No. __-_____

In the Supreme Court of the United States

SHRADDHA PATEL,

Petitioner,

v.

KIRIT PATEL, A/K/A KIRITKUMAR AMBALAL PATEL, *ET AL.*,

Respondents.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF *CERTIORARI*

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QUESTION PRESENTED

As explained in her Rule 4(a)(5) motion to extend the time within which to notice an appeal, the then-*pro se* petitioner did not receive notice of the nominal judgment in her favor until 3 days after the deadline to appeal. FED. R. APP. P. 4(a)(1)(A), (a)(5). Upon obtaining counsel and within 30 days of the original deadline to appeal. petitioner filed an unopposed motion to extend the time to appeal under Rule 4(a)(5). Acting *sua sponte* and without providing an opportunity to respond, the district judge found her motion untimely under *Rule 4(a)(6)*, which provides a longer grace period in no-notice cases (180 days versus Rule 4(a)(5)'s 30 days), albeit with a quicker trigger to file (14 days from notice versus Rule 4(a)(5)'s 30 days from judgment).

The Fourth Circuit affirmed the district court's holding that Rule 4(a)(6) displaces Rule 4(a)(5) in no-notice cases, splitting with the D.C., Third, Sixth, and Ninth Circuits, which allow both rules to apply concurrently by their terms. Before adoption of the pertinent parts of 28 U.S.C. §2107(c) and Rule 4(a)(6) in 1991, Rule 4(a)(5)'s precursors applied to no-notice cases. The 1991 amendments that provide Rule 4(a)(6)'s 180-day grace period and 14-day trigger in no-notice cases expressly provided *additional* relief to Rule 4(a)(5)'s existing relief, with no express intent to sever no-notice cases from existing Rule 4(a)(5).

The question presented is whether a would-be appellant who missed Rule 4(a)(1)(A)'s deadline to appeal due to a lack of notice of the entry of judgment may seek relief under Rule 4(a)(5) within 30 days of the original deadline to appeal, without seeking relief under Rule 4(a)(6).

PARTIES TO THE PROCEEDING

Petitioner is Shraddha Patel.

Respondents are her father and stepmother, Kirit and Krupa Patel of California, and her aunt and uncle, Nina and Atul Patel of Pennsylvania.

A third group of initial defendants – who were dismissed from the case in District Court* and were not parties in the appellate proceedings– are not respondents here. S.CT. RULE 12.6.

* The District Court dismissed Manu Patel and Suresh Patel for lack of personal jurisdiction, and Prabudas Patel and Nisha Patel were voluntarily dismissed in the District Court.

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PETITION FOR WRIT OF *CERTIORARI*

Shraddha Patel petitions this Court to issue a writ of *certiorari* to review the judgment of the U.S. Court of Appeals for the Fourth Circuit affirming the U.S. District Court for the Eastern District of Virginia's denial of an extension of the time within which to notice an appeal of the judgment entered in her favor against the respondents.

OPINIONS BELOW

The Fourth Circuit's decision is reported at 727 Fed. App'x. 52 and reprinted in the Appendix ("App.") at 1a. The district court's order is reported at 283 F.Supp.3d 512 and reprinted at 3a.

JURISDICTION

The Fourth Circuit issued its decision on June 18, 2018, and denied Shraddha's petition for rehearing *en banc* on August 21, 2018, App. 14a. By Order dated November 9, 2018, Chief Justice Roberts acting as Circuit Justice extended until January 18, 2019, the time within which to petition for a writ of *certiorari*. *Patel v. Patel*, No. 18A505 (2018). The district court had jurisdiction under 28 U.S.C. §1332(a)(1), and the Fourth Circuit had jurisdiction under 28 U.S.C. §1291. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Appendix quotes or excerpts the relevant authorities, which are the applicable appellate rules, FED. R. APP. P. 4(a)(5)-(6), and the statutory bases for those rules, 28 U.S.C. §2107; PUB. L. NO. 80-773, §1, 62 Stat. 869, 993 (1948).

