FINAL DECISIONS AND FINAL JUDGMENTS

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I. INTRODUCTION

There seems to be some confusion about final decisions and final judgments. Both are fundamental aspects of the rules governing the timing of federal appeals. Both are frequently mentioned when appellate-jurisdiction issues arise. And both are why we speak of "finality" as the organizing principle of federal appellate jurisdiction. But far too often, courts and litigants fail to distinguish between the two—speaking of final judgments when they mean final decisions (or vice versa) or treating the two as if they are one and the same.[1]

This conflating of final decisions and final judgments overlooks the distinct role that each plays in the law of federal appellate jurisdiction. That much can be seen in the current divide over appeals from dismissals with leave to reinstate. The courts of appeals all hold that these dismissals are not final.[2] But they disagree over what must be done to make them final. Some courts embrace litigant autonomy, whereby litigants can make a dismissal final by taking an appeal, waiting for the expiration of the time to reinstate, or expressly disclaiming the right to amend.[3] But several courts hold that dismissals with leave to amend are not

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1. *See* sources cited *infra* notes 100–104.

2. *See, e.g.*, Slayton v. Am. Express Co., 460 F.3d 215, 224 (2d Cir. 2006).

3. *See, e.g.*, Otis v. City of Chicago, 29 F.3d 1159, 1165 (7th Cir. 1994) (en banc); Schuurman v. Motor Vessel Betty K V, 798 F.2d 442, 445 (11th Cir. 1986) (per curiam).

final, appealable decisions until the district court enters a subsequent order.[4]

There is much to be said for the litigant-autonomy side of the split; the rule is pragmatically sound and avoids needless procedural wheel spinning.[5] More fundamentally, the litigant-autonomy side appreciates the distinction between final decisions and final judgments. The existence of a final decision determines if and when a court of appeals has jurisdiction to review a district court's rulings. Final decisions thus determine when federal litigants *can* appeal. The entry of a final judgment, in contrast, determines when the appeal clock begins running. Final judgments thus determine the point by which litigants *must* appeal. And in the context of a dismissal with leave to reinstate, a final decision exists once there is no longer any prospect of reinstatement—whether that comes via an appeal, through the expiration of the time to reinstate, or through an explicit disclaimer. A subsequent final judgment merely starts the appeal clock. And litigants are free to appeal before that clock starts running.

A lack of precision between final decisions and final judgments can have consequences. It can create needless procedural detours that add complexity to the already-messy law of appellate jurisdiction. It can result in needlessly cumbersome rules of appellate jurisdiction. In the worst cases, a lack of precision can deprive litigants of their right to appeal.

In this article, I use the split over the finality of dismissals with leave to reinstate to illustrate the separate roles that final decisions and final judgments play in the law of federal appellate jurisdiction. Distinguishing these two concepts could help clear up some of the unacceptable mess that is modern federal appellate jurisdiction. But more remains to be done. There is far too much uncertainty over what constitutes

4. *See, e.g.*, Britt v. DeJoy, 45 F.4th 790, 793 (4th Cir. 2022) (en banc); WMX Techs., Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc).

5. *See Otis*, 29 F.3d at 1165–66.

a final decision.[6] And uncertainty over when the appeal deadline begins—and ends—is unacceptable.[7] Nevertheless, precision about both is an important step.

II. APPEALS AFTER DISMISSALS WITH LEAVE TO REINSTATE

A. The Final-Judgment Rule

As a long-standing, widely accepted, and riddled-with-exceptions rule, federal appeals normally must wait until the end of district court proceedings. This is the federal final-judgment rule.[8] The rule comes from 28 U.S.C. § 1291, which gives the courts of appeals jurisdiction over the "final decisions" of district courts.[9] And a "final decision" is normally one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[10] So for most federal litigants, their one and only appeal comes once the district court has finished with their case.

6. *See, e.g.*, Bryan Lammon, *Finality, Appealability, and the Scope of Interlocutory Review*, 93 WASH. L. REV. 1809, 1815–19 (2018) [hereinafter Lammon, *Finality*].

7. Bryan Lammon, *Cumulative Finality*, 52 GA. L. REV. 767, 827–30 (2018) [hereinafter Lammon, *Cumulative Finality*].

8. On the final-judgment rule, see *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994); *Mitchell v. Forsyth*, 472 U.S. 511, 543 (1985) (Brennan, J., concurring in part and dissenting in part); *Abney v. United States*, 431 U.S. 651, 657 (1977); *see also* Aaron R. Petty, *The Hidden Harmony of Appellate Jurisdiction*, 62 S. C. L. REV. 353, 356–60 (2010) (discussing the final-judgment rule's history).

9. 28 U.S.C. § 1291.

10. Catlin v. United States, 324 U.S. 229, 233 (1945); *see also* Ritzen Grp., Inc. v. Jackson Masonry, LLC, 140 S. Ct. 582, 586 (2020) (echoing *Catlin*'s definition).

Like almost any rule, the final-judgment rule has exceptions.[11] In fact, it has a lot of them.[12] I will set aside the intricacies of these exceptions (and they are intricate) for now. For present purposes, it's enough to say that the courts of appeals generally lack jurisdiction over an appeal until a district court has made a final decision. And, again, most litigants' one and only appeal comes after that final decision.

Identifying a final decision is not always straightforward. That has been especially true when district courts dismiss actions with leave to reinstate.

B. Dismissals With Leave to Reinstate

Dismissals with leave to reinstate come in a variety of forms.[13] At their most general, they happen when the district court identifies a defect in an action that prevents it from proceeding further. But this defect is potentially correctable. And if the plaintiff corrects the deficiency, the case can proceed.

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11. Some of these exceptions deem particular kinds of district court orders "final decisions" as that term is used in § 1291, even though those decisions don't mark the end of district court proceedings. Other exceptions allow the immediate appeal of certain district court decisions despite the order not qualifying as a "final decision." I think it's best to call any situation in which someone can appeal before the end of district court proceedings an "exception" to the final-judgment rule. *See* Bryan Lammon, Perlman *Appeals After* Mohawk, 84 U. CIN. L. REV. 1, 27–28 (2018) [hereinafter Lammon, Perlman *Appeals*]; Bryan Lammon, *Rules, Standards, and Experimentation in Appellate Jurisdiction*, 74 OHIO ST. L.J. 423, 447 n.118 (2013) [hereinafter Lammon, *Rules, Standards, and Experimentation*].

12. For in-depth discussions of exceptions to the final-judgment rule, see Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 NOTRE DAME L. REV. 175, 185–201 (2001); Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717, 729–47 (1993); Petty, *supra* note 8, at 360–93; Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1643, 1652–59 (2011); Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237, 1244–72 (2007).

13. These dismissals are sometimes called "conditional dismissals." *See, e.g.*, Trs. of Pension, Welfare, & Vacation Fringe Benefit Funds of IBEW Loc. 701 v. Pyramid Elec., 223 F.3d 459, 465 (7th Cir. 2000).

Getting more specific, dismissals with leave to reinstate involve several variables. First, there are different kinds of correctable defects. Perhaps the most common is a defective complaint. A district court might dismiss that complaint for failure to state a claim. But rather than dismiss the case outright, the court gives the plaintiff a chance to amend the complaint. Other defects involve dismissals as a sanction for contemptible behavior (allowing reinstatement if the plaintiff changes its behavior),[14] dismissals for failure to timely serve the defendants (allowing reinstatement with proper service),[15] and dismissals for failure to pay the filing fee (allowing reinstatement after proper payment).[16]

A second variable is the mechanism by which the district court dismisses with leave to reinstate. Sometimes these dismissals are backward looking: the district court dismisses the action but will reopen the case if the given conditions are satisfied.[17] Other times they are forward looking: the district court announces that it will dismiss an action if certain conditions are not met.[18] The former is probably more common, though courts of appeals have expressed a preference for the latter.[19]

A third variable is the phrasing of the dismissal. In their ideal form, these dismissals say that they are "with leave to reinstate/refile/amend" and give a set amount of

14. *See, e.g.*, Otis v. City of Chicago, 29 F.3d 1159, 1162 (7th Cir. 1994) (en banc) (dismissing a case for failure to cooperate in discovery but allowing reinstatement if the plaintiff answered the defendant's interrogatories).

