

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12439

D.C. Docket No. 1:18-cv-24190-RS

WILLIAM O. FULLER,
MARTIN PINILLA,

Plaintiffs-Appellees,

versus

JOE CAROLLO,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(September 25, 2020)

Before WILLIAM PRYOR, Chief Judge, TJOFLAT and HULL, Circuit Judges.

WILLIAM PRYOR, Chief Judge:

Joe Carollo, a Miami City Commissioner, appeals from an order that Carollo says denied him qualified immunity. But the district court granted Carollo's motion to dismiss and granted the plaintiffs, Miami businessmen William Fuller

and Martin Pinilla, leave to amend their complaint. That order is not appealable. We dismiss Carollo's appeal for lack of jurisdiction.

Fuller and Pinilla allege that Carollo violated their rights to freedom of speech and association under the First Amendment by retaliating against them for their support of one of Carollo's political opponents. They sued Carollo and others, *see* 42 U.S.C. § 1983, and the case was referred to a magistrate judge for pretrial proceedings. Carollo and other defendants not party to this appeal moved to dismiss the complaint for failing to state a claim. Carollo's motion sought dismissal of the complaint based, in part, on qualified immunity.

The magistrate judge recommended dismissing Fuller and Pinilla's complaint with leave to amend based on problems with the scope of the requested relief. Because the magistrate judge recommended dismissing with leave to amend, she also reviewed the other arguments presented in the motions to dismiss, including Carollo's argument for qualified immunity. The magistrate judge concluded that Carollo was not entitled to qualified immunity because his alleged conduct violated clearly established law.

The district court adopted the magistrate judge's report and granted the motions to dismiss, with leave for Fuller and Pinilla to amend. The district court also ordered that "Defendant Carollo's Motion to Dismiss [be] DENIED as to

qualified immunity for the reasons detailed in the Report and Recommendation.” But given the dismissal of the complaint, that language had no effect.

We have no choice but to *sua sponte* dismiss this appeal for lack of jurisdiction. “[T]he existence of appellate jurisdiction in a specific federal court over a given type of case is dependent upon authority expressly conferred by statute.” *Carroll v. United States*, 354 U.S. 394, 399 (1957). Carollo argues that we have jurisdiction because “a district court’s denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable ‘final decision’ within the meaning of 28 U.S.C. § 1291.” *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). But the district court did not enter an appealable order denying Carollo qualified immunity. The district court instead dismissed Fuller and Pinilla’s complaint and granted them leave to amend it.

So a different finality rule applies: “[A]n order dismissing a complaint with leave to amend within a specified time becomes a final judgment if the time allowed for amendment expires” *Auto. Alignment & Body Serv., Inc. v. State Farm Mut. Auto. Ins. Co.*, 953 F.3d 707, 719–20 (11th Cir. 2020). The district court gave Fuller and Pinilla until June 28, 2019, to file an amended complaint. But Carollo filed his notice of appeal on June 26, two days before the order granting Fuller and Pinilla leave would have become final. And there is no later judgment that could have cured Carollo’s premature notice of appeal. Fuller and Pinilla did

in fact amend their complaint within the time allowed by the district court; on June 28 they filed a new pleading entitled “Second Amended Complaint.” And on August 19, 2019, the district court stayed the proceedings on the Second Amended Complaint pending this appeal. Because Carollo did not appeal from a final order of the district court, we lack jurisdiction under section 1291. And no other statute provides us with jurisdiction over the appeal.

We **DISMISS** the appeal.