No. 21-____

In the
Supreme Court of the United States

CONSTANCE GEORGE,
Petitioner,
v.
HOUSE OF HOPE RECOVERY; BRIDGES TO CHANGE, INC.; WASHINGTON COUNTY DEPARTMENT OF HOUSING SERVICES; AND PATRICIA BARCROFT,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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February 28, 2022

QUESTION PRESENTED

This Petition seeks review of the Ninth Circuit's outlier view in a longstanding circuit split over service of the notice of appeal. Federal Rule of Appellate Procedure 3(d) assigns "[t]he district clerk" the duty to "serve notice of the filing of a notice of appeal," with the express caveat that a "failure to serve notice does not affect the validity of the appeal." Consistent with this plain language, six circuits have recognized that a failure to serve the notice of appeal does not divest appellate jurisdiction, with some dismissing the contrary view as "frivolous." *United States v. Uni Oil, Inc.*, 710 F.2d 1078, 1080 n.1 (5th Cir. 1983). But the Ninth Circuit has staked out that "frivolous" view in a series of decisions over the course of four decades, holding that Rule 3 requires the appellant to serve the notice of appeal and that doing so is essential to jurisdiction. Most recently, a Ninth Circuit panel applied this atextual rule to the pro se appeal that Petitioner filed here. Even though the district court had served Petitioner's notice of appeal on all parties, the Ninth Circuit held it lacked jurisdiction over two appellees because Petitioner herself had not served them with her notice of appeal. Under the Ninth Circuit's distortion of Rule 3, pro se litigants like Petitioner stand to lose their right to appeal for failing to take actions that this Court has, by Rule, expressly assigned to the courts.

The question presented is:

Whether Federal Rule of Appellate Procedure 3 permits a court of appeals to dismiss an appeal because the appellant did not serve the notice of appeal.

PARTIES TO THE PROCEEDING

Petitioner Constance George was plaintiff in the district court and appellant in the Ninth Circuit.

Respondents House of Hope Recovery, Bridges to Change, Inc., Washington County Department of Housing Services, and Patricia Barcroft were defendants in the district court and appellees in the Ninth Circuit.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are related to this Petition:

Constance George v. House of Hope Recovery, et al., No. 3:15-cv-01277 (D. Or.).

Constance George v. House of Hope Recovery, et al., No. 18-35551 (9th Cir.).

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PETITION FOR WRIT OF CERTIORARI

The filing of a notice of appeal is a pivotal litigation event that marks the transfer of jurisdiction from the district court to the court of appeals. *See Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982). But unlike other litigation documents, the filer need not serve the notice of appeal. Instead, the Federal Rules of Appellate Procedure specifically require the district court to give notice of this transfer of jurisdiction by serving it on the parties. Fed. R. App. P. 3(d)(1). And lest district courts prevent review of their decisions by failing in that duty, the Rules dictate that a failure to serve the notice of appeal does not divest jurisdiction from the court of appeals. Fed. R. App. P. 3(d)(3).

Six courts of appeals have applied Rule 3's precepts without controversy. Under that majority view of the plain language of Rule 3(d), the other circuits have rejected attempts to frustrate jurisdiction due to a purported failure to serve the notice of appeal. But the Ninth Circuit has ignored that plain language. Instead, longstanding Ninth Circuit caselaw holds that Rule 3 requires the *appellant* to serve the notice of appeal to establish jurisdiction. And that unsupportable, outlier rule doomed the appeal of Petitioner Constance George.

Ms. George is a black Jehovah's Witness who brought racial and religious discrimination claims over her termination from House of Hope, which runs a women's recovery home in Aloha, Oregon. After the district court entered judgment against her and her counsel withdrew, she filed a paper pro se notice of appeal with the district clerk, which served the notice

on all parties. But then two defendants—Respondents Bridges to Change and Washington County, the "Program Defendants"—objected that *Ms. George* had not served them with the notice of appeal. And the decision below applied Ninth Circuit caselaw to dismiss her appeal against the Program Defendants for lack of jurisdiction.

Ms. George sought rehearing of that ruling to conform Ninth Circuit law to its sister circuits and to the plain text of Rule 3. But the Program Defendants urged the court to reject this "invitation to revisit Ninth Circuit 43-year-old precedent" in *Rabin v. Cohen*, 570 F.2d 864, 866 (9th Cir. 1978), which requires service of the notice of appeal. App.63. The panel sided with the Program Defendants and denied rehearing with an amended opinion. And so the circuit split on the service requirement persists.

This case presents the perfect opportunity to resolve that split. There are no alternate grounds to affirm the Ninth Circuit's dismissal. In fact, the panel acknowledged that Ms. George met all the jurisdictional requirements to appeal, but it dismissed solely for lack of service. In another pro se filing, Ms. George explained she was told that if she "wanted to appeal" the summary judgment rulings, it "could only be done" after her case against the remaining defendants concluded. App.41. And so, left without an attorney at the entry of final judgment, she did everything the rules required to appeal that decision. She filed a paper document in the district court 30 days after judgment, stating her intent "to appeal the … earlier summary judgement ruling." App.32. And the district court docketed that notice and served it on

the parties as required by Rule 3(d). Although Ms. George had followed the Rules to a tee, the lower court nevertheless denied her a decision on the merits.