15. *See, e.g.*, Ordower v. Feldman, 826 F.2d 1569, 1571 (7th Cir. 1987).

16. *See, e.g.*, Davis v. Advoc. Health Ctr. Patient Care Express, 523 F.3d 681, 683 (7th Cir. 2008).

17. *See, e.g.*, *Otis*, 29 F.3d at 1162.

18. *See, e.g.*, *Davis*, 523 F.3d at 683 (giving the plaintiff 25 days to pay the filing fee, else the district court would dismiss the suit).

19. *See* Elfenbein v. Gulf & W. Indus., Inc., 590 F.2d 445, 450 (2d Cir. 1978) ("[T]he ideal disposition in cases such as these is to grant leave to replead within a specified time period, with a direction to the clerk to enter judgment if no amended complaint is forthcoming.").

time to correct the deficiency.[20] But district courts aren't always that clear.

For example, rather than say that a plaintiff can amend, courts sometimes dismiss a "complaint" rather than dismiss the "case" or "action."[21] Dismissal of a complaint is normally treated as a dismissal with leave to reinstate, while the dismissal of an action or case is not.[22]

Other times, district courts use the term "without prejudice" to describe a dismissal with leave to reinstate.[23] This phrasing is particularly problematic. For one thing, "with leave to reinstate" and "without prejudice" are not synonymous.[24] For another thing,

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20. *See* WMX Techs., Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc) ("It would always be helpful if district courts made their intentions in that regard both plain and explicit."); *see also* Garcia-Goyco v. L. Envtl. Consultants, Inc., 428 F.3d 14, 18–19 (1st Cir. 2005) (noting the difficulties that arise if the district court does not set a deadline).

21. *See* Azar v. Conley, 480 F.2d 220, 223 (6th Cir. 1973) (discussing the distinction between dismissing a complaint and an action). Not everyone buys this distinction. *See* Wilcox v. Georgetown Univ., 987 F.3d 143, 155–56 (D.C. Cir. 2021) (Randolph, J., dissenting) ("The majority's fiction—that an 'action' remains after the district court dismisses the complaint for failing to state one—is the proverbial grin without the cat. "'Well! I've often seen a [complaint] without [a cause of action]," thought Alice; "but [an action] without a [complaint]! It's the most curious thing I ever saw in my life!'" (quoting LEWIS CARROLL, ALICE IN WONDERLAND & THROUGH THE LOOKING GLASS 69 (J. Tenniel illus. 1997))); *see also* Bragg v. Reed, 592 F.2d 1136, 1138 (10th Cir. 1979); Weisman v. LeLandais, 532 F.2d 308, 309 (2d Cir. 1976).

22. *See* Ciralsky v. C.I.A., 355 F.3d 661, 666 (D.C. Cir. 2004).

23. *See* Hoskins v. Poelstra, 320 F.3d 761, 763 (7th Cir. 2003) (noting that a dismissal "without prejudice is not final, and thus not appealable under 28 U.S.C. § 1291, because the plaintiff is free to amend his pleading and continue the litigation"); Borelli v. City of Reading, 532 F.2d 950, 951 (3d Cir. 1976) (per curiam) ("Although the district court's order did not mention amendment, an implicit invitation to amplify the complaint is found in the phrase 'without prejudice.'").

24. A without-prejudice dismissal means only that the plaintiff is not barred from refiling the case in the same district court. Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 506 (2001); *see also* Mirpuri v. ACT Mfg., Inc., 212 F.3d 624, 628 (1st Cir. 2000) ("In this circuit, the phrase 'without prejudice,' when attached to a dismissal order, is not to be read as an invitation to amend, but rather as a signification that the judgment does not preclude a subsequent lawsuit on the same cause of action either in the rendering court or in some other forum."); Bryan Lammon, *Disarming the Finality Trap*, 97 N.Y.U. L. REV. ONLINE 173, 181 (2022) [hereinafter Lammon, *Disarming*] (discussing the meaning and effect of with- and without-prejudice dismissals).

there is a lot of confusion about the finality of dismissals without prejudice. The courts of appeals might seem split on the finality of dismissals without prejudice.[25] But the truth is that there is really no useful general rule about the finality of without-prejudice dismissals.[26] Some are final, such as without-prejudice dismissals for a lack of subject-matter jurisdiction, for improper venue, or for failure to join a necessary party.[27] Some aren't, such as without-prejudice dismissals that *also* come with leave to reinstate.[28] Courts would do well to give much less weight to the "without-prejudice" designation when addressing finality. And using that term only adds to the finality issues that already come from dismissals with leave to reinstate.

On top of these variables, it's sometimes unclear whether a district court has dismissed with leave to reinstate.[29] Further issues can arise when district courts

25. *Compare* Eastman Kodak Co. v. STWB, Inc., 452 F.3d 215, 219 (2d Cir. 2006), *Garcia-Goyco*, 428 F.3d at 18, *and* Allied Air Freight, Inc. v. Pan Am. World Airways, Inc., 393 F.2d 441, 444 (2d Cir. 1968), *with* S.B. v. KinderCare Learning Centers, LLC, 815 F.3d 150, 152 (3d Cir. 2016), *and Hoskins*, 320 F.3d at 763. *See also* Domino Sugar Corp. v. Sugar Workers Loc. Union 392, 10 F.3d 1064, 1066 (4th Cir. 1993) (suggesting the existence of a split).

26. Courts sometimes discuss the issue with the appropriate nuance. *See* Carter v. Buesgen, 10 F.4th 715, 720 (7th Cir. 2021) ("As a general and highly imperfect rule of thumb, a dismissal with prejudice is final and thus reviewable, and a dismissal without prejudice is not."); United States v. City of Milwaukee, 144 F.3d 524, 528 n.7 (7th Cir. 1998) ("[T]his court has not accorded talismanic importance to the fact that a complaint, or in this case a motion, was dismissed 'without prejudice.'").

27. *See, e.g.*, Davis Forestry Corp. v. Smith, 707 F.2d 1325, 1326 n.1 (11th Cir. 1983) (reviewing a without-prejudice dismissal that was due to a lack of standing).

28. *See, e.g.*, Otis v. City of Chicago, 29 F.3d 1159, 1163 (7th Cir. 1994) (en banc) ("Because the conditional ability to revive the case renders the dismissal a disposition without prejudice, neither side may appeal immediately.").

29. *See, e.g.*, Cooper v. Ramos, 704 F.3d 772, 776–77 (9th Cir. 2012); *Hoskins*, 320 F.3d at 764; Acevedo-Villalobos v. Hernandez, 22 F.3d 384, 389 (1st Cir. 1994); Quartana v. Utterback, 789 F.2d 1297, 1299–1300 (8th Cir. 1986); Czeremcha v. Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO, 724 F.2d 1552, 1554 (11th Cir. 1984); Elfenbein v. Gulf & W. Indus., Inc., 590 F.2d 445, 448 (2d Cir. 1978); Firchau v. Diamond Nat'l Corp., 345 F.2d 269, 270–71 (9th Cir. 1965).

do not set a specific time within which to correct any defects.[30]

C. Finality and Dismissals with Leave to Reinstate

Regardless of what form a dismissal with leave to reinstate comes in, the courts of appeals hold that they are not final decisions under § 1291.[31] This makes some sense. The litigation can continue so long as certain conditions are met. District court proceedings are thus not necessarily over.[32] Unless something (such as a statute of limitations[33]) prevents further proceedings, a dismissal with leave to reinstate is not final.

