Appendix to the Petition ("App.") at 3a-38a. The district court's order for dismissal without prejudice is unreported and is reprinted at App. 40a-41a. The district court's order on the motion to dismiss WPP's First Amended Complaint is unreported and is reprinted at App. 42a-68a.

JURISDICTION

The Ninth Circuit entered its judgment on August 23, 2011. It denied a timely petition for rehearing and rehearing en banc on November 29, 2011. App. 1a-2a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Pertinent statutory provisions are set forth in an appendix to this petition. *See* App. 69a-70a.

INTRODUCTION

This case involves a straightforward procedural question with profound implications for the fair and efficient administration of justice in our federal courts.

When a district court dismisses a plaintiff's claim pursuant to Rule 12(b)(6) with leave to amend, the plaintiff may decide that it would rather take an immediate appeal than file an amended complaint.

The circuits have adopted decidedly different approaches regarding how a plaintiff may effect such an appeal. Some allow the plaintiff merely to wait until the time period for amendment has lapsed; others require the plaintiff expressly to disclaim any intent to amend; still others require the plaintiff to obtain a final and prejudicial judgment.

In this case, the Ninth Circuit endorsed a dramatically different procedure, one that does violence to finality principles and deepens the confusion among the federal circuits. It held that a district court may facilitate an immediate appeal by granting a voluntary dismissal and entering a judgment of dismissal *without prejudice*. The procedural gambit sanctioned by the Ninth Circuit will permit plaintiffs both to appeal a claim and—at the same time—to amend the claim and re-file it in the same forum, or elsewhere. The threat to principles of finality and judicial efficiency is manifest, and highlights the need for this Court's intervention.

This question will recur with great frequency. Plaintiffs have every incentive to pursue the procedural maneuver approved of in this case, which allows them multiple bites at the same apple: pursuing appellate review; retaining the option to re-file the claim while the appeal is pending; and preserving an opportunity to amend and re-file their claim even if the appeal fails. If the Ninth Circuit's decision stands, plaintiffs in our Nation's largest federal circuit will employ that maneuver with impunity. This Court should grant review.

STATEMENT OF THE CASE

1. Spot Runner, Inc. ("Spot Runner") is a start-up company that was founded in 2004. It developed an

internet-based platform to assist small businesses in advertising on television. App. 7a. As a privately held company, Spot Runner is backed by investments from financial institutions and individual investors.

WPP Luxembourg Gamma Three Sarl ("WPP") is a Luxembourg corporation and a subsidiary of a global communications company that, along with its partners, is the largest media buyer in the world. Amended Complaint ¶ 14. In 2006 and 2007, WPP invested over $11 million in Spot Runner. App. 7a, 10a. Because Spot Runner is privately held, WPP's investments were governed by contract law and not the federal disclosure regime that applies to publicly traded companies.

2. In 2009, a dispute arose between WPP and Spot Runner about WPP's contract rights. WPP filed suit against Spot Runner, its Chief Executive Officer, Vice President, General Counsel, and several investment funds, among others (collectively, "Petitioners"), in the United States District Court for the Central District of California. WPP's Complaint asserted one claim for misrepresentation under Section 10(b) of the Securities Exchange Act and SEC Rule 10b-5, and eight claims brought under California state law. The district court exercised jurisdiction pursuant to 28 U.S.C. § 1331 and 15 U.S.C. § 78aa. App. 6a. After Petitioners moved to dismiss, the district court granted the motion but gave WPP leave to amend.

WPP filed its Amended Complaint in October 2009. The Amended Complaint added Rule 10b-5 claims premised on theories of material omission, insider trading, and scheme liability, and additional state law claims. Petitioners again moved to dismiss.