Under §2107(a) and Rule 4(a)(1)(A), appellants in civil litigation involving only non-federal parties have 30 days after judgment to file a notice of appeal. 28 U.S.C. §2107(a); FED. R. APP. P. 4(a)(1)(A). While filing "an appeal within the prescribed time is mandatory and jurisdictional," *Bowles v. Russell*, 551 U.S. 205, 209 (2007) (interior quotations omitted), Congress and the federal rules allow two ways for a district court to extend or reopen the time to appeal. *See* 28 U.S.C. §2107(c); FED. R. APP. P. 4(a)(5)-(6); *accord In re WorldCom, Inc.*, 708 F.3d 327, 332-33 (2d Cir. 2013) (recognizing the two paths to extend the time within which to appeal); *Benavides v. Bureau of Prisons*, 79 F.3d 1211, 1214 (D.C. Cir. 1996) (same).

Under Rule 4(a)(5), a district court may extend the time for filing a notice of appeal if the party (1) moves no later than thirty days after the deadline to appeal expires, and (2) shows "excusable neglect or good cause." FED. R. APP. P. 4(a)(5)(A)(i)-(ii). Under Rule 4(a)(6), a district court may extend the time for filing a notice of appeal if (1) the moving party did not receive notice of entry of the judgment or order sought to be appealed within 21 days after entry, (2) the party moves within the earlier of 180 days after entry of the judgment or order and 14 days after receiving notice of that entry, and (3) no party would be prejudiced. FED. R. APP. P. 4(a)(6)(A)-(C).

STATEMENT OF THE CASE

Petitioner Shraddha Patel seeks to challenge the amount of the damages award in the final judgment in her favor against her estranged father, stepmother, and uncle for kidnapping and holding her hostage for more than five months, during which they rented her home, stole her identity, and fraudulently applied for

workers compensation. Defendants' actions resulted in foreclosure of her home, pillaging of her furniture and other assets, and destruction of her credit rating, the latter being critical to her pre-abduction career in the financial industry.

The Underlying Tort Case

It is undisputed that respondents Kirit, Krupa, and Atul Patel – her father, stepmother, and uncle, respectively – abducted Shraddha from her Arlington home on May 1, 2013, while Shraddha was very ill with bronchitis and that, from May through October 2013, they kept her captive in substandard conditions, deprived her of medical care, and inflicted physical and emotional abuse on her. It is also undisputed that her father – who had an undisputed history of physically abusing Shraddha's mother – threatened to kill Shraddha and her mother if Shraddha tried to escape. Moreover, it is undisputed that before Shraddha escaped in October 2013, the respondents caused Shraddha significant economic losses that dwarf the $9,500 in damages awarded to her in these proceedings:

- Shraddha's Arlington home that went into foreclosure was valued at $365,000;
- Her car – valued at $20,000 with approximately $7,000 balance remaining on her note – was eventually repossessed for non-payment;
- She also lost personal property and furnishings from her home valued at $30,000;
- On top of the credit-related defaults on the home and car, various credit-card and utility bills went unpaid, further damaging her credit; and
- Because of the damage to her credit, Shraddha has been unable to resume her financial-industry

career, causing lost income of approximately $100,000 annually since her abduction (*i.e.*, her income has not improved because she has been rejected from continuing her career because of the damage to her credit rating).

Of the eight defendants, two were dismissed for lack of personal jurisdiction – which Shraddha does not challenge – and two were dismissed voluntarily. The Pennsylvania aunt and uncle participated in a trial in 2016, resulting in dismissal of all counts against the aunt, and partial judgment against Shraddha's uncle for false imprisonment. *See* FED. R. CIV. P. 54(b).

The Default Judgment Proceedings

Shraddha was represented by counsel for most of the proceedings below. On December 20, 2016, Shraddha moved through counsel for a default judgment against her father and stepmother, but on May 22, 2017, the district court granted her counsel's motion to withdraw. It is undisputed that Shraddha was proceeding *pro se* and that the Clerk's Office of the United States District Court for the Eastern District of Virginia advised Shraddha that that Court would not schedule a hearing for the default-judgment award against her defaulting father and mother until Shraddha scheduled the hearing, that Shraddha was seeking to find counsel, and that she never received notice of the district court's default-judgment hearing and did not receive notice of the nominal judgment against her father and stepmother until 33 days after the entry of that judgment. The relevant facts are set forth in Shraddha's declaration, App. 19a-20a, in support of her motion to extend the time to appeal.

Unopposed Motion to Extend Time to Appeal

On or about October 20, 2018, Shraddha prevailed upon her former trial counsel to file a new appearance and support her motion under FED. R. APP. P. 4(a)(5) for an extension of the time within which to notice an appeal. The defendants – respondents here – did not file an opposition to Shraddha's motion. Although defendants did not oppose Shraddha's motion for an extension, the district judge *sua sponte* converted her motion under Rule 4(a)(5) into a motion under Rule 4(a)(6) and denied it as untimely. App. 8a-11a; *compare* FED. R. APP. P. 4(a)(5) *with id.* 4(a)(6).

