No. 21-1211

# In the Supreme Court of the United States

CONSTANCE GEORGE,
*Petitioner*,
v.
HOUSE OF HOPE RECOVERY, ET AL.,
*Respondents*.

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

## MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF LAW SCHOOL CLINICS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

James S. Azadian
*Counsel of Record*
Cory L. Webster
Ryan J. VanOver
DYKEMA GOSSETT LLP
333 South Grand Ave.
Suite 2100
Los Angeles, CA 90071
(213) 457-1800
jazadian@dykema.com

*Counsel for Amici Curiae*

## MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF THE PETITION

Under Supreme Court Rule 37.2(b), Seton Hall University School of Law's Center for Social Justice and the University of Washington School of Law's Ninth Circuit Appellate Advocacy Clinic (collectively, "law school clinics") respectfully request leave to submit a brief as *amici curiae* in support of the petition for writ of certiorari filed by petitioner Constance George. As required under Rule 37.2(a), the law school clinics timely notified all parties' counsel of their intent to file this brief more than 10 days before its due date. Petitioner consented to the filing of this brief. One respondent stated that it does not consent, thus necessitating this motion.

The law school clinics advise indigent individuals and represent them in appellate courts around the country, including in the Ninth Circuit, in cases involving issues of public interest affecting the poor, minority groups, inmates, and other disempowered members of society. They have regularly provided pro bono and *amicus* representation to inmates and civil and criminal defendants, including in this Court. In most of those cases, the clients are without counsel during trial court proceedings, including when they file their notice of appeal.

This proposed *amicus* brief addresses the Ninth Circuit's unique rule for what a would-be appellant

must do to invoke its appellate jurisdiction, arguing that the rule imposes an undue burden on *pro se* litigants that does not as a practical matter apply to represented parties. The brief urges the Court to grant the petition to overrule the Ninth Circuit's ill-conceived standard for appellate jurisdiction, which directly conflicts with Federal Rule of Appellate Procedure 3, as interpreted by six other circuits.

Because this brief provides empirical information about the disparate impact the Ninth Circuit's rule has on *pro se* litigants, *amici* believe that it may be helpful to the Court as it considers the petition for certiorari. For these reasons, the Court should grant this motion for leave to file a brief as *amici curiae*.

Respectfully submitted,

James S. Azadian
*Counsel of Record*
Cory L. Webster
Ryan J. VanOver
DYKEMA GOSSETT LLP
333 South Grand Ave.
Suite 2100
Los Angeles, CA 90071
(213) 457-1800
jazadian@dykema.com

*Counsel for Amici Curiae*

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## INTEREST OF *AMICI CURIAE*[1]

*Amici* are Seton Hall University School of Law's Center for Social Justice and the University of Washington School of Law's Ninth Circuit Appellate Advocacy Clinic. *Amici* advise indigent individuals and represent them in appellate courts around the country, including in the Ninth Circuit, in cases involving issues of public interest affecting the poor, minority groups, and other disempowered members of society. *Amici* have regularly provided pro bono and *amicus* representation to inmates and civil and criminal defendants in federal appeals, including in this Court. In most of those cases, *amici*'s clients were without counsel during trial court proceedings.

*Amici* have a substantial interest in the resolution of this case because *pro se* litigants suffer disproportionately from rules that pose jurisdictional barriers to an appeal being resolved on the merits. Adding jurisdictional rules to the notice of appeal process can deprive *pro se* litigants of appellate review.

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[1] Counsel for all parties received notice of *amici*'s intent to file this brief at least 10 days before its due date. One respondent stated that it does not consent, thus necessitating a motion for leave to file this brief. Under Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Rule 3 of the Federal Rules of Appellate Procedure instructs litigants on what they must do to appeal a ruling against them. The process is meant to be simple. The litigant must timely file a notice of appeal or a document that serves as the functional equivalent of a notice of appeal. Rule 3 also requires the district court clerk to serve that document on the other parties. If a litigant timely files the functional equivalent of a notice of appeal, the court of appeals has jurisdiction, even if there are imperfections in the document or if the clerk fails to serve the other parties. The Ninth Circuit, however, adds another jurisdictional requirement by mandating that the would-be appellant ensure some additional form of service upon or notice to the other parties, a burden not found in Rule 3 and rejected by six other circuits.

