No. _____

In The
Supreme Court of the United States

HAROLD WADE AND LORRAINE WADE,
Petitioners,

v.

KREISLER LAW, P.C.,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The "functional equivalence" doctrine of *Foman v. Davis*, 371 U.S. 178 (1962), *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), and *Smith v. Barry*, 502 U.S. 244 (1992), allows rules of procedure to be liberally construed so substitute filings or technically defective filings can satisfy a jurisdictional rule that the appellant file a notice of appeal.

The question presented in this case is whether the "functional equivalence" doctrine also applies to nonjurisdicitonal mandatory claim processing rules requiring a petition for permission to appeal.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Harold Wade and Lorraine Wade ("The Wades") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The decision of the Seventh Circuit (App. 1-9) is reported at 926 F.3d 447 (7th Cir. 2019). The bankruptcy court's decision (App. 12-23) is reported at 592 B.R. 672 (Bankr. N.D. Ill. 2018).

JURISDICTION

The judgment of the Seventh Circuit was entered on June 14, 2019. App. 10-11. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Rule of Appellate Procedure 5 and Federal Rule Bankruptcy Procedure 8006(g) are reproduced at App. 24-27.

INTRODUCTION

This Court should grant this petition because the Seventh Circuit misinterpreted recent opinions *Hamer*, *Manrique*, and *Nutraceutical Corp.,* and created a lopsided split with five other circuits on an important and frequently occurring issue that this Court has yet to address: whether the functional equivalence doctrine applies to nonjurisdicitonal mandatory claim processing rules requiring a petition for permission to appeal.

At the same time, the Seventh Circuit's decision is not limited to rules requiring a petition for appeal. It also creates an eleven to one split and would prohibit litigants from using functional equivalence for notice of appeals under Federal Rule Appellate Procedure 3, which this Court has been allowing since *Foman v. Davis*, 371 U.S. 178 (1962), *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), and *Smith v. Barry*, 502 U.S. 244 (1992). Moreover, every circuit of appeal allows litigants to use functional equivalence to meet Rule 3. The Seventh Circuit also fails to reconcile how it prohibits the use of functional equivalence for nonjurisdicitonal mandatory claim processing rules, but this Court's long-standing practice allows functional equivalence for jurisdictional rules.

Accordingly, it is of exceptional importance that this Court step in, not only to protect functional equivalence for Rule 3, but also as a timely opportunity for this Court to resolve the important question of whether its precedent from *Foman*, *Torres*, and *Smith* extends to nonjurisdicitonal mandatory claim processing rules that require a petition for permission to appeal, and to resolve a recognized circuit split.

For these reasons, this Court should grant this petition to provide clarity and uniformity on this important issue of appellate procedure.

STATEMENT OF THE CASE

I. Proceedings in the Bankruptcy Court

The Petitioners, Harold and Lorraine Wade ("The Wades") filed a Chapter 13 bankruptcy on January 15, 2015. Because this was the second bankruptcy filing by the Wades in less than a year, according to 11 U.S.C. § 362(c)(3)(A), the automatic stay in the case would terminate after 30 days unless the Wades sought and obtained an extension. The Respondent, Kreisler Law P.C. ("Kreisler") was an unsecured creditor of the Wades. At the time of the Wades' bankruptcy filing, Kreisler had a pending state court case.

The Wades timely filed a motion to extend the automatic stay on January 29, 2015. However, the motion was inadvertently filed on a day the assigned judge was not sitting, so the motion was stricken. The Wades did not refile the motion, and the automatic stay terminated on February 14, 2015. Subsequently, Kreisler returned to state court and obtained a default judgment for $29,389.65 on April 2, 2015. Kreisler later recorded a memorandum judgment lien that attached to the Wades' home.

The Wades moved for sanctions against Kreisler, alleging it violated the automatic stay by filing a lien against their home. The bankruptcy court denied this motion. The bankruptcy courts are divided as to whether there exists an automatic stay as to

property of the estate, or it terminates in its entirety when the automatic stay is not extended under § 362(c)(3)(A). The bankruptcy court held that the automatic stay terminated in its entirety, and denied the Wades' motion for sanctions on June 6, 2018. On June 11, 2018, the Wades filed a timely notice of appeal. App. 28-29.