The question, then, is how to make them final. That's an issue on which the courts of appeals have split, and the Supreme Court has never squarely addressed it. But at least two of the Court's cases might have some bearing on the issue.

First is *The Three Friends*, which held that the dismissal of a libel in admiralty with leave to amend within ten days was final once the plaintiff appealed.[34] The Court concluded that the appeal—which came five days before the time to amend expired—waived the right

30. *See Garcia-Goyco*, 428 F.3d at 18–19 (noting the difficulties that arise if the district court does not set a deadline).

31. *See, e.g.*, Slayton v. Am. Express Co., 460 F.3d 215, 224 (2d Cir. 2006); Ordower v. Feldman, 826 F.2d 1569, 1572 (7th Cir. 1987); Connecticut Nat'l Bank v. Fluor Corp., 808 F.2d 957, 960 (2d Cir. 1987); *see also* CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3914.1 (3d ed. 2022). *Cf.* Clark v. City of Kansas City, Kan.,172 U.S. 334, 338 (1899) (holding that the grant of a demurrer was not final). A handful of cases have said that these dismissals are final, but those cases should be regarded as outliers. *See, e.g.*, Car Carriers, Inc. v. Ford Motor Co., 789 F.2d 589, 590 n.4 (7th Cir. 1986).

32. *See* Hunt v. Hopkins, 266 F.3d 934, 936 (8th Cir. 2001) ("[W]hen a district court grants a plaintiff leave to amend his pleading, the court signals that the action has not been fully and finally adjudicated on the merits, and that further proceedings will follow.").

33. *See Ordower*, 826 F.2d at 1572–73; *see also* Donahue v. Wilder, 824 F. App'x 261, 263 n.4 (5th Cir. 2020) (dismissal that directed plaintiff to exhaust administrative remedies was final because exhaustion was no longer possible).

34. The Three Friends, 166 U.S. 1, 49 (1897).

to amend.[35] Upon that waiver, "the decree of dismissal took effect immediately."[36] The decree was thus final, and the Court had jurisdiction.[37]

The Three Friends suggests that litigants can finalize a dismissal with leave to reinstate by simply filing an appeal. But the continuing import of the case (which was decided in 1897) is unclear. That the case involved a libellant (not a plaintiff) filing a libel in admiralty (not a complaint) should be irrelevant—those are simply the old admiralty equivalent of the modern terms.[38] But the Seventh Circuit has suggested that procedural changes since *The Three Friends* preclude reading the case to allow appeals alone to create finality.[39] The court noted that "[l]itigants no longer 'elect' when the decision takes effect."[40] Instead, Federal Rule of Civil Procedure 58 controls when a final judgment is entered.[41] And litigants cannot make a clearly interlocutory order final by simply filing a notice of appeal.[42]

I disagree with this reading of *The Three Friends*. The appellant in *The Three Friends* did not exactly "elect" when the decision became final. The Supreme Court instead took the appeal itself to be "an election to waive the right to amend."[43] And that waiver—not the filing of a notice of appeal itself—made the dismissal take effect and become final. *The Three Friends* should

35. *Id.*

36. *Id.*

37. *Id.*

38. *See* United States v. City of Milwaukee, 144 F.3d 524, 529 n.11 (7th Cir. 1998) ("Prior to 1966, the libel served as the initiatory pleading in admiralty actions, corresponding to the complaint."); Otis v. City of Chicago, 29 F.3d 1159, 1164 (7th Cir. 1994) (en banc) (noting that the distinction between a complaint and libel in admiralty does not matter for finality purposes).

39. *See* Albiero v. City of Kankakee, 122 F.3d 417, 420 (7th Cir. 1997) ("Current rules make it impossible to carry forward the rationale of *The Three Friends*.").

40. *Id.*

41. *Id.*

42. *Id.*

43. The Three Friends, 166 U.S. 1, 40 (1897).

still be good law. Why so many courts have overlooked it escapes me.

Then there is the case that has received much more attention: *Jung v. K. & D. Mining Co.*[44] Simplifying only a little bit, the district court in *Jung* dismissed the plaintiffs' complaint with leave to amend within 20 days.[45] But the plaintiffs never amended, and nearly two years passed before the plaintiffs told the district court that they were standing on the complaint.[46] The district court then dismissed the plaintiffs' case, and the plaintiffs appealed shortly thereafter.[47] The Seventh Circuit dismissed the appeal, concluding that the plaintiffs had not appealed within 30 days of the final judgment.[48]

The Supreme Court summarily reversed.[49] It held that the appeal—which was filed within 30 days of the district court's last order—was timely.[50] Neither the initial order of dismissal nor the expiration of the time to amend started the appeal clock.[51] It instead started once the district court entered the last order of dismissal.[52] The Court explained that the time when the appeal clock begins running must be clear, given the short window in which to appeal and the dire consequences of failing to appeal on time.[53] Requiring the district court to formally enter a final judgment creates that clarity.[54]

Courts have disagreed over what *Jung* means for the finality of dismissals with leave to reinstate. They've accordingly split on what is required to finalize those dismissals. I will return to *Jung*—and how best to read

44. Jung v. K. & D. Mining Co., 356 U.S. 335 (1958).
45. *Id.* at 336.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 337.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*

it—momentarily.[55] First, I describe the split that *Jung* has created over the finality of dismissals with leave to reinstate.

III. MAKING DISMISSALS WITH LEAVE FINAL

At its broadest level, the split involves two camps: courts that do not require any formal action from the district court, and courts that do. Courts in the first category have also divided over what, short of formal action from the district court, is necessary for finality. And while most of the circuits have settled on what they deem necessary, there are also intra-circuit tensions and divisions.

I begin this Part by briefly describing these various ways to finalize dismissals with leave to reinstate. I then turn to the state of the law in the circuits.

A. The Options for Finality

Some courts of appeals have adopted what might be termed a "litigant-control" rule. They hold that some action from the plaintiff can finalize the dismissal. That action can come in various forms.

In what is probably the easiest method of achieving finality, courts have held that an appeal alone creates a final decision.[56] Rather than try to satisfy any conditions set by the district court, the plaintiff files a notice of appeal before the time to satisfy those conditions has expired.[57] This appeal is an implicit waiver of the right to reinstate.[58] Since there is no longer any chance of

55. *See infra* Part IV.

56. *See, e.g.*, Schuurman v. Motor Vessel Betty K V, 798 F.2d 442, 445 (11th Cir. 1986) (per curiam).

57. *See id.* (noting that "the plaintiff need not wait until the expiration of the stated time in order to treat the dismissal as final, but may appeal prior to the expiration of the stated time period").

58. United States v. Mayton, 335 F.2d 153, 158 n.12 (5th Cir. 1964) ("Of course an unsuccessful plaintiff may file an amended complaint to cure deficiencies. But we have held that this is permissive and need not be done to invest finality in the order of dismissal.").

reinstatement, district court proceedings are over. The dismissal is thus final.[59] And nothing more formal is necessary.[60]

Other courts hold that the expiration of the time to correct any deficiencies results in a final decision.[61] This option requires nothing of the plaintiff besides waiting. Once the time to reinstate has ended, there is again no chance of reinstatement, district court proceedings are over, and the dismissal is final.[62] Courts applying this rule have also held that a notice of appeal filed before the expiration of the time to refile, though not itself sufficient to create a final decision, relates forward to the expiration of the time to refile.[63]

And still other courts hold that the plaintiff's express (rather than implicit) waiver of the right to reinstate makes the dismissal final.[64] This disclaimer often happens via a filing in the district court.[65] But it can also

59. *E.g.*, Frederico v. Home Depot, 507 F.3d 188, 192–93 (3d Cir. 2007); McKusick v. City of Melbourne, 96 F.3d 478, 482 n.2 (11th Cir. 1996); United Steelworkers of Am., AFL-CIO v. Am. Int'l Aluminum Corp., 334 F.2d 147, 150 n.4 (5th Cir. 1964).