Over the years, and as recent as last year, Rule 3 has been amended to ensure that "the right to appeal not be lost by mistakes of mere form" or "through inadvertent omission." *See* Fed. R. App. P. 3 Notes of Advisory Committee on 1979 Amendments, 1993 Amendments, and 2021 Amendments. The Ninth Circuit's rule imposes an unclear and unjustified barrier to appellate jurisdiction, one that falls disproportionately on *pro se* litigants.

In her petition, Ms. George argues that, in dismissing her appeal for lack of jurisdiction, the Ninth

Circuit applied its rule requiring an appellant to serve the notice of appeal on all other parties. Ms. George explains how such a rule is contrary to Rule 3 and the decisions of other circuits.

The precise nature of the additional burden required under the Ninth Circuit's rule is somewhat unclear, but there is no mistaking that its rule imposes a jurisdictional burden of some form of service or notice that is required in no other circuit. The Ninth Circuit ruled that Ms. George timely filed the functional equivalent of a notice of appeal. Under the standard used in all other circuits, stemming from *Smith v. Barry*, 502 U.S. 244 (1992), Ms. George satisfied the only requirement for appellate jurisdiction. The Ninth Circuit, however, held that it lacked jurisdiction over her appeal because Ms. George did not give "adequate notice" to the defendants. The Ninth Circuit's rule cannot be squared with Rule 3, this Court's precedent, or the rule of six other circuits.

Ms. George is not unusually situated in her risk of being put out of court unwittingly by the Ninth Circuit's jurisdictional rule. The rule is a procedural trap for the many litigants who cannot afford a lawyer. *Pro se* litigants like Ms. George are particularly likely to file a notice of appeal, or its functional equivalent, that is handwritten or otherwise not automatically delivered to all parties electronically and to have a difficult time monitoring whether the district court clerk has served the notice, as required by Rule 3.

Billion-dollar lawsuits with white-shoe lawyers grab the headlines, but *pro se* cases are the ones filling the nation's courts. Between 1999 and 2018, 28% of all cases in federal court involved at least one *pro se* party. Mark D. Gough & Emily S. Taylor Poppe, *(Un)Changing Rates of Pro Se Litigation in Federal Court*, 45 LAW & SOCIAL INQUIRY 567, 574 (2020). The Ninth Circuit—the busiest court of appeals—receives so many *pro se* appeals each year (between 4,000 and 6,000) that in any given year nearly 10% of all new federal appeals filed nationwide are *pro se* appeals in the Ninth Circuit. Minorities, the poor, and prisoners disproportionately make up this large class of *pro se* litigants.

*Pro se* appeals are important not only to the litigants in those cases; some of those cases shape the law when they are heard on the merits. In one prominent example, sixty years ago, Clarence Gideon's handwritten petition for certiorari permanently changed the criminal justice system. Self-represented parties already face significant hurdles in navigating the court system alone. The Ninth Circuit's unique rule adds another needless and unjustified barrier, and allowing the rule to stand will only widen the gap in access to justice for the underprivileged.

## ARGUMENT

### A. The Ninth Circuit imposes on would-be appellants an obligation of service or notice, an added jurisdictional burden recognized by no other circuit.

Ms. George's petition contends that the Ninth Circuit's rule requires an appellant to serve the notice of appeal on the other parties to invoke the court's appellate jurisdiction. Her contention reflects a fair reading of that court's opaque caselaw, and the petition explains other circuits' decisions holding that the failure to serve a notice of appeal does not invalidate an appeal. But even if the Ninth Circuit's rule could be understood as requiring that the appellant ensure that the other parties receive some form of notice, rather than requiring that the appellant serve the document, the Ninth Circuit still stands alone in adding a jurisdictional burden that is contrary to Rule 3 and this Court's precedent.

#### 1. All courts of appeals except the Ninth Circuit require only that a litigant timely file the "functional equivalent" of a notice of appeal.