The district judge premised his decision to convert Shraddha's Rule 4(a)(5) motion into a Rule 4(a)(6) motion on the fact that Shraddha's motion relied on her not having received notice of judgment and his reasoning that Rule 4(a)(6) is the provision tailored to no-notice cases:

> The plain text of these Rules compels the conclusion that Rule 4(a)(6), and not Rule 4(a)(5), applies here because Rule 4(a)(6) addresses the precise factual scenario in this case, namely plaintiff's claim that she did not receive notice of the judgment until September 23, 2017. Specifically, Rule 4(a)(6) allows district courts to reopen the time to appeal where "the court finds that the moving party did not receive notice . . . of the entry of the judgment or order sought to be appealed within 21 days after entry." Rule 4(a)(6)(A), FRAP. And here, plaintiff's only explanation for why plaintiff failed to file a timely notice of appeal is that plaintiff did not receive notice of the judgment until September 23, 2017, three days after the expiration of the

> 30-day deadline under Rule 4(a)(1). Accordingly, the plain text of Rule 4(a)(6) makes clear that Rule 4(a)(6) applies here, not Rule 4(a)(5), as plaintiff claims.

App. 8a-9a. Moreover, the district judge did not provide Shraddha a chance to respond to this change, a chance she would have had if defendants had made the "Rule 4(a)(6) applies" argument. *See* E.D. Va. Local Rule 7(F)(1) ("moving party may file a reply brief within six (6) calendar days after the service of the opposing party's response brief").

The Appeal in the Fourth Circuit

Shraddha timely appealed the denial of the Rule 4(a)(5) extension, as well as the entry of judgment – in the event that an appellate court extends the time within which to appeal that judgment – to the Fourth Circuit. Shraddha filed an opening brief, but the defendants-appellees defaulted. Shraddha filed a notice of supplemental authority on the default, citing *Mironescu v. Costner*, 480 F.3d 664, 677 (4th Cir. 2007), for the proposition that "Rule 28(b) … requires that appellees state their contentions and the reasons for them at the risk of abandonment of an argument not presented," and that "[e]ven appellees waive arguments by failing to brief them." *Id.* (interior quotations omitted). In that notice, Shraddha called the panel's attention to the respondents' waiver of all waivable issues. Notwithstanding that waiver, the panel "affirm[ed] the denial of the motion to extend the appeal period for the reasons stated by the district court," and dismissed the balance of the appeal. App. 2a. Shraddha timely petitioned for a rehearing by the panel and the *en banc* court, which the Fourth Circuit denied on August 21, 2018. App. 14a.

REASONS TO GRANT THE WRIT

The petition not only raises important issues of appellate jurisdiction and due process, but also provides an ideal vehicle for this Court to resolve those issues. This Court should grant the writ for four distinct reasons.

1. The federal circuits are split on the question presented here, with the D.C., Third, Sixth, and Ninth Circuits all taking positions opposite the Fourth Circuit. *See* Section I, *infra.*

2. In relying on the canon against surplusage, the lower courts read far too much into that canon, by failing to consider that Rules 4(a)(5) and (a)(6) could meaningfully coexist, with each serving a purpose distinct from the other. *See* Section II.A, *infra.*

3. Relatedly, and even more importantly, the lower courts failed to consider the historical evolution of the two rules, with Rule 4(a)(5)'s having applied in no-notice cases for more than 40 years when Rule 4(a)(6) was added as *additional* relief in 1991. The real question is not whether the Advisory Committee or Congress could have intended Rule 4(a)(5)'s general language to include no-notice cases when Rule 4(a)(6) dealt expressly with no-notice cases. The real question is whether the Advisory Committee or Congress meant the expressly "additional" relief in Rule 4(a)(6) impliedly to repeal Rule 4(a)(5)'s longstanding application to no-notice cases. *See* Section II.B, *infra.*

4. This petition presents an ideal vehicle for this Court to resolve the purely legal issue of whether Rule 4(a)(5) applies in no-notice cases: if Rule 4(a)(5) does apply, Shraddha's appeal can continue; if Rule 4(a)(6) supplants Rule 4(a)(5) in no-notice cases, her appeal

is over. There are no fact-bound issues or even any *facts* relevant to the petition. *See* Section III, *infra.*

In addition to the foregoing reasons to grant the writ, the jurisdictional question here is not so much between Shraddha and the respondents – after all, they defaulted *twice* when presented with Shraddha's arguments – as it is between her and Article III. Because the respondents are unlikely to respond at all, much less respond well, Shraddha respectfully submits that the Court should appoint *amicus* counsel to defend the lower courts' position that appellate jurisdiction does not lie here. *Amicus* counsel would ensure the level of advocacy that this Court requires to decide the important issue presented here.