60. *See United Steelworkers*, 334 F.2d at 150 n.4 ("The Union was entitled to treat the dismissal as final, which it did. It was not required to formally disclaim any right to file an amended complaint.").

61. *See* Zablocki v. Merchs. Credit Guide Co., 968 F.3d 620, 623 (7th Cir. 2020); Otis v. City of Chicago, 29 F.3d 1159, 1165 (7th Cir. 1994) (en banc).

62. *See, e.g.*, Hagan v. Rogers, 570 F.3d 146, 151–52 (3d Cir. 2009); Batoff v. State Farm Ins. Co., 977 F.2d 848, 851 n.5 (3d Cir. 1992); Festa v. Loc. 3 Int'l Bhd. of Elec. Workers, 905 F.2d 35, 37 (2d Cir. 1990) (per curiam).

63. *See* Shott v. Katz, 829 F.3d 494, 496 (7th Cir. 2016); United States v. Vitek Supply Corp., 151 F.3d 580, 583 (7th Cir. 1998); Albiero v. City of Kankakee, 122 F.3d 417, 420 (7th Cir. 1997). This is a straightforward application of Federal Rule of Appellate Procedure 4(a)(2). On Rule 4(a)(2), see generally Lammon, *Cumulative Finality*, *supra* note 7.

64. *See* Borelli v. City of Reading, 532 F.2d 950, 951 n.1 (3d Cir. 1976) (per curiam) (noting that plaintiffs can "file an appropriate notice with the district court asserting [their] intent to stand on the complaint, at which time an order to dismiss the action would be appropriate").

65. *See, e.g.*, Slayton v. Am. Express Co., 460 F.3d 215, 225 (2d Cir. 2006) (dismissal with leave to amend was final once plaintiffs appealed and told the district court that they did not intend to amend their complaint); *In re* Westinghouse Sec. Litig., 90 F.3d 696, 705 (3d Cir. 1996) (notice of intent to stand on complaint, filed in district court, resulted in a final decision).

come in appellate briefing or even at oral argument in the appeal.[66]

In each of these scenarios, courts reason that there is no longer any prospect of reinstatement. By appealing, letting the time to reinstate expire, or disclaiming the right to reinstate, the plaintiff has given up on proceeding any further in the district court. District court proceedings are thus over, and the dismissal is final.[67]

Other courts of appeals have adopted a "subsequent-order" rule. They require that the district court enter another order for a dismissal with leave to become final.[68] The first step in this process is for the plaintiff to either explicitly disclaim the right to reinstate or let the time to reinstate expire (or perhaps even both).[69] The district court must then enter a subsequent order of dismissal, which courts occasionally refer to as an order of "absolute dismissal."[70] This subsequent order does not grant any leave to reinstate. It instead signals that the

66. *See, e.g.*, Bing v. Brivo Sys., LLC, 959 F.3d 605, 612 (4th Cir. 2020) (stating that counsel's standing on the complaint at oral argument resolved any questions about the finality of a without-prejudice dismissal); Conn. Nat'l Bank v. Fluor Corp., 808 F.2d 957, 960–61 (2d Cir. 1987) (holding that a "disclaimer of intent [at oral argument] to amend effectively cure[d] the nonfinal character of the judgment from which the appeal has been taken," but a written disclaimer would have been preferred).

67. *See, e.g.*, *Slayton*, 460 F.3d at 224; *Westinghouse Sec. Litig.*, 90 F.3d at 706.

68. *See* Britt v. DeJoy, 45 F.4th 790, 793 (4th Cir. 2022) (en banc); Moya v. Schollenbarger, 465 F.3d 444, 451 n.9 (10th Cir. 2006); WMX Techs., Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc); Anastasiadis v. S.S. Little John, 339 F.2d 538, 540 (5th Cir. 1964).

69. *See, e.g.*, Pinkert v. Schwab Charitable Fund, 48 F.4th 1051, 1054 n.1 (9th Cir. 2022). *Cf.* Weston Family P'ship LLLP v. Twitter, Inc., 29 F.4th 611, 618–19 (9th Cir. 2022) (holding that an appeal filed after a dismissal with leave to amend but before a subsequent final judgment was premature).

70. *See Anastasiadis*, 339 F.2d at 540 ("[A]n order by the District Court granting defendant's motion to dismiss with leave to amend was not a final appealable order in the absence of an order of absolute dismissal after expiration of the time for amendment."); Richards v. Dunne, 325 F.2d 155, 156 (1st Cir. 1963) (per curiam) (dismissal with leave to amend was not final, as a subsequent order of "absolute dismissal" was necessary).

district court has finished with the action. So district court proceedings are over, and the dismissal is final.[71]

There is also a third option that a few courts have endorsed: the "self-executing" or "automatic-finality" rule. In these cases, the district court dismisses with leave to amend, but the court also states that the dismissal will become final once the time to reinstate expires.[72] Once that time comes, the non-final order automatically transforms into a final order. No subsequent order is necessary. It's automatic.[73]

B. The State of the Circuits

When it comes to the split on finalizing dismissals with leave to reinstate, some generalizations are possible.

The Seventh, Eleventh, and D.C. Circuits fall squarely into the litigant-control side.[74] Of these, the Eleventh Circuit probably has the most permissive approach. It holds that an appeal alone is enough to create finality, even before the time to reinstate has expired.[75] Unsurprisingly, given the permissiveness of this appeal-only approach, the Eleventh Circuit has also said that the expiration of time or a disclaimer is sufficient (though not necessary) to create a final decision.[76]

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71. *See, e.g.*, Weston Fam. P'ship LLLP v. Twitter, Inc., 29 F.4th 611, 618–19 (9th Cir. 2022); Sapp v. City of Brooklyn Park, 825 F.3d 931, 934–35 (8th Cir. 2016); Azar v. Conley, 480 F.2d 220, 223 (6th Cir. 1973).

72. *See* Weber v. McGrogan, 939 F.3d 232, 238 (3d Cir. 2019).

73. *See, e.g.*, Berke v. Bloch, 242 F.3d 131, 135 (3d Cir. 2001).

74. *See* N. Am. Butterfly Ass'n v. Wolf, 977 F.3d 1244, 1256 (D.C. Cir. 2020); Otis v. City of Chicago, 29 F.3d 1159, 1167–68 (7th Cir. 1994) (en banc); Schuurman v. Motor Vessel Betty K V, 798 F.2d 442, 442 (11th Cir. 1986) (per curiam).

75. *See Schuurman*, 798 F.2d at 442; *see also*, McKusick v. City of Melbourne, 96 F.3d 478, 482 n.2 (11th Cir. 1996); Van Poyck v. Singletary, 11 F.3d 146, 148–49 (11th Cir. 1994); Briehler v. City of Miami, 926 F.2d 1001, 1003 (11th Cir. 1991).

76. *See In re* United States, 844 F.2d 1528, 1531 (11th Cir. 1988); *Schuurman*, 798 F.2d at 444–45.

The Seventh and D.C. Circuits have not held that an appeal alone suffices. But they have held that the expiration of the time to reinstate results in a final decision.[77] And if a litigant appeals before that time has expired, the Seventh Circuit relates forward the notice of appeal to the expiration of the reinstatement period.[78] The practical difference from the Eleventh Circuit is thus minimal.

On the other side of the split, the First, Fourth, Eighth, and Ninth Circuits have adopted the subsequent-order rule.[79] Each has held that plaintiffs cannot simply wait for the expiration of the time to reinstate or even disclaim their right to reinstate. Plaintiffs must instead obtain another order from the district court. Until they do, there is no final decision.