Under Rule 3, "the timely filing of a notice of appeal in a civil case is a jurisdictional requirement." *Bowles v. Russell*, 551 U.S. 205, 214 (2007). Rule 3 lists other requirements of a notice of appeal. But a litigant's failure to timely file a notice of appeal is the

only misstep that can divest a court of appeals of jurisdiction. Fed. R. App. P. 3(a)(2).

Sometimes litigants—especially those unrepresented by counsel—intend to appeal, but they mislabel documents or do not perfectly address all the claims-processing requirements of Rule 3(c). Recognizing flexibility in the Rule, the Court has held that Rule 3's notice requirements are satisfied when a litigant timely submits a document that is the "functional equivalent" of the formal notice of appeal contemplated by the Rule. *Smith v. Barry*, 502 U.S. 244, 248 (1992); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316–17 (1988), superseded by statute on other grounds. "[W]hen papers are 'technically at variance with the letter of [Rule 3], 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.'" *Smith*, 502 U.S. at 248 (quoting *Torres*, 487 U.S. at 316–17).

*Torres* and *Smith* teach that, when applying the "functional equivalent" standard, a court's analysis should be guided by whether the document, on its face, indicates a party's intent to appeal and contains the basic information required by Rule 3(c). *Smith* at 248 ("[T]he notice afforded by a document . . . determines the document's sufficiency as a notice of appeal."). If the document indicates an intent to appeal and provides the basic information, the question of appellate jurisdiction ends there. *See Becker v. Montgomery*, 532 U.S. 757, 767 (2001) ("[I]mperfections in

noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court.").

When a notice of appeal or its functional equivalent has been filed, Rule 3(d) requires that "[t]he district clerk [must] serve notice of the filing of a notice of appeal," expressly directing that a "failure to serve notice does not affect the validity of the appeal." Fed. R. App. P. 3(d)(1), (d)(3). Rule 3 contains no requirement that the appellant serve the other parties or ensure that they otherwise receive notice.

All courts of appeals except the Ninth Circuit adhere to this formulation of the test for determining whether a mislabeled document is sufficient to create appellate jurisdiction. The beginning and end of the inquiry is whether a timely filed document is the "functional equivalent" of a formal notice of appeal. *See Sueiro Vazquez v. Torregrosa de la Rosa*, 494 F.3d 227, 233 (1st Cir. 2007); *Haugen v. Nassau Cty. Dep't of Soc. Servs.*, 171 F.3d 136, 137–38 (2d Cir. 1999); *Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 837–38 (3d Cir. 1990); *Clark v. Cartledge*, 829 F.3d 303, 306 (4th Cir. 2016); *United States v. Cantwell*, 470 F.3d 1087, 1089 (5th Cir. 2006); *Frieder v. Morehead State Univ.*, 770 F.3d 428, 430 (6th Cir. 2014); *Wells v. Ryker*, 591 F.3d 562, 565 (7th Cir. 2010); *Carson v. Dir. of the Iowa Dep't of Corr. Servs.*, 150 F.3d 973, 975 (8th Cir. 1998); *Ray v. Cowley*, 975 F.2d 1478, 1478–79 (10th Cir. 1992); *Rinaldo v. Corbett*, 256 F.3d 1276, 1279 (11th Cir. 2001); *Anderson v. District of Columbia*, 72

F.3d 166, 168 (D.C. Cir. 1995); *Fraige v. Am. Nat'l Watermattress Corp.*, 902 F.2d 43 (Fed. Cir. 1990).

**2. The Ninth Circuit sets itself apart by requiring a would-be appellant to do more than timely file the "functional equivalent" of a notice of appeal.**

The Ninth Circuit has a different rule. Its test has two parts. The first part is the same as the rule uniformly adopted by its sister circuits, inquiring whether the document is functionally equivalent to a formal notice of appeal. But the Ninth Circuit requires the would-be appellant to satisfy a second part of the test, mandating something more to create appellate jurisdiction.