I. THE DECISIONS BELOW SPLIT WITH FOUR OTHER CIRCUITS.

In holding that Rule 4(a)(6) displaces Rule 4(a)(5) in no-notice cases, the panel split with the holdings of other circuits that the two rules can both apply:

> Rule 4(a)(6) was enacted to provide a party an additional window of opportunity to file a notice of appeal where the additional period allowed under Rule 4(a)(5) has expired; it was not intended to be the exclusive avenue by which to seek a remedy where a party has received late notice of the entry of a judgment or order.

Zack v. United States, 133 F.3d 451, 453 (6th Cir. 1998); *see also In re Alexander*, 197 F.3d 421, 426 (9th Cir. 1999); *Baker v. United States*, 670 F.3d 448, 462 n.19 (3d Cir. 2012). Indeed, the D.C. Circuit overruled a district court in the reverse situation: "Because the district court treated Benavides' clearly styled Rule 4(a)(6) motion as though it were made under Rule

4(a)(5), we must remand for the district court to apply the correct standard and to exercise its discretion whether to reopen the time for filing an appeal." *Benavides*, 79 F.3d at 1215. Given that Rule 4(a)(5) and (a)(6) *can* plainly be read to co-exist – as the D.C., Third, Sixth, and Ninth Circuits have read them – Shraddha respectfully submits that the rules *should* be read that way.

To the extent that any ambiguity is present, this Court should resolve the ambiguity to avoid due-process injuries to future litigants and courts from the uncertainty. Here, for example, the respondents did not file an opposition to Shraddha's motion to extend the time within which to appeal; instead, the district judge hatched the Rule 4(a)(6) theory *sua sponte* and did not provide Shraddha an opportunity to respond. Similarly, respondents defaulted in the Fourth Circuit and, accordingly, did not dispute Shraddha's argument that the canon against repeals by implication rebuts the district judge's invocation of the canon against surplusage. *Compar*e Section II.A, *infra* (surplusage), *with* Section II.B, *infra* (repeals by implication). If Shraddha's reading of the two rules is wrong, the courts below have not explained *why*. The ambiguity – if any – between these two rules remains an unjust trap for future litigants.[1] This Court should

[1] Before Shraddha's case, the Fourth Circuit had repeatedly found that *both* Rules 4(a)(5) and 4(a)(6) apply in no-notice cases. *See*, *e.g.*, *In re Goodnow*, 22 F.App'x 89, 90 (4th Cir. 2001); *Daniels v. Potter*, 164 F.App'x 386, 386-87 (4th Cir. 2006); *Buckley v. Freund*, 22 F.App'x 185, 185-86 (4th Cir. 2001); *Thomas v. Crosby*, 133 F.App'x 901, 902 (4th Cir. 2005); *United States v. Tidd*, 544 F.App'x 172, 172-73 (4th Cir. 2013); *United States v. Gray*, 98 F.App'x 239, 240 n.2 (4th Cir. 2004).

resolve both that ambiguity and the split between this case and the D.C., Third, Sixth, and Ninth Circuits.

II. THE DECISIONS BELOW ARE WRONG.

Based on Rule 4(a)(6)'s application to no-notice cases,[2] the district court invoked the canon against surplusage to hold that Rule 4(a)(5) cannot apply in no-notice cases. App. 9a; *accord id.* 2a (panel adopts district court's ruling). Shraddha respectfully submits that the lower courts' reading places too much weight on the canon against surplusage and misreads the plain language of – and history behind – Rules 4(a)(5) and 4(a)(6). Consequently, the district judge and panel erred when they evaluated Shraddha's Rule 4(a)(5) motion as a Rule 4(a)(6) motion.