This is a manifest injustice. Not only does the Ninth Circuit's rule lack any foundation in the text of Rule 3 that it purports to interpret, but it is uniquely harsh to pro se litigants who are entitled to a liberal construction of Rule 3. *See Smith v. Barry*, 502 U.S. 244, 248 (1992). In fact, the Program Defendants have suggested that the Ninth Circuit's jurisdictional service rule applies only to appellants who, like Ms. George, fail to correctly caption their notices of appeal. But it is vital to the just administration of the courts of appeals that pro se appellants receive the hearing to which they are entitled on a timely appeal. And so the time has come for this Court to resolve this lopsided circuit split and correct the Ninth Circuit's outlier, atextual rule. The Court should grant certiorari and reverse.

OPINIONS BELOW

The original and amended orders of the Ninth Circuit are unreported and reproduced at App.1–6 and App.9–16. The order of the United States District Court for the District of Oregon granting summary judgment to the Program Defendants is unreported and reproduced at App.17–28.

JURISDICTION

On April 20, 2018, the district court entered judgment, and Ms. George filed a timely notice of appeal 30 days later on May 21, 2018. App.31–37. On November 18, 2021, the Ninth Circuit issued a decision affirming in part and dismissing the appeal in part for lack of jurisdiction. App.1–6. On December

2, 2021, Ms. George sought panel rehearing of the dismissal for lack of jurisdiction. App.52–61. On January 5, 2022, the Ninth Circuit issued an amended decision and denied rehearing. App.9–16. This Court has jurisdiction under 28 U.S.C. § 1254(a) to review the Ninth Circuit's dismissal for lack of jurisdiction.

RULE AT ISSUE

Federal Rule of Appellate Procedure 3 provides as follows in pertinent part:

> **(a) Filing the Notice of Appeal.**
>
> …
>
> (2) An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal.
>
> …
>
> **(c) Contents of the Notice of Appeal.**
>
> …
>
> (7) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice, or for failure to properly designate the judgment if the notice of appeal was filed after entry of the judgment and designates an order that merged into that judgment.
>
> …

> **(d) Serving the Notice of Appeal.**
>
> (1) The district clerk must serve notice of the filing of a notice of appeal by sending a copy to each party's counsel of record—excluding the appellant's—or, if a party is proceeding pro se, to the party's last known address. …
>
> …
>
> (3) The district clerk's failure to serve notice does not affect the validity of the appeal. …

STATEMENT OF THE CASE

A. Ms. George Files Suit Over Racial And Religious Discrimination In The "Homeless To Work" Program.

This action arises from Ms. George's participation in the "Homeless to Work" program run by Respondent Bridges to Change with support from Respondent Washington County, Oregon. *See* App.19. These two Program Defendants offered Ms. George housing with House of Hope, which operates "Christ centered" women's recovery homes in Oregon under the leadership of director Patricia Barcroft. *See* App.19–20. About a week into Ms. George's time at House of Hope, a dispute arose over her attendance of House of Hope's religious meetings. Ms. George said she was feeling ill and would not be attending an evening meeting. *See* App.21. The same evening, Ms. Barcroft had excused Ms. George's roommate—a white woman who was not a Jehovah's Witness—for illness. *See id.* But Ms. Barcroft refused to excuse Ms. George, and when Ms. George would not attend the meeting, House of Hope terminated her tenancy. *See id.*

Ms. George then retained an attorney to file this action in the District of Oregon. In it, she alleges racial and religious discrimination in housing by House of Hope, Ms. Barcroft, Bridges to Change, and Washington County. The district court granted summary judgment on all of Ms. George's claims against the Program Defendants and on certain of her claims against House of Hope and Ms. Barcroft. App.18, 22–28. Ms. George then went to trial on her remaining claims against House of Hope and Ms. Barcroft. After a mistrial for a non-unanimous verdict, D.C.Dkt.65, the district court granted all counsel leave to withdraw and appointed pro bono counsel for both sides. D.C.Dkt.72, 79, 95.

A second trial of Ms. George's remaining claims against House of Hope and Ms. Barcroft took place before the magistrate judge on consent. The jury returned a defense verdict, and the district court entered judgment. App.29. The district court then granted Ms. George's pro bono trial counsel leave to withdraw. D.C.Dkt.156.

B. Ms. George Files A Pro Se Notice Of Appeal And The District Court Serves It On The Parties.

Thirty days after the judgment, Ms. George, then pro se, made a paper filing in the district court stating her intent to appeal. While she submitted it using the form for a "Motion for Appointment of Pro Bono Counsel," the document's purpose as a notice of appeal was plain: she listed Bridges to Change, Washington County, and House of Hope in the caption and stated on the first page that she "would like to appeal the … earlier summary judgment ruling by Judge Michael H. Simon. (opinion and order)." App.32.

Ms. George did not serve her notice of appeal—instead, the district court docketed it and served it on all parties via ECF. *See id.*; D.C.Dkt. 157. Even though the Program Defendants had "been terminated from the case," they continued to receive ECF notices because they had not filed a request to discontinue them. U.S. District Court, District of Oregon, CM/ECF User Manual, Discontinuing NEFs for a Case, available at https://bit.ly/2ZI8Uen. There is no evidence that those ECF notices were not sent to or received by the Program Defendants. The Ninth Circuit docketed Ms. George's appeal and granted her request to appoint pro bono counsel to represent her on appeal.