The bankruptcy court subsequently certified an order for direct appeal to the United States Court of Appeals for the Seventh Circuit on July 2, 2018, under 28 U.S.C. § 158(d)(2)(A) with no opposition from Kreisler. App. 30-35. In that four-page certification order, the bankruptcy court laid out: 1) the facts necessary to understand the legal questions; 2) the questions themselves; 3) the relief sought by the appellants; and 4) the reasons why the appeal should be allowed and is authorized. *Id*. The certification also included how the elements required under §§ 158(d)(2)(A)(i) and (ii) were met, stating the appeal involved a question of law on which there is no controlling decisions in the Seventh Circuit or the Supreme Court of the United States, and the appeal involved a matter of public importance, and that the appeal raised a legal question requiring resolution of conflicting decisions. *Id*.

II. Proceedings in the Seventh Circuit

On July 18, 2018, the Seventh Circuit docketed the appeal, and the bankruptcy court transmitted to the Seventh Circuit the following: 1) the bankruptcy court's four-page certification order; 2) the bankruptcy court's opinion and order being appealed; and 3) a copy of the entire bankruptcy docket. App. 30-35. On July 25, 2018, the Seventh Circuit gave

Kreisler until August 8, 2018, to file a response to the Wades' notice of appeal. App. 36-37. Kreisler had an opportunity to bring up any opposition to the merits of the Wades asking for direct appeal, but instead filed its opposition to the Wades' appeal on the sole basis of not timely filing a petition for permission as required by 8006(g) of the Federal Rules of Bankruptcy Procedure and Federal Rule of Appellate Procedure 5 ("Rule 5") on August 8, 2018. The content requirements required under § 158(d)(2)(A) are essentially identical to what Rule 5 requires. App. 25. The Wades filed a reply on August 10, 2018, arguing they did timely file a petition for permission on July 18, 2018, when the bankruptcy court timely transmitted the bankruptcy judge's certification order and opinion well within the 30-day timeline, which was the functional equivalence of a petition for permission.

On August 17, 2018, the Seventh Circuit provisionally accepted the Wades' appeal but deferred consideration of the issue until after merits briefing and sought future briefing on the issue of whether *Hamer v. Neighborhood Housing Services of Chicago* prevented application of the doctrine of functional equivalence to the Wades' appeal. App. 38-41.

At oral argument on February 6, 2019, Judge David F. Hamilton asked Kreisler's attorney if "any feature of the handling of the petition has prejudiced you and your client in anyway?"; in which Kreisler's attorney responded "no". *See* Audio Recording Case #18-2564, beginning at 17:24 and 17:39, http://media.ca7.uscourts.gov/sound/2019/cm.18-2564.18-2564_02_06_2019.mp3.

After merits briefing and oral argument, the Seventh Circuit concluded that since Fed. R. Bank. P. 8006(g) was a mandatory claims processing rule, and Kreisler timely invoked an objection, that it was mandatory that the Wades' appeal was dismissed. App. 9. The Seventh Circuit did not analyze whether the content of the bankruptcy court's timely transmission had sufficient content to meet Fed. R. Rule Bank. P. 8006(g) or Rule 5. Rather the court relied on the recent Supreme Court cases *Hamer*, *Nutraceutical Corp.*, and *Manrique*, noting that the ability to use the functional equivalence doctrine is an equitable exception, and was completely prohibited by the timely objection of Kreisler. App. 9. The Seventh Circuit also questioned whether this Court's decision in *Torres* could be extended to use functional equivalence for Rule 5, and was not persuaded that it can be. App. 8. The Seventh Circuit thus dismissed the appeal based solely on the Wades' failure to file a petition for permission to appeal.

REASONS FOR GRANTING THE WRIT

I. The Seventh Circuit's decision conflicts with this Court's precedents.

The Seventh Circuit erroneously treated functional equivalence as an equitable exception. App. 6, 7, 8. But functional equivalence cannot be an equitable exception because it applies to jurisdictional rules. Moreover, functional equivalence has been allowed by this Court when facing strict jurisdictional rules which demand *sua sponte*

dismissal, so functional equivalence must be allowed in the face of the less stern nonjurisdicitonal mandatory claim processing rule hurdle.