The Tenth Circuit also probably falls in the subsequent-order side of the split. It has several cases requiring a subsequent order for finality.[80] But in *Lewis v. B.F. Goodrich Co.*, the en banc Tenth Circuit seemed to apply the automatic-finality rule.[81] The district court in *Lewis* had stayed proceedings on the only unresolved claim and said that, should the parties not move to reopen the case within 60 days, the action was dismissed with prejudice.[82] No one sought to reopen the proceedings within the given time.[83] According to the Tenth Circuit, the expiration of that time turned the stay

77. *See N. Am. Butterfly Ass'n*, 977 F.3d at 1256; *Otis*, 29 F.3d at 1167–68; *see also* Zablocki v. Merchs. Credit Guide Co., 968 F.3d 620, 623 (7th Cir. 2020); Shott v. Katz, 829 F.3d 494, 496 (7th Cir. 2016); Davis v. Advoc. Health Ctr. Patient Care Express, 523 F.3d 681, 683 (7th Cir. 2008); United States v. Vitek Supply Corp., 151 F.3d 580, 583 (7th Cir. 1998).

78. *See* Albiero v. City of Kankakee, 122 F.3d 417, 420 (7th Cir. 1997).

79. *See* Britt v. DeJoy, 45 F.4th 790, 793 (4th Cir. 2022) (en banc); Sapp v. City of Brooklyn Park, 825 F.3d 931, 934–35 (8th Cir. 2016); WMX Techs., Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc); Richards v. Dunne, 325 F.2d 155, 156 (1st Cir. 1963) (per curiam).

80. *See* Moya v. Schollenbarger, 465 F.3d 444, 451 n.9 (10th Cir. 2006); Midwestern Devs., Inc. v. City of Tulsa, 319 F.2d 53, 53–54 (10th Cir. 1963); Crutcher v. Joyce, 134 F.2d 809, 814 (10th Cir. 1943).

81. *See* Lewis v. B.F. Goodrich Co., 850 F.2d 641, 642–43 (10th Cir. 1988).

82. *Id.* at 642.

83. *Id.*

of proceedings into a with-prejudice dismissal of the only remaining claim and thus produced a final decision.[84] In support of this conclusion, the Tenth Circuit cited to the Eleventh Circuit's case law holding that the expiration of the time to reinstate creates a final decision.[85]

Other circuits are messy, with decisions on each side of the split and no decision reconciling them.[86] The Second Circuit, for example, has two decisions from the 1930s that require a subsequent order of absolute dismissal.[87] But recent decisions have endorsed the litigant-control option. One case held that the expiration of time to reinstate results in a final decision.[88] And a pair of others have allowed plaintiffs to create a final decision by disclaiming the right to reinstate.[89]

The Fifth Circuit's case law is similarly inconsistent. In a pair of decisions from 1964, the Fifth Circuit held that an appeal alone finalized the dismissal with leave to reinstate.[90] But a third decision from that same year said an order of absolute dismissal was necessary.[91] The Fifth Circuit has not resolved these conflicting cases, though

84. *Id.* at 642–43.

85. *Id.* at 643 n.2.

86. The Sixth Circuit does not have clear case law on this issue. In two cases, the court suggested that plaintiffs could create finality by appealing—the appeal was an implicit disclaimer of the right to reinstate. *See* Boxill v. O'Grady, 935 F.3d 510, 517 (6th Cir. 2019); Robert N. Clemens Tr. v. Morgan Stanley DW, Inc., 485 F.3d 840, 846 (6th Cir. 2007). In contrast, the Sixth Circuit's decision in *Azar v. Conley*, 480 F.2d 220, 223 (6th Cir. 1973), suggests that an appeal alone is not enough. Some courts have read *Azar* to adopt the absolute-dismissal rule. But none of these cases clearly adopted a rule, and I am not aware of any Sixth Circuit case that does so.

87. *See* Cory Bros. & Co. v. United States, 47 F.2d 607, 607 (2d Cir. 1931); Western Elec. Co. v. Pacent Reproducer Corp., 37 F.2d 14, 15 (2d Cir. 1930). Another older Second Circuit decision permitted automatic finality. *See* Cleary Bros. v. Christie Scow Corp., 176 F.2d 370, 372 (2d Cir. 1949).

88. *See* Festa v. Loc. 3 Int'l Bhd. of Elec. Workers, 905 F.2d 35, 36–37 (2d Cir. 1990) (per curiam).

89. *See* Slayton v. Am. Express Co., 460 F.3d 215, 224 (2d Cir. 2006); Kittay v. Kornstein, 230 F.3d 531, 537 (2d Cir. 2000).

90. United States v. Mayton, 335 F.2d 153, 158 n.12 (5th Cir. 1964); United Steelworkers of Am., AFL-CIO v. Am. Int'l Aluminum Corp., 334 F.2d 147, 150 n.4 (5th Cir. 1964).

91. *See* Anastasiadis v. S.S. Little John, 339 F.2d 538, 540 (5th Cir. 1964).

at least one recent decision suggested that the expiration of time to reinstate resulted in a final decision.[92]

Then there is the Third Circuit, the law of which appears to be unsettled. One line of cases in the Third Circuit held that plaintiffs can finalize a dismissal with leave to amend by formally disclaiming the right to amend.[93] Another line of cases held that the expiration of the time to reinstate was an implicit disclaimer.[94] In *Weber v. McGrogan*, a panel of the Third Circuit surveyed these two lines of cases and said that expiration of the time to reinstate alone is not enough.[95] Instead, a clear and unequivocal disclaimer was necessary.[96]

After *Weber*, it seemed that the Third Circuit required an express disclaimer. But subsequent decisions have gone both ways.[97] And in one unpublished, post-*Weber* case, another panel of the Third Circuit said that the expiration-of-time cases were still good law.[98] After all, those cases said that the expiration of time sufficed, and one panel cannot overrule circuit law.[99]

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92. *See* Lopez Dominguez v. Gulf Coast Marine & Assocs., Inc., 607 F.3d 1066, 1072–73 (5th Cir. 2010).

93. *See In re* Westinghouse Sec. Litig., 90 F.3d 696, 705 (3d Cir. 1996); Shapiro v. UJB Fin. Corp., 964 F.2d 272, 278 (3d Cir. 1992); Borelli v. City of Reading, 532 F.2d 950, 951–52 (3d Cir. 1976) (per curiam).

94. *See* Hagan v. Rogers, 570 F.3d 146, 151–52 (3d Cir. 2009); Frederico v. Home Depot, 507 F.3d 188, 192–93 (3d Cir. 2007); Batoff v. State Farm Ins. Co., 977 F.2d 848, 851 n.5 (3d Cir. 1992).

95. Weber v. McGrogan, 939 F.3d 232, 240 (3d Cir. 2019).

96. *Id. Weber* also said that automatic-finality was acceptable. *See id.*; *see also* Berke v. Bloch, 242 F.3d 131, 135 (3d Cir. 2001).

97. Steuert v. L-3 Commc'ns Corp., No. 22-1847, 2023 WL 421006, at *1 (3d Cir. Jan. 26, 2023) (dismissing an appeal because although the plaintiff appealed, he "did not clearly stand on his complaint"); Wilson v. Biden, No. 22-2797, 2023 WL 2783256, at *1 (3d Cir. Apr. 5, 2023) (holding that the court had appellate jurisdiction when the plaintiff appealed rather than file an amended complaint).

98. *See* Thorpe v. Twp. of Salisbury, No. 22-2448, 2023 WL 2783255, *1 (3d Cir. Apr. 5, 2023).

99. *See id.*

IV. FINAL DECISIONS, FINAL JUDGMENTS, AND DISMISSALS WITH LEAVE TO REINSTATE

On its face, the split on finalizing dismissals with leave to reinstate can be traced to different readings of *Jung*. But more fundamentally, these different readings of *Jung* reflect confusion about the different roles that final decisions and final judgments play. In this Part, I first explain those roles. I then show that *Jung* was about the latter—final judgments—and thus supports the litigant-control side of the split.