C. The Ninth Circuit Joins All Parties To Ms. George's Appeal And The Program Defendants Challenge Jurisdiction.

Shortly after appointment, counsel saw that the district court's judgment had been "ENTERED in favor of Defendants House of Hope Recovery and Patricia Barcroft," but it did not name the Program Defendants. App.29. And because the judgment did not name the Program Defendants, the Ninth Circuit had not included them in the appeal. Ms. George's counsel then spoke with the Program Defendants, and they indicated they knew about Ms. George's appeal, but believed the original judgment had not resolved the claims against them. App.49–50.

Because the Program Defendants maintained that the judgment did not resolve claims against them, Ms. George sought to proceed separately against them on appeal. She filed a pro se motion asking for a judgment for the Program Defendants, D.C.Dkt.171,

which the district court granted, entering an amended judgment "in favor of all Defendants and against Plaintiff." App.7. And so just before her counsel filed the opening brief as to House of Hope and Ms. Barcroft in the original appeal, Ms. George filed a second pro se notice of appeal from the amended judgment. App.43.

But the Ninth Circuit did not docket Ms. George's new notice of appeal as a separate appeal against the Program Defendants. Instead, it added the Program Defendants to the appeal from the original judgment, along with House of Hope and Ms. Barcroft. App.46–47. It also directed Ms. George to address whether her failure to previously add the Program Defendants or to address her claims against them in her opening brief led to a waiver. *Id.* Ms. George's counsel urged that there was no basis for a finding of waiver: only the amended judgment was final and Ms. George had diligently pursued her claims against the Program Defendants from the outset. COA.Dkt.43.

In the very first point of their response brief, the Program Defendants argued that the court of appeals lacked jurisdiction over Ms. George's appeal against them. COA.Dkt.61 at 13–14. They said Ms. George did not serve them with her May, 21, 2018 pro se filing and that, "[w]ithout service," it "cannot be treated as a notice of appeal." *Id.* at 14. And they quoted the Ninth Circuit's holding in *In re Sweet Transfer & Storage, Inc.* that "the document in question [must] have been *served* upon the other parties." *Id.* (quoting 896 F.2d 1189, 1193 (9th Cir. 1990)). Ms. George responded that the original judgment was not final, but that even if the court held otherwise, a lack of

service did not impair its jurisdiction. COA.Dkt.74-1 at 19–20; App.48–51.

D. The Ninth Circuit Dismisses Ms. George's Appeal As To The Program Defendants Because She Did Not Serve Them With Her Notice Of Appeal.

The Ninth Circuit held oral argument on Ms. George's appeal only as to House of Hope and Ms. Barcroft. The panel then affirmed the judgment for House of Hope and Ms. Barcroft on the merits. App.4–5. But it declined to even reach her appeal as to the Program Defendants and instead dismissed it for lack of jurisdiction. App.3–4.

The Ninth Circuit reached this conclusion despite having found that Ms. George met all three requirements for appellate jurisdiction: "(1) she appealed a final decision, (2) her appeal was timely, and (3) she complied with the notice required by Rule 3." App.3 (cleaned up). The court concluded that the original judgment was a final decision, even though it named only House of Hope and Ms. Barcroft, because the district court had previously granted summary judgment against the Program Defendants. App.3.[1] It held that Ms. George's notice of appeal was timely

[1] This holding effectively adopted the doctrine of cumulative finality—that the last of a series of decisions that resolves all claims against all parties may be treated as a final judgment. *See* 15A Wright & Miller, Fed. Prac. & Proc. Juris. § 3914.9 (2d ed.). Although Ms. George contends that the amended judgment was the only final judgment here, *see* Fed. R. Civ. P. 54(b), this Petition does not seek review of the Ninth Circuit's holding on finality. Nor would it make a difference to the issues under review, since the district court, not Ms. George, served her notices of appeal from both the original and amended judgments.

because she filed it "with the district court within 30 days after entry of the judgment." *Id.* And it held that Ms. George's filing was a notice of appeal because it "gave notice of her intent to appeal the court's final judgment." *Id.* (citing *Smith*, 502 U.S. at 248).

Yet, despite holding that Ms. George met all three requirements of appellate jurisdiction, the court dismissed her appeal as to the Program Defendants because she "did not serve her notice of appeal" on them. App.3. And based on this, it concluded "she did not comply with the requirements of Federal Rule of Appellate Procedure 3 as to those two defendants." App.3. But instead of discussing what Rule 3 requires, the panel relied on the *Sweet Transfer* decision cited by the Program Defendants. App.4. And it quoted this Court's statement in *Smith*, about the substance of the notice of appeal, that the "purpose of a notice of appeal 'is to ensure that the filing *provides sufficient notice* to other parties and the courts.'" App.3–4 (quoting *Smith*, 502 U.S. at 248) (emphasis added).