By way of background, Rule 4(a)(5) was adopted in 1967, derived from a predecessor rule introduced in 1946. *See* FED. R. APP. P. 4 advisory committee note to 1967 amendment; 16A CHARLES A. WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC.: Jurisdiction & Related Matters, §3950.3 (4th ed. 2008); PUB. L. NO. 80-773, §1, 62 Stat. 869, 993 (1948) (statutory precursor required "a showing of excusible [sic] neglect based on failure of a party to learn of the entry of the judgment"). In 1991, Congress amended §2107(c), and the underlying the rules were amended to create the new form of relief in Rule 4(a)(6). *See* PUB. L. NO. 102-198, §12(4), 105 Stat. 1623, 1627 (1991); FED. R. CIV. P. 77 advisory committee note to 1991 amendment; 16A WRIGHT & MILLER §3950.6 n.4 ("purpose [of Rule

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[2] For simplicity's sake, Shraddha refers to cases where the movant receives either no notice of a judgment or notice too late to file a timely notice of appeal as "no-notice" cases. Under the rules, there is no practical difference between no notice and late notice.

4(a)(6)] is stated more fully in the Committee Note to the conforming amendment to Civil Rule 77(d) than in the Note to Rule 4(a)(6)").

As the advisory committee note explains, Rule 4(a)(6) was introduced "to permit district courts to ease strict sanctions … imposed on appellants whose notices of appeal are filed late because of their failure to receive notice of entry of a judgment." FED. R. CIV. P. 77 advisory committee note to 1991 amendment. After all, "Rule 4(a)(5) … would not aid a litigant who first learned of the entry of judgment more than 30 days after the original appeal time ran out" and "[i]t was to the plight of this litigant that the 1991 amendment to Rule 4 was addressed." 16A WRIGHT & MILLER § 3950.6. The question here is whether – in seeking to help litigants who learn of a judgment 30 days after the time to appeal – Congress also intended to *un-help* litigants like Shraddha, who lacked notice of entry of judgment but learned of the entry within 30 days of the original deadline to appeal.

A. The canon against surplusage is inapposite.

Based on Rule 4(a)(6)'s application to no-notice cases, the district judge invoked the canon against surplusage to hold that Rule 4(a)(5) cannot apply in no-notice cases: "to apply Rule 4(a)(5), and not Rule 4(a)(6), in this case would render Rule 4(a)(6) superfluous." App. 9a; *accord* App. 2a (adopting district court's holding). As explained in this section, it was legal error to hold that the canon against surplusage displaces Rule 4(a)(5) from no-notice cases.

To be sure, Rules 4(a)(5) and 4(a)(6) *overlap*, with different levels of stringency across several parameters:

- Rule 4(a)(5) requires only good cause or the movant's excusable neglect, whereas Rule 4(a)(6) requires the absence of prejudice to the non-moving party.
- Rule 4(a)(5) provides up to 30 additional days to appeal, whereas Rule 4(a)(6) provides only an additional 14 days to appeal.
- Rule 4(a)(6) applies up to 180 days post-judgment, whereas Rule 4(a)(5) applies only up to 60 days post-judgment.
- Rule 4(a)(5) applies in cases of any type of good cause or excusable neglect, whereas Rule 4(a)(6) applies exclusively to lack of notice.

Compare FED. R. APP. P. 4(a)(5) *with id.* 4(a)(6). Parties who can make the good-cause or excusable-neglect showing will always prefer Rule 4(a)(5) in the first 60 days, post-judgment, but parties who cannot make that showing or fall outside the 60-day window must comply with Rule 4(a)(6). The rules overlap, but each also applies in situations in which the other does not.[3]

The canon against surplusage is not absolute: "While it is generally presumed that statutes do not contain surplusage, instances of surplusage are not unknown." *Arlington Central School Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291, 299, n.1 (2006). More to the

[3] For example, Rule 4(a)(6) applies to parties who did not receive notice without good cause or excusable neglect within the first 60 days, post-judgment, and Rule 4(a)(5) applies to parties whose good cause or excusable neglect extends to something other than the lack of notice.

point, mere overlap is not the same as superfluity that renders one or the other statute as mere surplusage. *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143-44 (2001); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249 (1992); *Skilling v. United States*, 561 U.S. 358, 413 n.45 (2010). To the contrary, "[r]edundancies across statutes are not unusual events in drafting, and so long as there is no positive repugnancy between two laws, a court must give effect to both." *Germain*, 503 U.S. at 253 (internal quotations and citations omitted). Where "the statutes do not pose an either-or proposition" and instead "each … confer[] jurisdiction over cases that the other … does not reach," there is no superfluity. *Id.* Put another way, courts, should "not hesitate[] to give effect to two statutes that overlap, so long as each reaches some distinct cases." *J.E.M. Ag Supply*, 534 U.S. at 144. As indicated, Rules 4(a)(5) and 4(a)(6) easily meet the test for coexistence.