A. Distinguishing Final Decisions and Final Judgments

The courts of appeals often use the terms "final decision" and "final judgment" interchangeably.[100] Courts have used both terms when discussing their appellate jurisdiction.[101] Courts have also used both terms when discussing the moment at which the time to appeal starts running.[102] Courts will sometimes define the two concepts identically.[103] Some have even

100. *See, e.g.*, Triangle Cayman Asset Co. v. LG & AC, Corp., 52 F.4th 24, 30 (1st Cir. 2022) ("Final decisions—which we also often refer to as final judgments—are those that dispose[] of all claims against all parties." (quotation marks omitted)).

101. *See, e.g.*, Belya v. Kapral, 45 F.4th 621, 625 (2d Cir. 2022) (noting that "[a]ppellate jurisdiction typically requires either a final judgment, 28 U.S.C. § 1291, or a certified interlocutory appeal, 28 U.S.C. § 1292(b)"); Unified Data Servs., LLC v. Fed. Trade Comm'n, 39 F.4th 1200, 1206 (9th Cir. 2022) ("Pursuant to 28 U.S.C. § 1291, we only have appellate jurisdiction over 'final decisions' of district courts." (quotation marks omitted).

102. *See, e.g.*, Amara v. Cigna Corp., 53 F.4th 241, 247 (2d Cir. 2022) ("[W]e have jurisdiction only if an aggrieved party appeals within 30 days after a district court issues a final decision."); Adams v. C3 Pipeline Constr. Inc., 30 F.4th 943, 957 (10th Cir. 2021) ("After the district court issues a final decision, a prospective appellant ordinarily has 30 days to file a notice of appeal."); Leavy v. Hutchison, 952 F.3d 830, 831 (6th Cir. 2020) ("Litigants generally have 30 days from the district court's entry of a final judgment or final order to file a notice of appeal.").

103. *Compare* Hall v. Hall, 138 S. Ct. 1118, 1123–24 (2018) ("A final decision ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." (quotation marks omitted), *with* Midland Asphalt

suggested that final decisions and final judgments are the same thing.[104] Indeed, the statute from which we get the term "final decisions"—28 U.S.C. § 1291—is often said to embody the "final-judgment rule."[105]

Conflating final decisions and final judgments is somewhat understandable. Over the years, Congress has used both terms to describe appellate jurisdiction. The first Judiciary Act allowed for appeals from "final decrees and judgments."[106] With the creation of the modern courts of appeals in 1891, that language was changed to give the new circuit courts of appeals jurisdiction to review a "final decision" of a district court.[107] The Judicial Code of 1911 more or less finalized the modern phrasing, giving the courts of appeals "appellate jurisdiction to review by appeal or writ of error final decisions in the district courts."[108] The merger of law and equity—and the elimination of writs of error—resulted in the form now found in § 1291: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts . . . ."[109]

Corp. v. United States, 489 U.S. 794, 798 (1989) ("[A] final judgment is normally deemed not to have occurred until there has been a decision by the District Court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." (quotation marks omitted)).

104. Williams v. Taylor Seidenbach, Inc., 958 F.3d 341, 354 n.7 (5th Cir. 2020) (Ho, J., concurring) ("[The dissent] appears to rely on the premise that '[t]he text of § 1291 demands [a] distinction between final decisions and final judgments.' But the Supreme Court has suggested the opposite." (citing Bankers Trust Co. v. Mallis, 435 U.S. 381, 384 n.4 (1978) (per curiam))). I discuss *Mallis*—and why this misreads *Mallis*—below. *See infra* notes 137–144 and accompanying text.

105. *See, e.g.*, Microsoft Corp. v. Baker, 137 S. Ct. 1702, 1715 (2017).

106. Judiciary Act of 1789, Pub. L. No. 1-20, § 22, 1 Stat. 72, 84; *see also id.* § 21 (providing for appeals from "final decrees" in admiralty and maritime cases). Section 22 used "final decrees and judgments" when discussing appeals to the circuit courts. It then used "final judgments and decrees" when discussing appellate review by the Supreme Court. The Judiciary Act of 1801—the so-called "Midnight Judges Act"—changed the wording slightly to "final judgments and decrees." Judiciary Act of 1801, Pub. L. No. 6-4, § 33, 2 Stat. 89, 99.

107. Judiciary Act of 1891, § 6, 26 Stat. 826, 828 (1891).

108. Judicial Code of 1911, Pub. L. No. 61-475 § 128, 36 Stat. 1087, 1133 (1911).

109. 28 U.S.C. § 1291. On the elimination of writs of error, see Crystallex Int'l Corp. v. Bolivarian Republic of Venez., 24 F.4th 242, 251–54 (3d Cir. 2022).

But final judgments and final decisions are not the same thing.[110] They instead play distinct roles in the law of federal appellate jurisdiction.

"Final decisions" determine when the courts of appeals have jurisdiction and thus when litigants *can* appeal. As much can be seen in the just-mentioned § 1291, which gives the courts of appeals "jurisdiction of appeals from all final decisions of the district courts." This statute is the main source of federal appellate jurisdiction. To be sure, other sources exist, as do several exceptions to § 1291.[111] But absent either of those, a court of appeals lacks jurisdiction to review any decisions in an action until the district court enters a final decision. So litigants generally cannot appeal until that point.

"Final judgments"—and more specifically, their entry on a district court's docket—determine when the time to appeal begins running and thus when litigants *must* appeal. No procedural statute or rule specifically defines "final judgments" (despite frequently referring to them).[112] But Federal Rule of Civil Procedure 54(a)

110. *See* Abney v. United States, 431 U.S. 651, 658 (1977) ("'While a final judgment always is a final decision, there are instances in which a final decision is not a final judgment.'" (quoting Stack v. Boyle, 342 U.S. 1, 12 (1951) (opinion of Jackson, J.))); Keith Mfg. Co. v. Butterfield, 955 F.3d 936, 940 (Fed. Cir. 2020) ("Given their common purpose, it is unsurprising that 'judgment' in the context of Rule 54 is often congruent to a 'final decision' under § 1291. They are not, however, equivalent." (citation omitted)); *see also* McClendon v. City of Albuquerque, 630 F.3d 1288, 1292 (10th Cir. 2011) ("While the defendants are correct that a final judgment is the paradigmatic 'final decision' appealable under § 1291, it doesn't follow from this fact that every case with a final judgment in it is appealable.") (citation omitted).

111. *See, e.g.*, Pollis, *supra* note 12, at 1652–59.

112. *See, e.g.*, 28 U.S.C. § 158 (a)(1) (giving district courts jurisdiction to review the "final judgments" of bankruptcy courts); § 1258 (giving the Supreme Court jurisdiction to review "[f]inal judgments or decrees" from the Supreme Court of the Commonwealth of Puerto Rico); § 1447(c) (discussing proceedings in a removed class action before "final judgment"); FED. R. CIV. P. 23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before final judgment."); 54(b) (allowing the district court to enter "a final judgment as to one or more, but fewer than all, claims or parties"); 60(b) (providing "[g]rounds for relief from a final judgment, order, or proceeding"); 79(b) (requiring that the clerk "keep a copy of every final judgment and appealable order"); FED. R. APP. P. 3(c) (detailing when a notice of appeal encompasses a final judgment).

defines a "judgment" to include "a decree and any order from which an appeal lies."[113] The "final judgment" is therefore a particular kind of judgment, normally the last one in an action.