E. The Ninth Circuit Issues An Amended Decision And Denies Rehearing.

Ms. George sought panel rehearing. She explained that the Ninth Circuit had overlooked three critical points: (1) Rule 3 commits service of the notice of appeal to the district court, not the appellant; (2) the district court did serve the notice of appeal on the Program Defendants via ECF; and (3) lack of service of the notice of appeal does not affect jurisdiction. *See* App.52–61. And she noted that every other circuit to consider the question has held that service is not essential to jurisdiction. App.55–57.

The panel directed the Program Defendants to address the rehearing petition, and they clung again to the jurisdictional service rule. In the very first sentence of their response, they characterized the rehearing petition as "an invitation to revisit Ninth Circuit 43-year-old precedent contained in *Rabin v. Cohen*, 570 F.2d 864, 866 (9th Cir. 1978)," which required service of the notice of appeal. App.63. Despite the judicially noticeable record of service by the district court, the Program Defendants continued to claim that they had not been served with the notice of appeal. App.66–67. They argued that the court had discretion to dismiss Ms. George's appeal under Rule 3(a)(2). App.73. And above all, they urged that the Ninth Circuit has "uniformly" required the appellant to serve a notice of appeal not labeled as such. App.67.

The Ninth Circuit denied rehearing. It issued an amended decision, but the changes in that opinion were only window dressing for the jurisdictional service rule. The amended decision still dismissed Ms. George's appeal as to the Program Defendants for lack of jurisdiction. App.13–14. It still cited *Smith* and it still quoted *Sweet Transfer*'s holding that "the document in question" must "have been *served* upon the other parties." App.14 (quoting *Sweet Transfer*, 96 F.2d at 1193). The only edit in the amended decision was to charge Ms. George with failing to "provide adequate notice" to the Program Defendants, App.13, rather than failing to "serve her notice of appeal." App.3. But because the Ninth Circuit also held that Ms. George's filing had given proper notice of her intent to appeal, the Ninth Circuit's reference to "adequate notice" was just a reference to service. App.13–14.

REASONS FOR GRANTING THE PETITION

The Court should grant this Petition to resolve the entrenched, lopsided split in the courts of appeals on whether appellants must serve the notice of appeal. The Ninth Circuit's holding violates both the plain language and the purpose of Rule 3(d). That Rule demands that the district court, not the appellant, serve the notice of appeal, and it expressly states that a lack of service does not impair jurisdiction. The split among the courts of appeals on this question is deep, wide, and intractable. Standing against the Ninth Circuit's jurisdictional service rule are ten decisions of six other courts of appeals that have applied Rule 3(d) according to its plain language. And this case involving a pro se appellant who met every requirement for appellate jurisdiction is an ideal vehicle to address the question. There are no alternate grounds to affirm the dismissal, and Ms. George's appeal illustrates the especially pernicious effect that the Ninth Circuit's rule has on pro se litigants. The Court should grant the Petition to resolve this circuit split and remedy the harsh effect of the Ninth Circuit's rule on unrepresented litigants.

I. The Ninth Circuit's Jurisdictional Service Rule Conflicts With The Plain Language Of Rule 3(d) And Every Other Circuit To Address The Issue.

The Ninth Circuit's requirement that the appellant serve the notice of appeal directly conflicts with Rule 3(d) of the Federal Rules of Appellate Procedure and with the decisions of six other circuits. The Court should grant review to give effect to Rule 3(d)'s plain directive that the duty to serve the notice

of appeal rests with the district court, not the appellant, and does not affect appellate jurisdiction.

A. This Court Has Clearly Stated In Rule 3(d) That Service Of The Notice Of Appeal Does Not Affect Jurisdiction.

The Court has made the role of service of the notice of appeal clear from its very first promulgation of the Federal Rules of Appellate Procedure. *See* 28 U.S.C. § 2072. The original 1967 version of Rule 3 dictates that "[t]he clerk of the district court shall serve notice of the filing of a notice of appeal," and that the "[f]ailure of the clerk to serve notice shall not affect the validity of the appeal." Federal Rules of Appellate Procedure, 389 U.S. 1065, 1070 (1967). With only minor stylistic changes, this language endures in the current version of Rule 3: "The district clerk must serve notice of the filing of a notice of appeal," but "[t]he district clerk's failure to serve notice does not affect the validity of the appeal." Fed. R. App. P. 3(d).

Although this Court has not definitively construed the Rule 3(d) service requirement, it has issued decisions under Rule 3(c) on the substantive requirements for a notice of appeal. In *Torres v. Oakland Scavenger Co.*, this Court held that, while a litigant's filing may serve as a notice of appeal if it "is the functional equivalent of what the rule requires," a filing that did not name the party seeking to appeal was not enough. 487 U.S. 312, 317 (1988). And then, in *Smith v. Barry*, the Court held that a document captioned as a brief sufficed because it is "the notice afforded by a document, not the litigant's motivation in filing it," that "determines the document's sufficiency" as a notice of appeal. 502 U.S. 244, 248

(1992). "If a document filed within the time specified by Rule 4 gives the notice required by Rule 3, it is effective as a notice of appeal." *Id.* at 248–249. Neither *Torres* nor *Smith* created separate rules for a "functional equivalent" of a notice of appeal. Instead, they applied the lenient construction that Rule 3 mandates by forbidding that an appeal "'be dismissed for informality of form or title of the notice of appeal.'" *See Smith*, 502 U.S. at 250 (Scalia, J., concurring) (quoting Fed. R. App. P. 3(c)(7)).