On January 27, 2010, the district court granted Petitioners' motion to dismiss the Amended

Complaint. *See* App. 67a-68a. The court held, among other things, that some of the Petitioners did not have any duty to disclose the information that was the subject of WPP's omission theory. *See* App. 53a-58a. It dismissed the omission claim against those Petitioners without leave to amend. *Ibid.* As to other Petitioners, the court held that WPP had failed properly to allege scienter and loss causation, and dismissed the omissions claim with leave to amend. *See id.* at 58a-62a. The court also dismissed WPP's claims for scheme liability and insider trading with leave to amend. *See id.* at 62a-67a. Finally, because WPP had "not sufficiently pled its federal securities law claim," the district court "decline[d] to reach the state claims until [its] jurisdiction over the case [had] been established." *Id.* at 67a.[1]

In its order dismissing the Amended Complaint, the district court directed WPP to "file its amended complaint, if any, no later than February 24, 2010." *Id.* 68a. The order stated that "[f]ailure to file an amended complaint by this date may result in dismissal without prejudice." *Ibid.* Thereafter, the case was transferred to the Honorable Dolly M. Gee.

On February 12, 2010, WPP filed a notice with the district court. The notice stated that WPP did "not intend to file an Amended Complaint in this action, but will stand upon the existing pleadings and appeal

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[1] The Amended Complaint also added a claim for control-person liability against one of Spot Runner's founders under Section 20(a) of the Securities Exchange Act. The district court struck the claim without prejudice, on the ground that its order on the first motion to dismiss had only granted Plaintiff leave to amend its claims under Section 10(b), and had not granted WPP leave to add new claims under Section 20(a). *See* App. 67a.

the Court's January 27, 2010 rulings to the Court of Appeals for the Ninth Circuit." District Court Dkt. No. 75, at 2. Notwithstanding its stated intentions, WPP also expressly "request[ed] that a judgment of dismissal *without prejudice* be entered in this action" (*ibid.* (emphasis added)), a judgment which by its terms would permit further amendment. Petitioners objected to this request, arguing that the proper course where a plaintiff wishes to stand on its pleading and test the district court's ruling on appeal was to enter a judgment of dismissal *with* prejudice. District Court Dkt. No. 76, at 1-2.[2] On February 25, 2010, the district court issued a judgment dismissing the entire action without prejudice. App. 39a.

3. WPP appealed the district court's dismissal of its federal claims to the Ninth Circuit. Petitioners filed a cross-appeal, arguing that the district court had erred in dismissing WPP's federal claims without prejudice. The Ninth Circuit concluded that the district court's order was an appealable final determination, and that it had jurisdiction pursuant to 28 U.S.C. § 1291. *Id.* at 6a.

With respect to the cross-appeal, the Ninth Circuit held that the district court's dismissal of WPP's federal claims without prejudice was not an abuse of discretion. *Id.* at 36a. In an opinion written by the Honorable James Gwin of the District Court for the

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[2] Consistent with precedent from within the Ninth Circuit, Petitioners proposed that WPP's state claims, which the district court had not reached, should be dismissed without prejudice. *See* Dkt. No. 76-3 (proposed order); *see also* Dkt. No. 76, at 2 n.2 (describing dismissal of pendent state claims without prejudice in *Ojo* v. *Farmers Grp., Inc.*, No. CV 05-5818-JFW (Ex), 2006 WL 4544130, at *1 (C.D. Cal. Mar. 7, 2006)).

Northern District of Ohio, sitting by designation, the court of appeals recognized that "the proper course of action where a plaintiff elects to not amend their complaint and immediately appeal is an order of dismissal with prejudice * * *." *Ibid.* (discussing *Edwards* v. *Marin Park, Inc.*, 356 F.3d 1058, 1064 (9th Cir. 2004)). But it held that this "proper course of action" was not a "mandatory rule," and did not "supplant the district court['s] long-standing discretion to dismiss complaints with or without prejudice." App. 36a.

According to the Ninth Circuit, this conclusion was consistent with case law governing voluntary dismissals for the purpose of taking an immediate appeal pursuant to Rule 41(a)(2).[3] In that context, the opinion stated, "district courts also enjoy discretion to dismiss claims with or without prejudice" and "should grant a motion for voluntary dismissal [without prejudice] unless a defendant can show that it will suffer some plain legal prejudice as a result." App. 36a n.6 (internal citations and quotation marks omitted).