For over a half of century, this Court has recognized that an untimely appeal based on a rule or statute that is jurisdictional cannot be excused, and must be dismissed. *United States v. Robinson*, 361 U.S. 220, 226-227 (1960). When dealing with a jurisdictional rule, this Court requires dismissal *sua sponte*, even if not raised by an opponent, and it can be raised at any time. *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 382 (1884). However, in 1962, this Court created the first and only equitable exception, labeled the unique circumstances doctrine, which excused an untimely appeal when an appellant relied on an erroneous court order. *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962); *Accord*, *Thompson v. INS*, 375 U.S. 384 (1964); *See also Carlisle v. United States*, 517 U.S. 416, 435 (1996) ("This Court has recognized one sharply honed exception…"). This Court eliminated the unique circumstances exception in 2007. *Bowles v. Russell*, 551 U.S. 205, 214 (2007).

In *Kontrick v. Ryan*, 540 U.S. 443, 453 (2004), this Court clarified the difference between a jurisdictional and a claims processing rule, the former being one that is created by Article III, and the latter being created by the judiciary. This Court made clear that if a rule is created by the judiciary, that it is a claims processing rule that can be waived or forfeited if not timely invoked. *Id.* at 451, 456. Lastly, this Court also reiterated this Court's long-standing practice that a jurisdictional rule must be enforced even if not timely invoked by a litigant. *Id.* at 454.

The annals of this Court's history clearly established the only equitable exception that existed to a jurisdictional rule was the unique circumstances doctrine until it was overruled in 2007, and that if a rule is claims processing, it can be waived or forfeited if not timely invoked. Therefore, functional equivalence is not an equitable exception.

In *Foman v. Davis*, 371 U.S. 178, 181 (1962), this Court held that even though the appellant failed to specify the precise judgment of the district court in the notice of appeal, that this defect could be overlooked. This Court based its decision on the theory that decisions on the merits should not be avoided on mere technicalities. *Id*.

Similarly, in *Houston v. Lack*, 487 U.S. 266, 270 (1988), this Court held that a *pro se* prisoner's notice of appeal was filed when it was delivered to prison authorities to be forwarded to the court, even though the court of appeals did not receive the notice of appeal until after the expiration of the time limit as prescribed by Federal Rule of Appellate Procedure 4(a)(1). Here, just like *Foman*, a technically defective filing satisfied the jurisdictional requirement for an appellant to file a notice of appeal.

On the heels of *Foman* and *Houston,* in which this Court recognized the importance of not dismissing an appeal based on technicalities, this Court then added the functional equivalence doctrine in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988). This Court concluded that despite Federal Rule of Appellate Procedure 3(c) being jurisdictional, that a notice of appeal that omitted the petitioner's name could still be deemed timely as long as the filing was the functional equivalent of Rule 3(c). *Torres*, 487 U.S. at 316-7. However, after undertaking an

analysis, even liberally construed, this Court held that the petitioner's use of "et al" instead of his "name" failed to be a sufficient functional equivalent of Rule 3(c). *Torres*, 487 U.S. at 317-318. Despite this Court viewing Rule 3(c) as jurisdictional, it did not automatically dismiss the case, but undertook the functional equivalence analysis to attempt to satisfy Rule 3(c). *Id*. at 318. This Court held that the appellant's functional equivalent filing lacked sufficient content to meet Rule 3(c). *Id*. However, this Court made it a point that functional equivalence does not rely upon whether a rule is jurisdictional, rather, it depends upon whether the Rule been complied with. *Id*. at 316 *citing Foman*, 371 U.S. at 181. This Court further stated

> [T]hat the requirements of the rules of procedure should be liberally construed and that mere technicalities should not stand in the way of consideration of a case on its merits. Thus if a litigant files papers in a fashion that is technically at variance with the letter of a procedural rule, a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires.
>
> *Id*.