Just as *Torres* and *Smith* resolved important and disputed questions about the substantive requirements of a notice of appeal under Rule 3(c), this case warrants review to resolve the circuit split over the procedural requirements of Rule 3(d). The plain text of Rule 3(d) dictates that the district court must serve the notice of appeal and that a lack of service does not affect the appeal's validity. And the liberal construction of Rule 3 that this Court applied in *Smith* makes that conclusion inescapable. A liberal construction for pro se appellants would not punish Ms. George for failing to take an action that the Rules specifically commit to the courts.

The same goes if the Court interprets Rule 3(d) according to its evident purpose and intent. *See Torres*, 487 U.S. at 319 (Scalia, J., concurring in the judgment). "Where that intent is to provide leeway, a permissive construction is the right one; where it is to be strict, a permissive construction is wrong." *Id.* Thus, in *Torres*, the purpose of the Rule suggested that failing to name the appellant was fatal, since Rule 3(c) requires the notice of appeal to "specify the party or parties taking the appeal" without exception. *See id.*

But Rule 3(d), in contrast, specifically commits service to "the district clerk," and it expressly states that a lack of service by the district court "does not affect the validity of the appeal." *See* Fed. R. App. P. 3(d)(1), (3). Because the Rule goes out of its way to show that a failure of service should not be charged against the appellant, it should be construed in accordance with its evident purpose not to make service jurisdictional.[2]

B. Six Circuits In Ten Decisions Recognize That Service Of The Notice Of Appeal Does Not Affect Jurisdiction.

These principles have not proven controversial in the other courts of appeals. Every other circuit to address this question has applied Rule 3(d) by its plain language to reject attempts to leverage a lack of service on specific appellees into a lack of appellate jurisdiction. Four circuits have done so in holdings and two have done so in dicta. The ten decisions from these six other circuits reinforce the plain language of Rule 3(d) and show that the Ninth Circuit's outlier jurisdictional service rule is unfounded.

The Sixth Circuit has rejected the notion that service of the notice of appeal is an element of jurisdiction. As Judge Sutton observed, arguments insisting on service to secure jurisdiction would "read [the] notice more carefully than they read Rule 3." *Frieder v. Morehead State Univ.*, 770 F.3d 428, 430

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[2] Given Rule 3(d)(3)'s express statement that lack of service does not affect validity, there is no merit to the suggestion by the Program Defendants that the court of appeals may use its discretion to dismiss an appeal "'as it considers appropriate'" if the appellant does not serve the notice. App.73 (quoting Fed. R. App. P. 3(a)(2)).

(6th Cir. 2014). Under the Rule, "[t]he person required to notify the appellees is not the appellant but the district clerk," and "[e]ven if the clerk fails in this duty," it "'does not affect the validity of the appeal.'" *Id.* (quoting Fed. R. App. P. 3(d)(3)). That plain language led the Sixth Circuit to reject a request to dismiss an appeal for lack of appellate jurisdiction. *See id.*

The D.C. Circuit has similarly rejected the contention that "failure to serve" a petition for review was "grounds for dismissal." *Oil, Chem. & Atomic Workers Loc. Union No. 6-418, AFL-CIO v. N.L.R.B.*, 694 F.2d 1289, 1297–98 (D.C. Cir. 1982). A lack of service could not support dismissal, the court explained, because Rule 3(d) "flatly states that '[f]ailure of the clerk to serve notice shall not affect the validity of the appeal.'" *Id.* at 1298 (quoting Fed. R. App. P. 3(d)).

The Tenth Circuit also rejected an attempt by an appellee to escape participation on the merits because "it was not served with the notice of appeal." *Perington Wholesale, Inc. v. Burger King Corp.*, 631 F.2d 1369, 1379 (10th Cir. 1979). As the court explained, even though the district court "failed to serve" the appellee as required by Rule 3, "this does not conclude the issue" because "the clerk's failure to serve the notice does not affect the validity of the appeal." *Id.* So, despite the lack of service, the appellee was still obliged to defend the appeal on the merits. *Id.*; *accord Reid v. Hamby*, 124 F.3d 217, 1997 WL 537909, at *1 (10th Cir. 1997) ("It is the duty of the clerk of the district court to serve the notice of appeal, not the appealing parties.").

The Fifth Circuit has a robust body of law insisting that service falls to the district court and is not jurisdictional. It has held that the plain language of Rule 3(d) means it is not just wrong, but "frivolous," to ask to dismiss an appeal because the appellee "was not properly served with the notice of appeal." *United States v. Uni Oil, Inc.*, 710 F.2d 1078, 1080 n.1 (5th Cir. 1983). Relying on the Tenth Circuit's decision in *Perington*, the Fifth Circuit in *Uni Oil* explained that the Rules are clear about what is and is not jurisdictional: "[a] delay in service is not jurisdictional" and "only the timely filing of the notice is a sine qua non." *Id.* Rule 3(d) "provides equally plainly that the responsibility for serving the notice on the parties is the clerk's, and not the appellant's," leaving "no reason why [an] appeal … should be dismissed" as to an unserved appellee. *Id.*; *Moore v. Hood Cty.*, 20 F.3d 468, 1994 WL 122162, at *1 (5th Cir. 1994).