In concluding its analysis, the Ninth Circuit stated "that under Rule 54(b), an interlocutory order that 'adjudicates fewer than all the claims or the rights and liabilities of fewer than all of the parties does not end the action as to any of the claims or parties and

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[3] The district court's February 25, 2010 order accompanying its dismissal without prejudice did not specify whether the dismissal was made pursuant to Rule 41(a)(2) or Rule 12(b)(6). *See* App. 40a-41a. In a footnote, the Ninth Circuit noted that, in its view, the district court's dismissal without prejudice "was made under Rule 12(b)(6), and not Rule 41(a)(2) * * *." *Id.* at 35a n.5.

may be revised at any time before the entry of judgment adjudicating all the claims and all the parties' rights and liabilities.'" App. 37a (quoting Fed. R. Civ. P. 54(b)). In view of Rule 54(b), the court of appeals wrote that "where some claims survive a motion to dismiss, the district court, in its discretion, has power to allow an amended complaint even with regard to claims that it earlier dismissed." App. 37a.

With respect to WPP's appeal, the Ninth Circuit affirmed the district court's dismissal of WPP's insider trading and scheme liability claims, as well as its dismissal of the omission claim against Spot Runner's General Counsel and the company itself. *Id.* at 27a-35a. It reversed the dismissal of the omission claim against Spot Runner's Chief Executive Officer and Vice President. *Id.* at 27a.

4. The Ninth Circuit denied Petitioners' timely petition for rehearing and rehearing en banc on November 29, 2011. Petitioners filed this petition for certiorari 90 days later, on February 27, 2012.

REASONS FOR GRANTING THE PETITION

This case presents a procedural question that has created persistent confusion throughout the federal system. Orders dismissing claims under Federal Rule of Civil Procedure 12(b)(6) without prejudice and granting the plaintiff leave to amend are common in federal district courts. Where, as here, the dismissal effectively disposes of the action, plaintiffs often prefer to take an immediate appeal rather than amend their complaint. Yet the process by which a plaintiff may forgo amendment and pursue an appeal in response to a non-prejudicial dismissal varies widely across the circuits.

By its Opinion below, the Ninth Circuit has deepened the uncertainty and discord on this question. The court of appeals held that a plaintiff need not subject itself to a prejudicial dismissal to take an appeal, but may instead proceed by way of a "judgment of dismissal *without prejudice*." App. 41a (emphasis added). That decision is at odds with settled principles of finality, and its expressly non-prejudicial nature departs widely from all of the approaches followed by the other circuits.

The proper judgment in this context is a dismissal with prejudice, which allows the plaintiff to pursue its appeal while protecting against the possibility of duplicative litigation. By contrast, the judgment sanctioned by the Ninth Circuit enables the plaintiff simultaneously to take an appeal and to re-litigate the claim elsewhere, or to re-file the claim down the road if its appeal fails. The risks attending this unorthodox judgment are amply demonstrated by the Opinion itself, which emphasizes the district court's power, on remand, to "allow an amended complaint even with regard to claims that it earlier dismissed."

App. 37a. By inviting plaintiffs to re-plead claims that the Court of Appeals has already reviewed and deemed deficient, the Opinion increases the likelihood of advisory opinions and piecemeal appeals.

Because the procedural posture in which this question arises is a common one, and because plaintiffs have every incentive to pursue the approach approved of by the Ninth Circuit, this question is likely to recur with great frequency. As a result, the harm to finality principles occasioned by the decision below will proliferate if the decision is allowed to stand. This Court should grant review.

I. THE NINTH CIRCUIT'S DECISION CREATES CONFUSION AMONG THE CIRCUITS ON A QUESTION OF FUNDAMENTAL IMPORTANCE

1. a. The federal circuits are divided as to whether a plaintiff who seeks to appeal a dismissal order and reject an invitation to amend must obtain a formal judgment of dismissal. *See, e.g.*, *WMX Techs.* v. *Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc) (describing split); *Garcia-Goyco* v. *Law Envtl. Consultants, Inc.*, 428 F.3d 14, 18 (1st Cir. 2005) (same).