Entry of a judgment on the district court's docket starts the appeal clock. By statute and rule, litigants have a brief window after a district court decision to appeal.[114] An appeal filed outside of this window is normally ineffective.[115] And the time to appeal runs from the entry of a judgment on the district court's docket.[116] In civil cases, this entry normally occurs when the district court sets out the judgment in a separate document.[117] If the district court neglects to enter the separate document, the judgment is deemed entered 150 days after the entry of a dispositive order on the civil docket.[118]

Final decisions and final judgments thus play distinct roles. To be sure, both can affect appellate jurisdiction. After all, the only statutory requirements for most civil appeals are a final decision under § 1291

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113. FED. R. CIV. P. 54(a).

114. *See, e.g.*, 28 U.S.C. § 2107(a) ("[N]o appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree."); FED. R. APP. P. 4(b) (setting a 14-day deadline for appeals in criminal cases).

115. *See* Bowles v. Russell, 551 U.S. 205, 213 (2007) (explaining that the civil appeal deadline is jurisdictional); United States v. Lopez, 562 F.3d 1309, 1313 (11th Cir. 2009) (explaining that the criminal-appeal deadline, while not jurisdictional, must be applied if the government objects to a late appeal).

116. *See* FED. R. APP. P. 4(a)(1); 4(b)(1).

117. FED. R. CIV. P. 58(c)(2)(A); FED. R. APP. P. 4(a)(7)(A)(ii). Federal Rule of Civil Procedure 58(a) requires that "[e]very judgment and amended judgment . . . be set out in a separate document" except for a handful of orders disposing of certain motions. This separate document must specify who won and the relief (if any) awarded. Phila. Indem. Ins. Co. v. Chicago Tr. Co., 930 F.3d 910, 912 (7th Cir. 2019) ("A judgment must provide the relief to which a prevailing party is entitled."). *See also* FED. R. CIV. P. 54(a) ("A judgment should not include recitals of pleadings, a master's report, or a record of prior proceedings."). In the few instances when no separate document is required, the time to appeal begins running from entry of the judgment or order itself in the civil docket. FED. R. APP. P. 4(a)(7)(A)(i).

118. FED. R. CIV. P. 58(c)(2)(B); FED. R. APP. P. 4(a)(7)(A)(ii).

and a timely appeal under 28 U.S.C. § 2107.[119] But the ways in which they can affect appellate jurisdiction are different. The existence of a final decision gives a court of appeals jurisdiction to review the district court's judgment. The entry of that judgment on the district court's docket starts the appeal clock.

B. Jung *and Dismissals with Leave to Reinstate*

Let's return to *Jung* with this distinction in mind.[120] Recall that *Jung* deemed an appeal appropriate when brought within 30 days of district court's subsequent order of dismissal.[121] Both sides of the dismissals-with-leave split find support in *Jung*. But the distinction between final decisions and final judgments shows that the litigant-control side has the better reading of the case.

The litigant-control side of the split thinks *Jung* addresses the entry of a final judgment. These courts read *Jung* to hold only that no final judgment was entered—and thus the time to appeal did not begin running—until the district court's subsequent order of dismissal.[122] The earlier dismissal might have been a final *decision* once the time to amend had expired, and the plaintiff probably *could* have appealed at that point.[123] But *Jung* said nothing about the existence of a final decision.[124] The only question was when the appeal clock started running. So the only issue was when the final judgment was entered.

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119. *See* 28 U.S.C. §§ 1291 & 2107; *see also* Fairley v. Andrews, 578 F.3d 518, 521 (7th Cir. 2009) ("The only prerequisites to appellate jurisdiction are a final judgment and a timely notice of appeal."). Note, the court should have said "final decision," not "final judgment."

120. For a summary of *Jung*, see *supra* notes 44–54 and accompanying text.

121. *See* Jung v. K. & D. Mining Co., 356 U.S. 335, 337 (1958).

122. *See* N. Am. Butterfly Ass'n v. Wolf, 977 F.3d 1244, 1255 (D.C. Cir. 2020).

123. *See* Otis v. City of Chicago, 29 F.3d 1159, 1167 (7th Cir. 1994) (en banc) (noting that *Jung* did not address whether the plaintiff could have appealed at an earlier point).

124. *See N. Am. Butterfly Ass'n*, 977 F.3d at 1255.

The subsequent-order side of the split thinks that *Jung* addresses the existence of a final decision. These courts read *Jung* to hold that there was no final decision—and thus no appellate jurisdiction—until the district court's subsequent order of dismissal.[125] They then apply that reading of *Jung* to other dismissals with leave to reinstate. A subsequent order—like the subsequent order in *Jung*—is necessary for these dismissals to be final.[126]

The litigant-control side has the better reading of *Jung*. To be sure, the opinion was not terribly clear.[127] But *Jung* was ultimately about timeliness. The defendants argued that the appeal was untimely. So the Supreme Court needed to decide when the appeal clock began running. That clock starts with the entry of a final judgment, not the existence of a final decision. And *Jung* held that the time to appeal did not start running until the district court's last order. That last order must have marked the entry of a final judgment.

The Supreme Court's decision in *United States v. Indrelunas* reinforces this reading of *Jung*.[128] The district court in *Indrelunas* resolved all claims but

125. *See* Britt v. DeJoy, 45 F.4th 790, 796–97 (4th Cir. 2022) (en banc); Garcia-Goyco v. Law Env't Consultants, Inc., 428 F.3d 14, 18 (1st Cir. 2005); *see also N. Am. Butterfly Ass'n*, 977 F.3d at 1274 (Millet, J., dissenting); *In re* United States, 844 F.2d 1528, 1537–38 (11th Cir. 1988) (Kravitch, J., specially concurring).

126. *See Britt*, 45 F.4th at 793; WMX Techs., Inc. v. Miller, 104 F.3d 1133, 1137 (9th Cir. 1997) (en banc); *see also N. Am. Butterfly Ass'n*, 977 F.3d at 1273–74 (Millet, J., dissenting).

127. *See N. Am. Butterfly Ass'n*, 977 F.3d at 1255 (noting that *Jung* never cited § 1291 or mentioned finality for appellate jurisdiction); *id.* at 1277 (Millet, J., dissenting) (noting that *Jung* did not mention Rule 58 or the requirement for entry of a judgment). Judge Millet's dissent in *North American Butterfly* pointed out that the Seventh Circuit's decision and the parties' cert-stage briefing in *Jung* addressed § 1291, not Rule 58. *Jung* also cited to *Cory Brothers & Co. v. United States*, 47 F.2d 607 (2d Cir. 1931), with approval, which required a subsequent order of dismissal for finality. I'm not convinced by Judge Millet's "legislative history" reading of *Jung*. The litigants might have been confused about the difference between final decisions and final judgments. And I don't find the cite to *Cory Brothers* to be enough to clearly endorse the subsequent-order side of this issue when the rest of the opinion is so easily explained as being about the entry of a final judgment.

128. United States v. Indrelunas, 411 U.S. 216, 221 (1973).

neglected to enter a final judgment for eight months.[129] The Court held that the time to appeal did not begin running until that subsequent judgment.[130] Like *Jung*, the Court reasoned that courts needed to avoid any uncertainty as to the appeal clock.[131]

Jung and *Indrelunas* thus show that the time to appeal does not begin running until entry of the judgment on the district court's docket. To be sure, some things have changed since those decisions. At the time of *Jung* and *Indrelunas*, litigants could always wait until the actual entry of a judgment; as one court put it, they could "defer the appeal until Judgment Day if that is how long it [took] to enter the document."[132] The Rules Committee eventually concluded that "forever is too long."[133] So it amended Civil Rule 58 and Appellate Rule 4 in 2002 to provide that when a district court neglects to set out the judgment in a separate document, the judgment is deemed entered on the docket 150 days after entry of a dispositive order on the civil docket.[134]

In the context of dismissals with leave to reinstate, this 150-day period runs from when the dismissal becomes final, which is the closest thing in these cases to the entry of a final decision on the docket. To be sure, some cases have said that the 30-day appeal clock itself (rather than the 150-day clock for deeming a judgment entered) begins running once the dismissal is finalized.[135] But that's true only if the district court has set out the judgment in a separate document. It's also true that the 150 days are supposed to run from the entry of the final decision on the docket and that finalizing the dismissal under the litigant-autonomy rule rarely (if ever) involves the district court's entering something on

129. *Id.* at 219.