Similarly, in *Smith v. Barry*, 502 U.S. 244, 248-9 (1992), this Court ruled that a timely filed brief was the functional equivalent of a notice of appeal to meet Rule 3 because the functional equivalent filing provided sufficient notice of the appeal to the opponent, was timely filed, and had all the content

Rule 3 required. Furthermore, even though this Court identified Rule 3 as jurisdictional, functional equivalence was allowed because this Court does not frame it as an equitable exception, but rather a "principal of liberal construction" of the rules. *Smith*, 487 U.S. at 248.

This Court allowed functional equivalence when dealing with a jurisdictional rule in *Torres* and *Smith*. As stated *supra*, the only equitable exception this Court allowed to a jurisdictional rule was the unique circumstances doctrine. The nature of an equitable exception is to wholly excuse a complete omission, i.e., something that was never filed at all, whereas the functional equivalence doctrine treats a timely filed substitute filing as another. If functional equivalence was an equitable exception, then this Court would have dismissed the appeals *sua sponte* in *Torres* and *Smith*, as the unique circumstances doctrine was the only allowable exception to a jurisdictional rule at the time.

The Seventh Circuit's decision that functional equivalence is an equitable exception is squarely at odds with this Court's precedents, which do not treat or label functional equivalence as an equitable exception. Furthermore, this Court's long-standing practice of using functional equivalence has never been conditioned on whether a rule is jurisdictional or claims processing, nor whether a timely objection is invoked. The only precondition this Court has required for use of functional equivalence is that the functional equivalent filing was timely filed, the content was sufficient to meet the rule or statute, and notice was sufficient to the other side.

The Seventh Circuit failed to follow this Court's practice by not undertaking an analysis to determine

if the Wades' timely functional equivalent filing had sufficient content and notice to meet Rule 5. Instead, the Seventh Circuit bypassed functional equivalence, holding that no Rule 5 petition was filed at all, and that a timely objection to the general attempt of functional equivalence mandates dismissal.

II. The Courts of Appeals are intractably split on whether functional equivalence can be used to satisfy Federal Rule of Appellate Procedure 5.

Since this Court's decisions in *Foman*, *Torres,* and *Smith*, the courts of appeals are divided on whether functional equivalence can be used to satisfy Rule 5. A large number of circuits have recognized the need for the doctrine to apply to Rule 5 and have held accordingly generating a robust beneficial use of functional equivalence, so this issue need not percolate further. These holdings make sense because if the doctrine applies to jurisdictional rules, it should also apply to nonjurisdicitonal mandatory claims processing rules. The Seventh Circuit used to hold so, but has now overruled its precedent to join only one other circuit, threatening all of the work that the other circuits have done to give life to the functional equivalence doctrine. App. 9. As the District of Columbia Circuit recognized, the federal Courts of Appeals do not treat these cases uniformly. *Kennedy v. Bowser*, 843 F.3d 529, 535 (D.C. Cir. 2016). This acknowledged split warrants Supreme Court review.

A. This Court's decisions in *Torres* and *Smith* established that functional equivalence can be used to comply with Federal Rule of Appellate Procedure 3, but did not address whether it can be used to satisfy Federal Rule of Appellate Procedure 5.

While *Torres* and *Smith* addressed functional equivalence under Fed. R. App. P. 3, this Court did generally hold that the *rules of procedure* should be liberally construed. (emphasis added) *Foman*, 371 U.S. at 181-182, *Torres*, 487 U.S at 316-7. While this Court has never directly taken up functional equivalence in the context of Rule 5, since Rule 5 is part of the *rules of procedure*, the functional equivalence doctrine should apply to this Rule as well.

B. The Second, Fifth, Eighth, Ninth, and Eleventh circuits have held that functional equivalence can be used to comply with Federal Rule of Appellate Procedure 5.

Since this Court's decisions in *Foman*, *Torres*, and *Smith*, the Second, Fifth, Eighth, Ninth, and Eleventh Circuits have recognized that functional equivalence is possible to use for compliance with Rule 5.