The Fifth Circuit's caselaw also addresses pro se appellants. It has held that a district court erred in requiring a certificate of service for a pro se notice of appeal because Rule 3(d) "unequivocally places upon the district clerk, not the appellant, the responsibility" to serve the notice of appeal. *Smith v. White*, 857 F.2d 1042, 1043 (5th Cir. 1988). And it has made equally clear that these principles also apply to an incorrectly captioned notice of appeal, where it still remains "the duty of the Clerk to see that notice thereof is served." *Cobb v. Lewis*, 488 F.2d 41, 45 (5th Cir. 1974) (citation omitted), *overruled on other grounds*, *Kotam Elecs., Inc. v. JBL Consumer Prod., Inc.*, 93 F.3d 724, 724 (11th Cir. 1996).

Two other circuits have stated in dicta that it is the clerk's duty to serve a notice of appeal and that its failure to discharge this duty does not affect the validity of the appeal. The Third Circuit has explained that "an appellant is obligated to provide its notice of appeal only to the district clerk, and not to any other parties," since it is the district court that "serves notice of the filing to all other parties pursuant to Rule 3(d)." *United States v. Best*, 304 F.3d 308, 311, n.3 (3d Cir. 2002). And the Second Circuit has remained "mindful that Rule 3(d) of the Appellate Rules states that 'failure of the clerk to serve notice [of appeal] shall not affect the validity of the appeal.'" *Yadav v. Charles Schwab & Co., Inc.*, 935 F.2d 540, 542 (2d Cir. 1991). Thus, the court explained, this "language seems designed to make sure that lack of service does not defeat validity." *Id.*

C. In Three Decisions Over Four Decades, The Ninth Circuit Has Held That Service Of The Notice Of Appeal Is Essential To Jurisdiction.

The Ninth Circuit stands alone, applying the view the Fifth Circuit calls "frivolous" to kick litigants out of court without a hearing. It has issued three decisions imposing a jurisdictional service requirement and stubbornly ignoring the text of the Rule that forbids it. There is thus a wide and well-developed conflict between the Ninth Circuit's jurisdictional service rule and the plain language of Rule 3(d), as applied by every other circuit to address the issue. That conflict warrants this Court's review and intervention.

For almost as long as Rule 3(d) has said that service of the notice of appeal is not essential to

jurisdiction, the Ninth Circuit has said that it is. In its 1978 decision in *Rabin v. Cohen*, 570 F.2d 864 (9th Cir. 1978), the Ninth Circuit began treating service of the notice of appeal as a jurisdictional requirement. Although *Rabin* found appellate jurisdiction was established, it ruled that a notice of appeal "not denominated" as such must be "served upon the other parties to the litigation." *Id.* at 866.

How *Rabin* derived this rule is unclear. It purported to draw it from Rule 3, but it did not address the language of that rule or say who must do the serving. *See id.* Instead, it provided a string cite of decisions to support the service rule and other purported jurisdictional requirements. *See id.* Yet none of the decisions *Rabin* cited hold that service, much less service by the appellant, is among those requirements. Rather, as much as those decisions address the issue, they state the opposite: that even for an incorrectly captioned notice, "'the only thing necessary to be done to perfect an appeal is to file a notice thereof with the Clerk, making it the duty of the Clerk to see that notice thereof is served.'" *Cobb*, 488 F.2d at 45 (quoting *Crump v. Hill*, 104 F.2d 36, 37–38 (5th Cir. 1939)). From the beginning, then, the Ninth Circuit's jurisdictional service rule has lacked any foundation in the Rules or in the common law.

Yet this erroneous rule persisted. The Ninth Circuit next applied *Rabin*'s service standard to dismiss an appeal in the bankruptcy context in *In re Sweet Transfer & Storage, Inc.*, 896 F.2d 1189 (9th Cir. 1990). There, the appellants argued that "their request for transcripts and their letter to the bankruptcy court should be held to constitute a notice

of appeal." *Id.* at 1193. But the Ninth Circuit invoked *Rabin* to explain that its precedents had "required the document in question to have been *served* upon the other parties." *Id.* (citing *Rabin*, 570 F.2d at 866). And because the appellants had not served those documents on the appellees, the Ninth Circuit dismissed the appeal for lack of jurisdiction. *See id.* Just as in *Rabin*, the court did so without addressing the language of Rule 3(d).

One Ninth Circuit decision deviated from this service requirement, but it was later vacated. In a footnote to *Pollard v. The GEO Grp., Inc.*, the Ninth Circuit noted that certain appellees were "never served with the notice of appeal," but that they conceded—and the court agreed—that "such a failure does not affect the validity of the appeal …., especially in light of the liberal construction" of Rule 3. 629 F.3d 843, 852 n.7 (9th Cir. 2010) (citing *Smith,* 502 U.S. at 248). The *Pollard* opinion did not cite either *Rabin* or *Sweet Transfer*, and this Court reversed it on other grounds in *Minneci v. Pollard*, 565 U.S. 118 (2012).