The Seventh and Eleventh Circuits permit a plaintiff to appeal a dismissal with leave to amend, without further trial court action, if the fixed time to amend has lapsed. *See Otis* v. *City of Chicago*, 29 F.3d 1159, 1164-67 (7th Cir. 1994) (en banc) (Easterbrook, J.); *Hertz Corp.* v. *Alamo Rent-A-Car, Inc.*, 16 F.3d 1126, 1132 (11th Cir. 1994). Under this approach, the non-prejudicial dismissal automatically becomes prejudicial and final upon the expiration of the time to amend—regardless of whether the trial

court uses "explicit 'ripening' language" in the judgment. *Otis*, 29 F.3d at 1166.

The Second and Third Circuits require plaintiffs to disclaim any intent to amend if they wish to stand on their complaint and take an immediate appeal. *See, e.g.*, *Slayton* v. *Am. Express Co.*, 460 F.3d 215, 224 (2d Cir. 2006); *Booth* v. *Churner*, 206 F.3d 289, 293 n.3 (3d Cir. 2000). The disclaimer is deemed to convert the dismissal order into a dismissal "with prejudice." *Shapiro* v. *UJB Fin. Corp.*, 964 F.2d 272, 278 (3d Cir. 1992). The plaintiff "irrevocably waive[s] the option offered by the district court further to amend his complaint, and must stand or fall on the [] complaint." *DiVitorrio* v. *Equidyne Extractive Indus., Inc.*, 822 F.2d 1242, 1247 (2d Cir. 1987).[4]

The First and Tenth Circuits impose more stringent procedural requirements on plaintiffs who decline the opportunity to amend in order to pursue an appeal. A plaintiff may "choose to announce his election to stand on his pleading, *let a final order or judgment be entered dismissing the action*, and then appeal from that order or judgment." *Moya* v. *Schollenbarger*, 465 F.3d 444, 452 n.11 (10th Cir. 2006) (emphasis added) (internal quotation marks omitted). In these circuits, where a plaintiff fails to obtain such an order or judgment, and simply files an appeal after the period of leave to amend has lapsed, it may not take an appeal. *See, e.g.*, *Richards* v. *Dunne*, 325 F.2d 155,

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[4] This type of disclaimer is fundamentally different from the notice filed in this case by WPP in the district court—wherein WPP stated that it did "not intend to file an Amended Complaint in this action," but then expressly left the door open to amendment by requesting a judgment of dismissal without prejudice. *Supra* at 5.

156 (1st Cir. 1963) (per curiam); *see also Garcia-Goyco*, 428 F.3d at 18 (discussing holding in *Dunne*); *cf. Tietz* v. *Local 10 of Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 525 F.2d 688, 689 (8th Cir. 1975) (plaintiff may not take an immediate appeal where the district court dismissed her complaint without prejudice to amend within fifteen days, and she filed a notice of appeal on the fifteenth day).[5]

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[5] To compound the confusion in this area, there is also a circuit split on a related issue: whether a district court judgment is appealable if it dismisses *with* prejudice the claims that are the subject of the appeal, but dismisses *without* prejudice other claims that have not yet been adjudicated. *See Doe* v. *United States*, 513 F.3d 1348, 1352-53 (Fed. Cir. 2008) (describing split). At least five circuits have held that there is no appellate jurisdiction under such circumstances. *See, e.g.*, *Rabbi Jacob Joseph Sch.* v. *Province of Mendoza*, 425 F.3d 207, 210 (2d Cir. 2005); *Marshall* v. *Kansas City S. Ry. Co.*, 378 F.3d 495, 499-500 (5th Cir. 2004); *West* v. *Macht*, 197 F.3d 1185, 1189 (7th Cir. 1999); *State Treasurer* v. *Barry*, 168 F.3d 8, 11 (11th Cir. 1999); *Cook* v. *Rocky Mountain Bank Note Co.*, 974 F.2d 147, 148 (10th Cir. 1992). But the Ninth Circuit and at least three other circuits have rejected that bright line rule, and have instead held that district court judgments may be treated as final even when unajudicated claims are voluntarily dismissed without prejudice. *See, e.g.*, *Doe*, 513 F.3d at 1353-54 (Fed. Cir. 2008); *James* v. *Price Stern Sloan, Inc.*, 283 F.3d 1064, 1070 (9th Cir. 2002); *Chrysler Motors Corp.* v. *Thomas Auto Co.*, 939 F.2d 538, 540 (8th Cir. 1991); *Hicks* v. *NLO, Inc.*, 825 F.2d 118, 120 (6th Cir. 1987) (per curiam). Here, Petitioners expressly reserved a jurisdictional challenge in cross-appealing the district court's non-prejudicial dismissal (Notice of Cross-Appeal by Defendants, District Court Dkt. No. 87, at 1 n.1), but did not challenge the dismissal without prejudice of WPP's unadjudicated state claims due to the binding Circuit precedent. The Court's resolution of the question presented herein could potentially implicate this split as well.