In a factual scenario strikingly similar to the present case, the Ninth Circuit, in *Blausey v. United States Tr.*, 552 F.3d 1124, 1130-31 (9th Cir. 2009), held that the bankruptcy court transmission of the

direct certification order was the functional equivalent to meet Rule 5 and Interim Fed. R. Bankr. P. 8001(f)(1).

The Second Circuit reached a similar conclusion in *Casey v. Long Island R.R. Co.*, 406 F.3d 142, 145-46 (2d Cir. 2005). There, the Second Circuit concluded that the appellant's brief was the functional equivalent to meet 28 U.S.C. § 1292(b) and Rule 5. The crux of the Second Circuit's analysis in ruling that functional equivalence can be used to meet Rule 5 and § 1292(b) was focused on whether the content of the functional equivalent had the "substance" required by Rule 5 and § 1292(b). *Id*. at 146.

The Fifth, Eighth, and Eleventh Circuit held that a functional equivalent filing *can* be used to meet Rule 5 and § 1292(b), but in those cases, the attempted functional equivalent filings were notices of appeals which failed to have the content required by Rule 5.[1] *Aucoin v. Matador Servs., Inc.*, 749 F.2d 1180, 1181 (5th Cir. 1985); *Estate of Storm v. Nw. Iowa Hosp. Corp.*, 548 F.3d 686, 687-88 (8th Cir. 2008); *Main Drug Inc. v. Aetna U.S. Healthcare, Inc.*, 475 F.3d 1228, 1231-32 (11th Cir. 2007). A notice of appeal is a very simple filing that does not contain a lot of information which is why it would be very

[1] Fed. R. App. P. 5(b) requires: a statement of the facts necessary to understand the question presented in the appeal; the question itself; the reasons why the appeal should be allowed and is authorized by the statute or rule; an attached copy of the order complain of, any relating memorandum; and any order complained of, any relating memorandum; and any order stating the district court's permission to appeal or finding that the necessary conditions for appeal are met.

difficult to have it contain all the content required under Fed. R. App. P. 5(b), however all these courts of appeals did not mandate strict compliance with Rule 5. App. 25. These courts of appeals held a proper functional equivalent filing could meet Rule 5 if the content was sufficient.

C. The Sixth Circuit —like the Seventh Circuit has concluded that functional equivalence cannot be used to comply with Federal Rule of Appellate Procedure 5.

Contrary to the Second, Fifth, Eighth, Ninth, and Eleventh Circuits, the Sixth, and now the Seventh Circuit have concluded that Rule 5 is strictly construed to not allow functional equivalence. Rather than recognizing that *Smith* and *Torres* apply to all rules of procedure, these courts appear to view that functional equivalence is not applicable with Rule 5.

In *Lynch v. Johns-Manville Sales Corp.*, 701 F.2d 44, 45 (6th Cir. 1983), the Sixth Circuit refused to even attempt to analyze if the district court's certification order under § 1292(b) could be the functional equivalent to meet Rule 5.

III. The Seventh Circuit's decision is wrong and conflicts with this Court's precedents because *Manrique*, *Hamer*, and *Nutraceutical Corp.* did not overrule this Court's long-standing practice of functional equivalence.

The Seventh Circuit's decision relies on this Court's recent opinions in *Manrique*, *Hamer*, and

Nutraceutical Corp. as the legal basis for the proposition that the functional equivalence doctrine has been overruled. However, none of these cases mentioned overruling the functional equivalence doctrine from *Torres* and *Smith*. Additionally, none of the appellants in *Manrique*, *Hamer*, and *Nutraceutical Corp.* were attempting to use a functionally equivalent filing, and all three cases dealt with attempting to excuse an untimely filed appeal, i.e., no notice of appeal or functional equivalent was filed.

A. This Seventh Circuit erroneously applied *Manrique*, *Hamer*, and *Nutraceutical Corp.* to overrule functional equivalence.