All of this led to the decision here, where the Ninth Circuit again reiterated its service rule. The panel held that it lacked jurisdiction over the Program Defendants because Ms. George "did not serve her notice of appeal" on them. App.3. It supported this by quoting *Sweet Transfer*'s demand that "'the document in question … have been *served* upon the other parties.'" App.4. And so the panel concluded that Ms. George "did not comply with the requirements of Federal Rule of Appellate Procedure 3," even though, like *Rabin* and *Sweet Transfer*, it never even mentioned what Rule 3(d) requires. App.3.

Ms. George's petition for panel rehearing urged the court to follow *Pollard*, rather than *Sweet Transfer* and *Rabin*. App.59. But the Program Defendants said the court had to follow the "43-year-old precedent contained in *Rabin v. Cohen,* 570 F.2d 864, 866 (9th Cir. 1978)." App.63. And so the Ninth Circuit did not budge. Instead, it denied rehearing and issued an amended decision that again confirmed the jurisdictional service rule. The amended decision cited the same cases as the original decision, again quoting *Sweet Transfer*'s demand that "'the document in question … have been *served* upon the other parties.'" App.14 (quoting *Sweet Transfer*, 896 F.2d at 1193). The only adjustment in the panel's amended decision was that it charged Ms. George with failing to "provide adequate notice," App.13, rather than failing to "serve her notice of appeal." App.3. But this cosmetic change did not cure the court's error of law. The panel still concluded Ms. George's filing "gave notice of her intent to appeal." App.13. So its finding that she did not give "adequate notice" was just the service requirement by another name.

Even apart from its lack of textual foundation, the Ninth Circuit's application of its atextual service rule falls apart on its own terms. The panel held that it lacked jurisdiction over Ms. George's appeal as to the Program Defendants, while it decided her appeal against House of Hope and Ms. Barcroft on the merits. But for any question of appellate jurisdiction, both sets of appellees are identically situated. Ms. George named both sets of appellees in her original notice of appeal. App.31. She did not serve that notice of appeal on anyone—neither on the Program Defendants nor on House of Hope and Ms. Barcroft.

But the district court satisfied its Rule 3(d) duty by serving all parties with the notice of appeal via ECF. *See id.*; D.C.Dkt.157. The only difference between the two sets of appellees was that the Program Defendants complained about service while House of Hope and Ms. Barcroft did not. So for the Ninth Circuit to dismiss Ms. George's appeal only as to the Program Defendants means that its jurisdictional service rule is waivable. And that, of course, means it is not a jurisdictional rule at all, since appellate jurisdiction "is open to challenge at any time." *See Fiester v. Turner*, 783 F.2d 1474, 1475 (9th Cir. 1986); *accord Griggs*, 459 U.S. at 61.

There is no need to await further percolation in the lower courts—the split on Rule 3(d) is wide, well developed, and lopsided. And the Ninth Circuit's position in that split is as entrenched as it is untenable. Having issued two published decisions asserting the jurisdictional service rule, the Ninth Circuit applied that rule here in an unpublished memorandum. Under its own rules, the Ninth Circuit's memorandum disposition—and adherence to it on a petition for rehearing—means that "the parties and the district court are aware of the facts, procedural events and applicable law" and there is no need "to clarify the law of the circuit." *See* 9th Cir. Gen. Orders 4.3.a. If the Ninth Circuit has determined there is no need to clarify circuit law on service, then Ninth Circuit law is clearly settled in open conflict with the plain language of Rule 3(d) and every other court of appeals to address the question. The Court should grant certiorari now and reverse.

II. The Ninth Circuit's Jurisdictional Service Rule Inflicts Extra Harm On Pro Se Litigants Who Are Entitled To A Liberal Construction Of Their Filings.

The Ninth Circuit's imposition of a jurisdictional service requirement under Rule 3 perniciously harms pro se litigants who should receive a liberal construction of their pleadings. *See Smith*, 502 U.S. at 248; *Haines v. Kerner*, 404 U.S. 519, 520 (1972). "The Ninth Circuit generally construes the requirements for a notice of appeal more liberally" for unrepresented litigants, and it will "construe almost any document that shows an *intent* to appeal as a notice of appeal" if it is timely filed. Rutter Group Prac. Guide Fed. Ninth Cir. Civ. App. Prac. 3:365-366. Yet, when it comes to service, the Ninth Circuit is harsher on pro se litigants than on anyone else, going beyond strict construction and erecting new hurdles found nowhere in the rule.

The allocation of the duty of service may not typically matter to a represented litigant. By filing a notice of appeal on ECF, the litigant and the district clerk simultaneously serve the notice on all other parties. But it matters greatly for a pro se appellant who files a paper notice of appeal with the clerk's office, relying on the district court for service. Under Rule 3(d), a paper filing by a pro se appellant should not be a problem: as in this case, the district court would place the paper notice of appeal on the electronic docket, thus serving it electronically on all parties. Yet while that is good service under the plain language of Rule 3(d), it is not good enough under Ninth Circuit caselaw. In the Ninth Circuit, unless the pro se plaintiff also takes the added step of

independently serving the notice on all parties, her appeal is subject to dismissal for lack of jurisdiction.