b. The decision below endorses a new—and deeply flawed—procedure by which a plaintiff may immediately appeal a dismissal with leave to amend by obtaining a judgment of dismissal *without prejudice* from the district court. Under the Ninth Circuit's approach, a losing plaintiff may appeal the dismissal of its claims without forfeiting the right to re-file its claims and restart the litigation in the district court. This unprecedented and disruptive procedure departs from the approaches sanctioned in the other circuits.

Until now, the Ninth Circuit had appeared to follow the more formal approach outlined above. It required plaintiffs who decline the opportunity to amend to obtain a prejudicial judgment from the district court before appealing: "[T]he district court should * * * take[] the election not to amend at face value, enter[] a final judgment dismissing all claims *with prejudice*, and allow[] the case to come to us on appeal in that posture." *Edwards* v. *Marin Park, Inc.*, 356 F.3d 1058, 1064 (9th Cir. 2004) (emphasis added). The "appropriate order" for the plaintiff to request, and the district court to issue, was "a voluntary dismissal *with prejudice* under Federal Rule of Civil Procedure 41(a)(2)." *Omstead* v. *Dell, Inc.*, 594 F.3d 1081, 1085 (9th Cir. 2010) (emphasis added); *see also WMX*, 104 F.3d at 1136 ("[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 decision below veers from this approach, creating a new rule of civil procedure that will inevitably spawn mischief in the lower courts. Although the Ninth Circuit recognized that "the proper course of action where a plaintiff elects to not

amend their complaint and immediately appeal is an order of dismissal with prejudice," it nonetheless held that this is not "a mandatory rule." App. 36a. Instead, even where the plaintiff has expressly informed the court that it intends to appeal, the Ninth Circuit held that district courts have essentially unfettered discretion to decide whether to dismiss with or without prejudice, *see ibid.*, and concluded that it had jurisdiction to review an appeal arising out of the district court's order of dismissal without prejudice, *see id.* at 6a.

c. The Ninth Circuit's new approach is the most recent and the most extreme among the circuits' various tacks on elective appeals of dismissal orders. It adds to a patchwork of approaches that spans our federal judicial system: Depending on which circuit an appeal arises in, a plaintiff may be able to appeal once the time period to amend the complaint has lapsed, *see, e.g.*, *Otis*, 29 F.3d at 1164-67, or it may have to disclaim any intent to amend before appealing, *see, e.g.*, *Slayton*, 460 F.3d at 224, or it may have to take the further step of obtaining a final order or judgment before bringing its appeal, *see, e.g.*, *Moya*, 465 F.3d at 452 n.11. Now, a plaintiff in the Ninth Circuit may obtain a judgment of dismissal without prejudice—which leaves open the possibility of future amendment or refiling—as a springboard to appeal. The persistent confusion in this area warrants this Court's review.