To be sure, the Ninth Circuit has not always been clear in defining the "more" it requires for establishing jurisdiction under Rule 3. Some cases say that service is required for appellate jurisdiction, while others require "notice." *See Rabin v. Cohen*, 570 F.2d 864, 866 (9th Cir. 1978) ("[D]ocuments which are not denominated notices of appeal will be so treated when they . . . are served upon the other parties to the litigation . . . ."); *In re Sweet Transfer & Storage, Inc.*, 896 F.2d 1189, 1193 (9th Cir. 1990) ("In prior cases, we have required the document in question to have been served upon the other parties."); *Cel-A-Pak v. Cal. Agric. Labor Relations Bd.*, 680 F.2d 664, 667 (9th Cir. 1982) (requiring "notice" to the opposing party and to the court).

Even in this case, the Ninth Circuit gave mixed signals about its rule—whether it requires the appellant to serve the other parties or whether it requires some other form of notice. After initially holding that it lacked jurisdiction because Ms. George "did not serve her notice of appeal on Bridges to Change or Washington County," App. 3, the court amended its decision to state instead that it lacked jurisdiction because Ms. George "did not provide adequate notice of appeal from a judgment against Bridges to Change and Washington County," App. 13.

What is clear, however, is that the Ninth Circuit's additional requirement, beyond the timely filing of a functional equivalent of a notice of appeal, imposes a concrete burden borne only by litigants seeking review from that court. The Ninth Circuit here ruled that Ms. George's motion for appointment of pro bono counsel was "the 'functional equivalent' of a formal notice of appeal" and that it was timely as a notice of appeal. App. 13. And it was right to so hold. Ms. George's document listed appropriate case information (including the names of the defendants who argued for lack of appellate jurisdiction), identified who was appealing (Ms. George), and stated that Ms. George wanted to appeal the jury's verdict and the "earlier summary judgment ruling." App. 31–32. In any other circuit, that would have been the end of the jurisdictional inquiry. But the Ninth Circuit held that it lacked jurisdiction because of Ms. George's failure to provide "adequate notice" to the other parties. App. 13–14.

The position of Bridges to Change and Washington County show how the Ninth Circuit's rule contravenes Rule 3 and improperly bars appellate jurisdiction in *pro se* appeals. In the court of appeals, those defendants asserted that they no longer received notifications of documents filed with the district court after they prevailed on summary judgment and that "neither Ms. George nor the District Court has ever served" them with the document deemed the functional equivalent of the notice of appeal. App. 66. Under the Ninth Circuit's rule, as applied by the panel in this case, there is no appellate jurisdiction in this scenario because Ms. George did not ensure that these defendants received notice that she was appealing. But Rule 3(d) places the burden of giving notice on the clerk, not the appellant, and states that the clerk's failure to give notice does not affect the validity of the appeal.

The Ninth Circuit's added jurisdictional requirement conflicts not only with Rule 3 and the holdings of six other circuits, but also with this Court's cases holding that a statute or rule is not jurisdictional when its language "provides no clear indication that Congress wanted that provision to be treated as having jurisdictional attributes." *Henderson v. Shinseki*, 562 U.S. 428, 439 (2011); *see also Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002 (2022) ("We do not read a statute or rule to impose a jurisdictional requirement unless its language clearly does so."). Even if the Ninth Circuit's requirement of "ade-

quate notice" could be viewed as a valid claims-processing rule, nothing in Rule 3 suggests, let alone clearly states, that the requirement is jurisdictional. To the contrary, Rule 3 identifies the failure to timely file a notice of appeal as the only requirement that affects jurisdiction.

The Ninth Circuit's creation of an additional jurisdictional burden is contrary to Rule 3 and this Court's cases and directly conflicts with the approach adopted by six other circuits. Those courts, unlike the Ninth Circuit, do not condition appellate jurisdiction on service or notice.

### B. The Ninth Circuit's unique rule profoundly affects thousands of *pro se* litigants, with an outsized impact on minorities, the poor, and incarcerated litigants.