The Program Defendants too have acknowledged the effect of the Ninth Circuit's rule on litigants like Ms. George. In fact, they tried to downplay the circuit conflict by arguing that the Ninth Circuit's jurisdictional service rule is limited to cases like Ms. George's pro se appeal, where the notice of appeal is not correctly captioned. *See* App.67. At the outset, the Ninth Circuit's decisions on this point do not impose any such limit—instead, they simply purport to apply Rule 3 on its face. *See Rabin*, 570 F.2d at 866. The panel here did not hold that Ms. George did not meet a rule for incorrectly named documents, but that her "notice of appeal" "did not comply with the requirements of Federal Rule of Appellate Procedure 3." App.3, 13. The only reason that the Ninth Circuit's decisions on this point address situations involving incorrectly named notices of appeal is because that is where a lack of service is most likely to occur.

But even if the Ninth Circuit's rule were limited as the Program Defendants suggest, it would be every bit as indefensible under Rule 3(d) and even more in need of review. Rule 3 does not create separate rules and categories for notices of appeal and for a "functional equivalent" filed by a pro se appellant. *See Smith*, 502 U.S. at 250 (Scalia, J., concurring). Instead, along with the "less stringent standards" for pro se litigants, *Haines*, 404 U.S. at 520, Rule 3 recognizes that the requirements of the notice of appeal receive a lenient construction: "'[a]n appeal must not be dismissed for informality of form or title of the notice of appeal.'" *See Smith*, 502 U.S. at 250

(Scalia, J., concurring) (quoting Fed. R. App. P. 3(c)(7)). Thus, in *White*, the Fifth Circuit held that it was wrong for a district clerk to require a pro se appellant to serve his notice of appeal. 857 F.2d at 1043. And it recognized in *Cobb* that even if the notice of appeal has the wrong name, it is still "the duty of the Clerk to see that notice thereof is served." 488 F.2d at 45 (quotation omitted). So if in fact the Ninth Circuit has crafted a stringent rule of unique hostility to incorrectly captioned notices of appeal, then it is in even more stark conflict with Rule 3(d) and the other courts of appeals. The rule that the Program Defendants suggest would cry out for review.

III. Ms. George's Pro Se Appeal Is An Ideal Vehicle To Resolve The Conflict In The Courts Of Appeals.

Ms. George's pro se appeal presents an ideal vehicle to resolve the circuit split and correct the Ninth Circuit's error. There are no alternative grounds to affirm the Ninth Circuit's dismissal. The panel relied solely on its errant jurisdictional service rule to dismiss her appeal as to the Program Defendants. App.4, 14. And it held Ms. George met each of the three requirements for appellate jurisdiction: she sought review of final judgment, her notice of appeal was timely filed, and she gave notice of her intent to appeal. App.3, 13. Thus, a reversal of Ninth Circuit precedent requiring service will provide Ms. George with the hearing on the merits that the panel denied her. She is just the sort of pro se appellant the Ninth Circuit's erroneous precedent hurts, and her case presents an ideal platform to correct it.

Nor does the fact that the Program Defendants have claimed that they were not served make this case any less suitable for review. To begin with, that claim is false: the judicially noticeable record shows that the Program Defendants received ECF notice of Ms. George's appeal as required by Rule 3(d), and they acknowledged to Ms. George's counsel that they were aware of her appeal. *See supra* at 6–7; App.49–50. They have offered nothing to rebut the evidence of service, much less shown any prejudice. But, more important, even if it were true that the district court had not served the Program Defendants, this too would only sharpen the focus of this Petition and heighten the need to apply Rule 3(d). That Rule states equally plainly that "[t]he district clerk's failure to serve notice does not affect the validity of the appeal." Fed. R. App. P. 3(d)(3). As other circuits have held, dismissing an appeal for lack of service by the district court would be just as much an error as concluding that the appellant is responsible for service. *See Uni Oil*, 710 F.2d at 1080 n.1; *Perington*, 631 F.2d at 1379.

No better vehicle to resolve the conflict created by this outlier rule is likely to arise in the future. Because the panel dismissed Ms. George's appeal via memorandum disposition, it has signaled that Ninth Circuit law is settled and there is no need "to clarify the law of the circuit." *See* 9th Cir. Gen. Orders 4.3.a. So any more applications of the jurisdictional service rule by the Ninth Circuit are likely to be short, unpublished dismissals of pro se appeals for failure to do what Rule 3(d) plainly states is not required. There is little chance those cases will come to this Court for review apart from the outside chance that they too will have pro bono counsel appointed on appeal. More

likely, the Ninth Circuit will just keep dismissing pro se appeals for lack of service without a challenge. This case, then, provides the only realistic vehicle to address the potentially massive impact of this erroneous rule in the nation's largest court of appeals.

It is hard enough already to be a pro se litigant. Many fail to timely file an appeal, and if they succeed, only a few, like Ms. George, then obtain an appointment of pro bono counsel. Yet under the Ninth Circuit's rule, even the most conscientious pro se litigant—one who reads the Rules before filing—may still find her appeal dismissed. One could forgive a pro se litigant for believing the instruction in the Rules that "[t]he district clerk" would "serve notice of the filing of a notice of appeal," and that if it did not, the failure would "not affect the validity of the appeal." Fed. R. App. P. 3(d)(3). But not in the Ninth Circuit—there, reliance on the language of the Rules can be fatal. The Court should grant certiorari and resolve this lopsided split by enforcing Rule 3's plain terms.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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February 28, 2022