2. The decision below not only deepens the inter-circuit discord on this issue, it also poses a serious threat to principles of finality. By allowing trial courts to facilitate an appeal by granting a voluntary dismissal *without prejudice*, the Ninth Circuit permits plaintiffs to have it both ways: they may obtain immediate review of a dismissal ruling while

retaining the option to re-file the appealed claims. A savvy plaintiff might even game the system by obtaining a voluntary dismissal without prejudice, filing an appeal, and—if he is unhappy with the composition of the appellate panel—dismissing the appeal and re-filing in the district court. In short, this form of judgment invites inefficient, duplicative litigation of the same claim, and heightens the need for this Court's attention.

Finality is an essential condition of appellate review and "an historic characteristic of federal appellate procedure." *Cobbledick* v. *United States*, 309 U.S. 323, 324-25 (1940). It also furthers the strong systemic interest in avoiding piecemeal appeals. *Ibid.* A dismissal with prejudice safeguards these important interests by requiring an appealing plaintiff to "submit[] to a judgment that serves to bar his claims forever." *E.g.*, *Concha* v. *London*, 62 F.3d 1493, 1507 (9th Cir. 1995). Prejudicial dismissals not only ensure that the order challenged on appeal represents the district court's final ruling, but also prevent the plaintiff from "bringing another action for the same cause" and thereby avoid the "possibility of piecemeal appeals." *Id.* at 1507-08.

Courts outside the Ninth Circuit protect these important finality interests by requiring a plaintiff to obtain either a formal dismissal with prejudice or its functional equivalent before appealing. As Judge Scirica explained, the reason a plaintiff may appeal a non-prejudicial dismissal with leave to amend "once the amendment period expired" is because "the district court's order had the effect of dismissing the improperly pleaded claims *with prejudice*." *Shapiro.*, 964 F.2d at 278 (emphasis added). By allowing the time to amend to expire and filing a notice of appeal, the plaintiff is deemed to have "irrevocably waived

the option offered by the district court" and locked herself into the complaint challenged on appeal. *DiVittorio*, 822 F.2d at 1247; *see also Schuurman* v. *Motor Vessel Betty KV*, 798 F.2d 442, 445 (11th Cir. 1986). The initial dismissal order ripens into a prejudicial judgment, and the case "is indubitably over in the district court." *Otis*, 29 F.3d at 1166; *see id.* at 1164 (noting that when the time to act lapses, "the dismissal becomes one with prejudice, hence final, and thus appealable").

By contrast, the Ninth Circuit has embraced a schizophrenic approach to finality principles, introducing further uncertainty into this already confused area. On the one hand, WPP expressed its intent to stand on the complaint and asked the district court for a dismissal order that would facilitate an appeal. *See* App. 12a. On the other hand, WPP sought, and the district court issued, a judgment dismissing the claims *without prejudice*. *See ibid.* While the district court plainly sought to create appellate jurisdiction in granting this request, it entered a judgment that left it uncertain whether WPP's claims would in fact "stand or fall on the [] complaint" before the court of appeals. *DiVittorio*, 822 F.2d at 1247. Indeed, the terms of the judgment left WPP "free to seek an adjudication of the same issue at another time in the same or another forum." *Concha*, 62 F.3d at 1507. The judgment increased the likelihood of multiple appeals in this case—and even presented the possibility of multiple appeals on the same claim.

Even assuming that this judgment is sufficiently final to permit appellate jurisdiction,[6] its express non-prejudicial nature unfairly permits the plaintiff to multiply the litigation while the court of appeals reviews the dismissal order. *Cf. Dearth* v. *Mukasey*, 516 F.3d 413, 416 (6th Cir. 2008) ("It would be unfair to allow [plaintiffs] the ability both to start anew in any district and to appeal the underlying basis of a ruling * * *.").

By granting review, this Court may establish a clear and uniform procedure for district courts to follow when a plaintiff wishes to take an appeal rather than amend its complaint. Review of this case would allow the Court to adopt a rule that protects finality interests by requiring that a dismissal with leave to amend be converted to one *with prejudice* if the plaintiff wishes to take an appeal. Absent such guidance, the risk is palpable that judgments styled as a "Final Judgment of Dismissal Without Prejudice" will metastasize.

3. If there were any doubt that a judgment of dismissal without prejudice to facilitate an appeal threatens to create procedural chaos, the risk is spelled out in the Ninth Circuit's opinion itself.