In *Manrique v. United States*, 137 S. Ct. 1266, 1270-71 (2017), the appellant failed to file a second timely notice of appeal under Federal Rule of Appellate Procedure 4 and 18 U.S.C. § 3742 to challenge a restitution judgment, and the opponent timely objected. This Court affirmed that the rules at issues were claims processing, but the opposing party did timely object, so it was properly dismissed. *Id.* at 1274. However, the appellant did not seek to use a functionally equivalent filing to meet Rule 4 or § 3742, but rather argued that any defect in the timely first notice of appeal, which failed to appeal the restitution, was harmless error. *Manrique*, 137 S. Ct. at 1273-74. This Court rejected that argument, reasoning that a claims processing rule timely invoked must lead to dismissal, even if there is harmless error. *Id.* at 1274. So, with no timely filed appeal or attempted functional equivalent

filing, this Court had to dismiss. *Id*. This case stands for the proposition that harmless error cannot excuse a lack of an appeal, so long as the other side raises dismissal timely. However, the Wades did file a functional equivalent filing, and furthermore, harmless error is not relevant to the functional equivalence doctrine.

Pursuant to functional equivalence, the litigant seeks not to excuse an untimely filing, but rather to use one timely filed document in place of another. This Court's long-standing practice has never conditioned the use of functional equivalence on harmless error, but has only required evidence of intent to appeal, and sufficient notice and content, which has the incidental benefit that the opponent is not prejudiced. *Smith*, 502 U.S. at 248-9.

In the Seventh Circuit's decision, the opposing side did have sufficient notice of the functional equivalence filing, and never disputed that notice of that filing, nor the content of it as being insufficient. *See* App. 36-37 and *infra* page 5. Thus, any reliance on harmless error from *Manrique* is misplaced.

In *Hamer v. Neighborhood Housing Services*, 138 S. Ct. 13, 18 (2017), the appellant failed to file a timely appeal under Federal Rule of Appellate Procedure 4(a)(5)(C). However, the opponent failed to timely object in district court, and lack of jurisdiction was raised for the first time in the Seventh Circuit, which it dismissed believing Fed. R. App. P. 4(a)(5)(C) was jurisdictional. This Court reversed, holding the rule was a mandatory claims processing rule not timely invoked, so the opponent forfeited its right to invoke dismissal. *Hamer*, 138 S. Ct. at 21-22. Just as in *Manrique*, no attempt was made by the appellant to use a timely-filed functional

equivalent. Thus, in *Hamer*, this Court merely clarified when a rule is considered mandatory claims processing or jurisdictional. *Id*. at 20.

This Court in *Hamer* was not trying to create any new legal theories about how jurisdictional and mandatory claims processing rules worked. This Court has for many years held that jurisdictional rules must be dismissed without exception, and nonjurisdicitonal mandatory claim processing rules only cause dismissal if timely invoked. *See Robinson*, 361 U.S. at 226-27; *Kontrick*, 540 U.S. at 451, 456. Rather, this Court was clearing up terminology to stop courts of appeals from misapplying jurisdictional and nonjurisdicitonal mandatory claim processing rules. *Id*. at 12-13. Moreover, this Court was not overruling functional equivalence. It was not mentioned. Nor did the appellant raise it.

The Seventh Circuit, relying on *Hamer* to overrule functional equivalence, is squarely at odds with this Court's precedence in *Torres* and *Smith*. This Court's decisions in those cases were based on the determination that the rules at issue were jurisdictional, which demands dismissal, yet did not condition the use of functional equivalence on whether the rule was jurisdictional.

The Seventh Circuit opinion goes further than overruling functional equivalence with petitions for permission. It also creates an eleven to one circuit split by overruling the use of functional equivalence to file a notice of appeal under Rule 3. Since *Foman*, *Torres*, and *Smith*, this Court has reaffirmed that functional equivalence is still good law, and has not been overturned. *Scarborough v. Principi*, 541 U.S. 401, 416 (2004) ("Other opinions of this Court are in full harmony with the view that imperfections in

noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court). Moreover, every court of appeal has allowed functional equivalence to meet Rule 3. *See Campiti v. Martinez*, 333 F.3d 317, 320 (1st Cir. 2003) (request for appointment of counsel was functional equivalent to meet Rule 3); *Roemer v. Booth*, 710 Fed. Appx. 36, 37 (2d Cir. 2018) (brief was functional equivalent to meet Rule 3); *Clark v. Linares*, 594 Fed. Appx. 81, 81 (3d Cir. 2015) (petition for writ of certiorari was functional equivalent to meet Rule 3(c)); *Clark v. Cartledge*, 829 F.3d 303, 306-7 (4th Cir. 2016) (motion for extension of time was functional equivalent to meet Rule 3); *United States v. Cantwell*, 470 F.3d 1087, 1088-89 (5th Cir. 2006) (motion for extension of time was functional equivalent to meet Rule 3); *In re Jones*, 680 F.3d 640, 642 (6th Cir. 2012) (objection was functional equivalent to meet Rule 3); *Remer v. Burlington Area School District*, 205 F.3d 990, 994-95 (7th Cir. 2000) (petition for interlocutory appeal was functional equivalent to meet Rule 3); *Carson v. Dir. of the Iowa Dep't of Corr. Servs.*, 150 F.3d 973, 975 (8th Cir. 1998) (certificate of appealability was functional equivalent to meet Rule 3); *U.S. Philips Corp. v. U.S. Dist. Court for the Cent. Dist. Of Cal.*, 526 Fed. Appx. 728, 732 (9th Cir. 2013) (petition for writ of mandamus was functional equivalent to meet Rule 3); *SEC v. Boock*, 763 Fed. Appx. 675, 676 n. 2 (10th Cir. 2019) (motion to reconsider was functional equivalent to meet Rule 3); *Jackson v. United States*, No. 18-14575-B, 2019 U.S. App. LEXIS 6882 at *2-3 (11th Cir. Mar. 7, 2019) (motion for extension of time to appeal as functional equivalent to meet Rule 3);

United States v. Gooch, 842 F.3d 1274, 1277-78 (D.C. Cir. 2016) (motion for extension of time was functional equivalent to meet Rule 3).

Lastly, in *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710, 713 (2019), the appellant failed to file a timely petition for permission to appeal under Federal Rule of Civil Procedure 23(f). This Court held Fed. R. Civ. P. 23(f) was a mandatory claims processing rule, but the opponent timely objected so it must be dismissed. *Id.* at 714. The appellant argued that a mandatory claims processing rule should be subject to the equitable exception of tolling, which this Court rejected. *Id.* at 714-15. Again, however, just like in *Manrique* and *Hamer*, no attempt was made by the appellant to use a timely-filed functional equivalent. The Seventh Circuit relied on *Nutraceutical* to dismiss the appeal here because Fed. R. Bank. P. 8006(g) and Rule 5 are mandatory claims processing, and a timely objection was filed. However, this is squarely at odds with this Court's long-standing practice that functional equivalence can only be defeated if the alleged functionally equivalent document is not timely filed or lacks sufficient content to comply with the rule. An objection to the general use of functional equivalence is not what *Manrique, Nutraceutical Corp.*, and *Hamer* stand for.

The only way for the Seventh Circuit's decision to fit squarely with *Manrique*, *Nutraceutical Corp.*, and *Hamer* would be if the Wades failed to use a timely functionally equivalent filing, or the purported functionally equivalent filing lacked sufficient content to meet Rule 5, then functional equivalence would fail. *See Casey*, 406 F.3d at 146 (court held appellate brief could serve as the functional

equivalent under 28 U.S.C. § 1292(b) and Fed. R. App. P. 5, but dismissed appeal for functional equivalent filing failing to have sufficient content.) *See also Patterson v. Oates*, 740 F. App'x 40 (4th Cir. 2018) (appellant's attempt at using an appellate brief as the functional equivalent failed since it was not timely filed). However, a timely functional equivalent filing was made, and neither the Seventh Circuit nor Kreisler questioned the notice or its content.

Since this Court's opinions in *Manrique*, *Nutraceutical Corp.*, and *Hamer* have been issued, many courts of appeals have continued to use functional equivalence because this Court has not overruled it. *See*, *e.g.*, *In re Burtch*, No. 19-12288-J, 2019 U.S. App. LEXIS 19887 at *1-2 (11th Cir. July 2, 2019) (court treated application for leave to file second habeas corpus petition as functional equivalent to meet Rule 3); *Steward v. Hernandez*, No. 19-55375, 2019 U.S. App. LEXIS 19006 at *2 (9th Cir. June 25, 2019) (court treated petition for rehearing en banc as functional equivalent to meet Rule 3); *Jackson*, 2019 U.S. App. LEXIS 6882 at *2-3 (court treated motion for extension of time as functional equivalent to meet Rule 3); *Almaguer v. Cty. Of Bexar*, 2019 U.S. App. LEXIS 24088 at *3 (5th Cir. August 13, 2019) (court treated *in Forma Pauperis* motion as functional equivalent of timely notice of appeal).