130. *Id.* at 221.

131. *Id.*

132. *In re* Kilgus, 811 F.2d 1112, 1117 (7th Cir. 1987).

133. Carter v. Hodge, 726 F.3d 917, 920 (7th Cir. 2013).

134. Pierce v. Visteon Corp., 791 F.3d 782, 785 (7th Cir. 2015).

135. Some cases have said that the appeal clock begins running with the expiration of the time to reinstate. *See* Berke v. Bloch, 242 F.3d 131, 136 (3d Cir. 2001); Otis v. City of Chicago, 29 F.3d 1159, 1167–68 (7th Cir. 1994) (en banc).

the docket.[136] But it takes only a little imagination to treat the initial dismissal as having been effectively entered once that dismissal becomes final.

So after the 2002 amendments, the situation in *Jung*—a nearly two-year delay in the entry of the final judgment—cannot reoccur. The district court's decision in *Jung* became final and thus appealable after the time to amend expired. Under the 2002 amendments, the appeal clock would have started running 150 days later. Adding everything together—20 days to amend, 150 days until the start of the appeal clock, and 30 days to appeal—the time to appeal in *Jung* would have run out 200 days after the district court's dismissal. The notice of appeal—filed nearly two years after that dismissal—would have been untimely.

The 2002 amendments thus changed how *Jung* and *Indrelunas* apply to modern litigation. Nowadays, a final judgment can be deemed entered. But the amendments did not change *Jung* and *Indrelunas*'s key holding: the appeal clock still does not begin running that entry.

The Supreme Court's decision in *Bankers Trust Co. v. Mallis* further cements the distinction between final decisions and final judgments.[137] *Mallis* held that the entry of a final judgment is not required for the court of appeals to have jurisdiction.[138] The district court in *Mallis* resolved all of the parties' claims but neglected to enter a final judgment.[139] The plaintiffs nevertheless appealed, and the Supreme Court held that appellate jurisdiction existed despite the absence of a final judgment.[140] The Court acknowledged *Jung* and *Indrelunas*'s point that requiring entry of the judgment creates certainty as to when the time to appeal begins

136. *See* N. Am. Butterfly Ass'n v. Wolf, 977 F.3d 1244, 1280–81 (D.C. Cir. 2020) (Millet, J., dissenting).

137. Bankers Tr. Co. v. Mallis, 435 U.S. 381 (1978).

138. *Id.* at 386–87.

139. *Id.* at 382.

140. *Id.* at 383.

running.[141] But if litigants appeal before that time begins to run, there is nothing to be gained by dismissing their appeals and forcing them to wait for the district court to enter a pro forma judgment.[142] "Wheels would spin for no practical purpose."[143] *Mallis* thus permits would-be appellants to waive any reliance on the entry of a judgment and appeal once the district court has made a final decision.[144]

Jung, *Indrelunas*, and *Mallis* teach that once a district court has made a final decision, the court of appeals has jurisdiction. At that point, a litigant can appeal regardless of whether the district court has entered a final judgment. But the time to appeal does not begin running until that final judgment is entered. By appealing before the final judgment, the appellant essentially waives the protection of *Jung* and *Indrelunas*. But that would-be appellant can also wait to appeal until entry of a final judgment, secure in knowing that the brief window of time in which to appeal has not begun, much less expired. Taken together, the cases avoid needless procedural wheel-spinning while protecting against the inadvertent loss of appellate rights.[145]

The litigant-autonomy side of the split over dismissals with leave to reinstate thus has the better rule. The rule is practically sound—once the condition for reinstatement has not been satisfied, we know the outcome of district court proceedings.[146] Nothing is gained by requiring a subsequent confirmation from the

141. *Id.* at 385 ("The separate-document requirement was thus intended to avoid the inequities that were inherent when a party appealed from a document or docket entry that appeared to be a final judgment of the district court only to have the appellate court announce later that an earlier document or entry had been the judgment and dismiss the appeal as untimely.").

142. *Id.*

143. *Id.*

144. Federal Rule of Appellate Procedure 4(a)(7)(B) codified and extended this rule. Ueckert v. Guerra, 38 F.4th 446, 452 (5th Cir. 2022).

145. Otis v. City of Chicago, 29 F.3d 1159, 1167 (7th Cir. 1994) (en banc).

146. *See id.* at 1165.

district court.[147] And the litigant-autonomy rule appreciates the different roles that final decisions and final judgments play.

C. The Importance of Precision

Granted, it's not always necessary to distinguish between a final decision and a final judgment. The existence of a final decision and the entry of a final judgment often coincide. Once district courts enter a final decision, they often set out the final judgment in a separate document and enter it on the docket.[148]

But a lack of precision can create problems for courts and litigants. It can create needless procedural detours over imagined issues, such as concern over appellate jurisdiction when the district court did not enter a final judgment. It can result in cumbersome procedural rules like the subsequent-order rule for dismissals with leave to reinstate.

In the worst cases, confusion over final decisions and final judgments can result in the inadvertent loss of appellate rights. This can occur when a district court announces its decision and says that an opinion is forthcoming.[149] Litigants then sometimes wait for that opinion before appealing, believing that there is no final decision until the court enters a final judgment.[150] If the district court takes too long—such that the judgment is deemed entered 150 days after the announced decision—the time to appeal might expire without anyone noticing.[151] And litigants can similarly forfeit the right to appeal when the order resolving all outstanding claims lacks any facts, law, or analysis, such that it constitutes the separate document required to start the appeal

147. *Id.* at 1165–66.

148. *See* Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 103 ("'[F]inal decisions' typically are ones that trigger the entry of judgment.").

149. *See, e.g.*, United States v. Bradley, 882 F.3d 390, 392 (2d Cir. 2018).

150. *See, e.g.*, Walker v. Weatherspoon, 900 F.3d 354, 356 (7th Cir. 2018).

151. *See* Vergara v. City of Chicago, 939 F.3d 882, 885 (7th Cir. 2019).

deadline.[152] Not realizing that this order started the appeal clock, litigants sometimes wait for another document. And when they finally appeal, it's too late.[153]

V. CONCLUSION

Distinguishing the separate roles that final decisions and final judgments play is only one step in clarifying the law of federal appellate jurisdiction. Disputes abound over whether a particular district court decision is final.[154] And judges sometimes disagree about whether or when a final judgment has been entered.[155] Much more work in this area remains to be done.

But precision in these concepts is an important first step. Recognizing what final decisions and final judgments do brings some clarity to these sometimes-amorphous aspects of federal appellate jurisdiction. And recognizing their separate roles focuses attention on the interests that underlie each. In particular, the need to easily determine when appellate jurisdiction exists raises questions about whether we have correctly defined final decisions. And the need for certainty as to when the appeal clock begins running raises questions about whether our current rules—which can deem a judgment entered 150 days after the entry of a dispositive order—are sufficiently clear.

152. *See, e.g.*, Vaqueria Tres Monjitas, Inc. v. Comas-Pagan, 772 F.3d 956, 959–60 (1st Cir. 2014).

153. Kidd v. D.C., 206 F.3d 35, 39 (D.C. Cir. 2000).

154. *See, e.g.*, Wilcox v. Georgetown Univ., 987 F.3d 143 (D.C. Cir. 2021).

155. *See, e.g.*, United States v. Mtaza, 849 F. App'x 463 (5th Cir. 2021); *Kidd*, 206 F.3d 35.