In affirming the district court's non-prejudicial dismissal, the panel stated—without any citation to supporting authority—that "where some claims survive a motion to dismiss, the district court, in its discretion, has power to allow an amended complaint

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[6] *Cf. Elliott* v. *White Mountain Apache Tribal Court*, 566 F.3d 842, 846 (9th Cir. 2009) (describing the need to give "practical construction to the finality requirement" as opposed to a more "technical" construction).

even with regard to claims that it earlier dismissed" and which were reviewed on appeal. App. 37a.

This language amounts to an express invitation for plaintiffs to amend dismissed claims in the wake of a published appellate opinion affirming their dismissal. That invitation is extraordinary, and sweeping in its implications. If a district court may unilaterally "revive dismissed claims" even after a decision by the Court of Appeals, then the district court's dismissal could not have been final to begin with. The rule envisioned by the Ninth Circuit would make elective appeals a vehicle for plaintiffs to obtain guidance from the courts of appeals without risking a dismissal that operates as an adjudication on the merits and terminates the litigation. This in the face of the "oldest and most consistent thread in the federal law of justiciability": that "the federal courts will not give advisory opinions." *Flast* v. *Cohen*, 392 U.S. 83, 96 (1968) (internal quotation marks omitted).

What is more, the Ninth Circuit's opinion highlighted the perverse consequences its decision portends in the context of securities litigation. It opined that a dismissal without prejudice could be used as a way to "temper[] the heightened pleading standards of the [Private Securities Litigation Reform Act] in securities actions where claims survive against co-defendants," by allowing a district court to "revive dismissed claims" at some later date "should evidence come to light." App. 38a. But this tactic would contradict the mandate from Congress that securities cases should stand or fall based on information in the plaintiffs' possession *before they file*. *See, e.g.*, *Medhekar* v. *U.S. Dist. Court for the N. Dist. of Cal.*, 99 F.3d 325, 328 (9th Cir. 1996) (citing 141 Cong. Rec. at H13669, S19151). This is just one

example of the mischief that will result if the Ninth Circuit's decision stands.

II. THIS QUESTION IS LIKELY TO RECUR

The procedural scenario featured in this case is hardly a unique one. Dismissals or partial dismissals of civil complaints as a result of Rule 12(b)(6) motions are a frequent occurrence. *See* Joe S. Cecil, *et al.*, *Motions to Dismiss for Failure to State a Claim After* Iqbal, Federal Judicial Center (Mar. 2011), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf (surveying 12(b)(6) dismissals in 23 federal district courts in 2006 and 2010). And district courts today are increasingly likely to grant motions to dismiss with leave to amend the complaint. *See id.* at 13 ("In 2010, 35% of the orders granted motions to dismiss with leave to amend at least some of the claims in the complaint, compared with 21% of the orders in 2006."). Thus, thousands of future plaintiffs will find themselves in exactly the same procedural posture as WPP in this case: facing a district court order dismissing one or more claims on 12(b)(6) grounds, with leave to amend.

The Ninth Circuit's decision offers a court-sanctioned roadmap for plaintiffs like WPP to refuse to amend and to appeal dismissed claims, while still (1) simultaneously preserving the option to re-file their claims; and (2) potentially retaining the ability to amend even if the dismissal is affirmed. For plaintiffs litigating within the Ninth Circuit—as well as in open circuits—this will surely become the preferred approach in short order. It offers the distinct advantage of allowing the plaintiff to increase its chance of ultimately prevailing by taking two bites at the apple.

And the Ninth Circuit's opinion all but ensures that plaintiffs will be able to obtain a without-prejudice dismissal to facilitate their appeal. Rule 41(a)(2) governs voluntary dismissals that are effected by court order. The court of appeals instructed that when plaintiffs request a "voluntary dismissal[] for the purpose of taking an immediate appeal under Rule 41(a)(2)," and "the request is to dismiss without prejudice," a "District Court *should grant*" the request "unless the defendant can show that it will suffer some plain legal prejudice as a result." App. 36a-37a n.6 (emphasis added) (internal quotation marks omitted). It further stressed that "[l]egal prejudice does not result merely because a defendant will be inconvenienced by potentially having to defend the action in a different forum * * *." *Ibid.*

Thus, the decision below loads the procedural deck in favor of plaintiffs, even where it will result in inefficient and duplicative litigation of the same claim. Within the Ninth Circuit, this decision will guarantee that district courts will grant without-prejudice dismissals to facilitate appeals in the mine run of cases.