B. Rule 4(a)'s history and the canon against repeals by implication compel reading Rule 4(a)(5) to apply by its terms to no-notice cases.

In addition to misapplying the canon against surplusage, the district judge also failed to consider the historical evolution of Rules 4(a)(5) and 4(a)(6) and, for that reason, neglected to apply the canon against repeals by implication to his ahistorical reading of the rules. For its part, the Fourth Circuit merely "affirm[ed] the denial of the motion to extend the appeal period for the reasons stated by the district court," App. 2a. thus repeating his mistake.

In the period before Rule 4(a)(6)'s adoption in 1991, lack of notice of a judgment fell within *Rule*

4(a)(5)'s ambit. *Ali v. Lyles*, 769 F.2d 204, 205 (4th Cir. 1985); *accord* PUB. L. NO. 80-773, §1, 62 Stat. 869, 993 (1948) (statutory precursor required "a showing of excusible [sic] neglect based on failure of a party to learn of the entry of the judgment"). By looking only to the text of Rules 4(a)(5) and 4(a)(6) as they appear today, the lower courts thus took the ahistorical view that Rule 4(a)(5) cannot apply to no-notice cases because Rule 4(a)(6) applies to no-notice cases.

In failing to consider that Rule 4(a)(5) *already applied* to no-notice cases in 1991, the lower courts violated the canon against repeals by implication, which requires "clear and manifest" evidence of the intent to repeal. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife,* 551 U.S. 644, 662 (2007) ("repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest") (alteration in original, interior quotations and citations omitted); *Fourco Glass Co. v. Transmirra Products Corp.,* 353 U.S. 222, 227 (1957) ("no changes of law or policy are to be presumed from changes of language in the revision unless an intent to make such changes is clearly expressed"). Significantly, "this canon of construction applies with particular force when the asserted repealer would remove a remedy otherwise available." *Schlesinger v. Councilman,* 420 U.S. 738, 752 (1975). The lower courts failed to consider Rule 4(a)(5)'s scope over time.

The district judge also cited the 1991 history of Rule 4(a)(6)'s adoption to claim that "it is clear that plaintiff's use of Rule 4(a)(5) in this case leads to the unsupportable conclusion that the Advisory Committee spent time and resources drafting a *new* rule to cover a factual scenario already addressed by

an existing rule." App. 11a (emphasis added); *accord id.* 2a. As indicated, however, Rule 4(a)(6) was not a wholly "new" rule for no-notice cases because Rule 4(a)(5) already applied to no-notice cases. Moreover, as enacted in 1991, the statutory basis for Rule 4(a)(6) is set off as being "*in addition*" to the original statutory basis for Rule 4(a)(5), PUB. L. NO. 102-198, §12(4), 105 Stat. 1623, 1627 (1991); 28 U.S.C. §2107(c), and that original rule unquestionably applied to no-notice cases prior to 1991. *Compare* PUB. L. NO. 102-198, §12(4), 105 Stat. at 1627 *with* PUB. L. NO. 80-773, §1, 62 Stat. at 993; *see* 28 U.S.C. §2107(c); *Ali*, 769 F.2d at 205. As such, the lower courts' ahistorical analysis failed to consider that Rule 4(a)(5) already applied to no-notice cases and that nothing in the amended statute "clearly and manifestly" repealed that pre-existing application by implication.

As relevant here, Congress showed no indication that it intended to remove no-notice cases wholesale from their Rule 4(a)(5) origin and to transplant them exclusively to Rule 4(a)(6). As explained, the added language for Rule 4(a)(6) is set off from the retained language for Rule 4(a)(5) by the introductory phrase "[i]n addition," 28 U.S.C. §2107(c), indicating supplementation rather than replacement. *See* PUB. L. NO. 102-198, §12(4), 105 Stat. at 1627; 28 U.S.C. §2107(c). In sum, nothing in the underlying *statute* suggests that Rule 4(a)(5) cannot continue to provide extensions in no-notice cases.