IV. This case is the ideal vehicle for this Court to address this issue of exceptional importance affecting thousands of appellants.

This case is an ideal vehicle for the Court to address this critical issue. There is no question that the Seventh Circuit viewed the functional equivalence doctrine as an equitable exception as it stated that *Nutraceutical Corp.*, *Hamer*, and *Manrique* overruled *Turner* and *Marshall* "…to the extent they approved exceptions" App. 9. The Seventh Circuit furthermore ignored that this Court's long-standing practice does not condition the use of functional equivalence on whether a rule is jurisdictional or nonjurisdicitonal mandatory claim processing. Additionally, there is no question that the Seventh Circuit viewed that functional equivalence cannot be used to satisfy Rule 5 as it stated that *Torres* did not extend so far as to allow functional equivalence to satisfy Rule 5. App. 8. Accordingly, the question of whether this Court has overruled functional equivalence is cleanly presented here.

The question of whether this Court's long-standing precedents in *Torres* and *Smith* extend to using Rule 5 with the functional equivalence doctrine makes this case an ideal vehicle. Functional equivalence with Rule 5 is not only used with Fed. R. Bankr. P 8006(g), such as the Wades' case, but also can be used with 28 U.S.C. §§ 1292(b) and 1453(c), and Federal Rule Civil Procedure 23(f). Absent intervention by this Court, the Seventh Circuit's decision will change how notices of appeal and petitions for permission to appeal are enforced in the Seventh Circuit.

The question presented is of exceptional importance because functional equivalence prevents appeals from being dismissed for not being strictly compliant. As this Court has recognized, it is contrary to the spirit of the federal rules for technicalities to stand in the way of deciding a case on its merits. *Torres*, 487 U.S. at 291, *Foman*, 371 U.S. at 181. Additionally, this Court has stated that pleading should not be a game of skill in which one misstep may be decisive to the outcome of the case. *Foman*, 371 U.S. at 182. If an appellant does not timely file a notice of appeal, this can end the lawsuit. Functional equivalence has also been used in this Court's long-standing practice under Federal Rule Appellate Procedure 3. *Torres*, 487 U.S. at 314, *Smith*, 502 U.S. at 245. Thousands of litigants every year are filing notice of appeals or petitions for permissions to appeal, so absent intervention from this Court, functional equivalence will continue to recur, but will be eviscerated in the Seventh Circuit. Thus, the Seventh Circuit's holding will affect future appellants from using functional equivalence to meet Rule 3 and rules involving petitions for permission to appeal such as Rule 5.

Many times, appellants can be *pro se* litigants, where the functional equivalent doctrine can save an appeal from being dismissed where the filing was slightly irregular, or another timely filed document could serve as the functional equivalent. Under the Seventh's Circuit's ruling, an opponent can simply invoke dismissal and it would be mandatory to dismiss the appeal, even if the appellant had a sufficient and timely functional equivalent filing. However, the purpose of enforcing timely raised dismissals to appeals that are based on mandatory

claims processing rules is not to disallow the use of functional equivalence, but it is to enforce a complete omission, i.e. where nothing whatsoever was filed, no filing of appeal or functional equivalent.

Furthermore, based on the Seventh Circuit's ruling, if any litigant relies on a rule or statute that is jurisdictional, then any future Seventh Circuit appeal would *sua sponte* force the court to dismiss it, even without opposition from the opponent, and even if a sufficient functional equivalent filing has been lodged. The Seventh Circuit's ruling will cause harsh consequences to *pro se* appellants, as well as appellants with attorneys, where they have complied with a timely and sufficient functionally equivalent filing.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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