III. THE NINTH CIRCUIT'S DECISION IS INCORRECT ON THE MERITS

Finally, review is appropriate here because the Ninth Circuit's decision is incorrect on the merits. The court of appeals' analysis rests on sweeping statements regarding dismissals *generally*. It fails to identify any authority, however, to support the proposition that these general rules extend to voluntary dismissals that are intended to facilitate an appeal.

In deciding this question, the Ninth Circuit initially advanced the uncontroversial proposition that

"[d]istrict courts have broad discretion in deciding * * * whether to dismiss actions with or without prejudice." App. 36a. But it offered no explanation or apposite authority for why this general standard should apply with equal force in the context of voluntary dismissals antecedent to an appeal. Indeed, as support for this proposition, the Ninth Circuit cited an opinion that does not even mention the word "prejudice", let alone address a district court's discretion regarding voluntary dismissals for the purpose of appeal. *See ibid.* (citing *In re Read-Rite Corp.*, 335 F.3d 843, 845 (9th Cir. 2003)).

Next, the Ninth Circuit noted that "district courts also enjoy discretion [under Rule 41(a)(2)] to dismiss claims with or without prejudice." App. 36a n.6. But the lead case cited for that proposition did not involve a dismissal for purposes of facilitating an appeal. *See Diamond State Ins. Co.* v. *Genesis Ins. Co.*, 379 F. App'x 671, 673 (9th Cir. 2010). And a second cited case, *Romoland School District* v. *Inland Empire Energy Center, LLC*, 548 F.3d 738, 747-51 (9th Cir. 2008), actually highlights why dismissal without prejudice is improper in this context. In *Romoland*, the district court granted a voluntary dismissal, but the accompanying order did not state that the dismissal was with prejudice. *Id.* at 740. The court of appeals nonetheless treated the district court's dismissal as being *with prejudice* in order to ensure finality. *Id.* at 750.

Similarly, the Ninth Circuit attempted to bolster its holding by restating the general rule that district courts "should grant" a "request to dismiss without prejudice * * * under Rule 41(a)(2) unless a defendant can show that it will suffer some plain legal prejudice as a result." App. 37a n.6. But the case it invoked for that proposition, *Smith* v. *Lenches*, 263 F.3d 972 (9th

Cir. 2001), dismissed federal securities claims *with prejudice* to allow the plaintiff to pursue parallel claims in state court. *Id.* at 975. That is precisely the judgment the district court should have entered here. The judgment in *Smith* did not unfairly prejudice the defendant because the plaintiffs did not appeal their dismissal. Hence, there was no risk that the federal claims would be both appealed and re-filed, as there is here.

By blindly applying these general standards to a voluntary dismissal for the purpose of filing an appeal, the Ninth Circuit arrived at a result at odds with common sense and contrary to precedent from both inside and outside the Circuit. Where plaintiffs forgo the opportunity to amend and obtain a final order before taking an appeal, finality principles require that order to specify dismissal *with prejudice*. As federal courts of appeals have repeatedly observed, district court discretion is cabined in the context of voluntary dismissals to facilitate an appeal, where the "proper" judgment is dismissal with prejudice. *See, e.g.*, *John's Insulation, Inc.* v. *L. Addison & Assocs., Inc.*, 156 F.3d 101, 107 (1st Cir. 1998); *Edwards*, 456 F.3d at 1064; *Omstead*, 594 F.3d at 1085. The district court abused its discretion by deciding otherwise. *Koon* v. *United States*, 518 U.S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law."). The Ninth Circuit should have vacated the district court's judgment and remanded.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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