While the district judge suggests that "it would require the suspension of disbelief to ascribe to the Advisory Committee the design to allow its careful and thorough scheme to be circumvented by artful pleading," App. 10a (interior quotations and alterations omitted), what he really advocates is a

suspension of the canon against repeals by implication.[4] In any event, the two rules are best read as overlapping, without either's displacing the other. Certainly, the intent to displace Rule 4(a)(5) in no-notice cases is not "clear and manifest."[5] Because Rule 4(a)(5) *can be read* to continue to apply in no-notice cases, Rule 4(a)(5) *should be read* that way.

Importantly, it is the *congressional enactment* – not the Federal Rules – that define the jurisdictional limits at issue here: "only Congress may determine a lower federal court's subject-matter jurisdiction." *Bowles*, 551 U.S. at 211 (internal quotations omitted). Thus, for example, this Court found Rule 4(a)(5)(C)'s 30-day limit to qualify as a waivable claim-processing rule, not a jurisdictional rule, because the underlying statute did not mandate that 30-day limit. *Hamer v. Neighborhood Hous. Servs.*, 138 S.Ct. 13, 22 (2017). Insofar as the respondents here – as distinct from the district judge and panel – waived any opposition to extending Shraddha's time within which to appeal, Rules 4(a)(5) and 4(a)(6) themselves do not provide a *jurisdictional basis* to dismiss Shraddha's appeal on the basis of Rule 4(a)(6)'s wording that deviates from the underlying *statutory* basis for Rule 4(a)(6). That statutory basis makes clear that Rule 4(a)(6)'s relief is

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[4] The district judge's suspension-of-disbelief language comes from *Brown v. GSA*, 425 U.S. 820, 833 (1976), which rejected interpreting a statute to defeat an administrative-exhaustion requirement by allowing immediate resort to judicial review under an alternate theory. That issue is not presented here.

[5] In the preemption context, which also requires clear-and-manifest intent, "[w]hen the text of [the] clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Altria Group, Inc. v. Good,* 555 U.S. 70, 77 (2008) (interior quotation omitted).

in addition to Rule 4(a)(5)'s relief. *See* 28 U.S.C. §2107(c). As such, the mere language of Rule 4(a) could not *jurisdictionally* displace Rule 4(a)(5), even assuming *arguendo* that the Advisory Committee intended to displace Rule 4(a)(5). By not making this argument, respondents waived it.[6]

As Chief Justice Marshall famously put it, "[w]e have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264, 404 (1821). Indeed, federal courts have a "virtually unflagging obligation ... to exercise the jurisdiction given them." *Colorado River Water Conserv. Dist. v. United States,* 424 U.S. 800, 817 (1976). Since Congress has not refused jurisdiction under Rule 4(a)(5) and its statutory precursor, federal courts cannot refuse jurisdiction based on any perceived exclusivity in Rule 4(a)(6)'s wording when the statutory basis for Rule 4(a)(6) expressly makes that rule "in addition" to the statutory basis for Rule 4(a)(5).

III. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THE CIRCUIT SPLIT.

This case is an ideal vehicle to resolve the purely legal question presented here: if Rule 4(a)(5) applies in no-notice cases, Shraddha's appeal can continue; if Rule 4(a)(6) supplants Rule 4(a)(5) in these cases, her appeal is over. There are no fact-bound issues or even any *facts* relevant to this Court's task of deciding whether Rule 4(a)(5) applies here.

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[6] To be clear, the argument lacks merit, but even if it did not lack merit, it would be waivable, not jurisdictional.

In one curable respect, the parties to this case might not present an appropriate vehicle to resolving the issue presented here. As this Court acknowledged in another context, parties with "a personal stake in the outcome of the controversy … assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult … questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962). Based on past performance, the respondents are unlikely to *respond* at all, much less respond well: they already have defaulted twice.

If the justices of this Court find themselves in conference, considering whether to ask respondents to file a brief, Shraddha respectfully submits that the Court should appoint *amicus* counsel to defend the lower courts' position on Rule 4(a)(5)'s inapplicability. While perhaps lacking a "personal stake" under *Baker*, *amicus* counsel would provide this Court – and the judges below – of an articulate voice for their view that appellate jurisdiction is absent. The issue here is between Shraddha (and similarly situated would-be appellants) and Article III and the implementing acts of Congress that define the federal courts' appellate jurisdiction. This Court should not allow defaulting respondents to hijack the important jurisdictional issues presented here.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

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Respectfully submitted,

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