The Ninth Circuit's standard uniquely burdens unrepresented litigants. By and large, "when individuals press their claims *pro se*, they fail at virtually every stage of civil litigation," are "much more likely to have their case dismissed," and "fail to receive materially meaningful access to justice." Victor D. Quintanilla, Rachel A. Allen & Edward R. Hirt, *The Signaling Effect of Pro Se Status*, 42 LAW & SOC. INQUIRY 1091, 1091 (2017). The challenges in navigating the court system alone are exacerbated for *pro se* litigants within the Ninth Circuit. That court's rule requiring litigants both to timely file a document that is the "functional equivalent" of a notice of appeal and also

to provide "adequate notice" to opposing parties imposes on would-be appellants an added jurisdictional hurdle found nowhere in the text of Rule 3 or in this Court's precedent.[2]

The class of litigants potentially affected by the Ninth Circuit's rule is vast. Since 2000, on average almost 75,000 *pro se* cases are filed each year in federal district courts across the country.[3] In the Ninth Circuit, between 40% and 50% of new appeals filed each year are *pro se* cases.[4] And even though the Ninth Circuit sits at a table of one with its rule of appellate ju-

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[2] Although the Ninth Circuit terminated 4,354 *pro se* appeals in 2020, only 2,734 of those cases "were terminated on the merits." United States Courts for the Ninth Circuit, 2020 Annual Report ("CA9 Annual Report"), at 63, available at https://cdn.ca9.uscourts.gov/datastore/judicial-council/publications/AnnualReport2020.pdf. That left 1,620 *pro se* appeals that were terminated by the Ninth Circuit on grounds other than the merits of the appeal.

[3] Judiciary Data and Analysis Office of the Administrative Office of the U.S. Courts, *Just the Facts: Trends in Pro Se Civil Litigation from 2000 to 2019* (Feb. 11, 2021), available at https://www.uscourts.gov/news/2021/02/11/just-facts-trends-pro-se-civil-litigation-2000-2019#figures_map.

[4] For example, in 2020, the Ninth Circuit received 10,400 new appeals, 4,590 of which were *pro se* cases. CA9 Annual Report, at 60, 63. The CA9 Annual Report defines *pro se* cases as those "involving at least one self-represented litigant." *Id.* at 60. Reports showing this data for prior years is available at https://www.ca9.uscourts.gov/judicial-council/annual-reports/.

risdiction, it is a large table. The Ninth Circuit receives so many new *pro se* appeals each year (between 4,000 and 6,000) that in 2020 almost 10% of all federal appeals nationwide—counseled or not—were *pro se* cases in the Ninth Circuit.[5]

Studies on *pro se* litigants have reported that "[o]nly a small fraction of the legal problems experienced by low-income and poor people living in the United States—less than one in five—are addressed with the assistance of legal representation." Columbia Law School Human Rights Clinic, *Access to Justice: Ensuring Meaningful Access to Counsel in Civil Cases*, 64 SYRACUSE L. REV. 409, 410 (2014). "The result is a crisis in unmet civil legal needs that disproportionately harms racial minorities, women, and non-English speakers." *Id*. at 411. Other studies have reported data indicating "racial and ethnic minorities, in particular African Americans, are much less likely to have lawyers than white plaintiffs." Amy Myrick et al., *Race and Representation: Racial Disparities in Legal Representation for Employment Civil Rights Plaintiffs*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 705, 713 (2012). Compared to white plaintiffs, "African Americans are 2.5 times as likely to file pro se," and cases alleging racial discrimination were "about 1.8 times

[5] In 2020, there were 48,190 new appeals filed in the circuit courts, 4,590 of which were *pro se* cases in the Ninth Circuit. CA9 Annual Report, at 60, 63.

more likely to be filed without the benefit of counsel." *Id.* at 718.

The Ninth Circuit's added jurisdictional requirement that the would-be appellant serve the notice of appeal, or otherwise ensure that the other parties receive notice, imposes a burden that applies disproportionately to *pro se* parties, and especially to incarcerated litigants. Parties represented by counsel have access to the courts' Case Management/Electronic Case Filing system, which they are mandated to use unless granted an exemption, whereas *pro se* litigants are "automatically exempt from electronic filing." *See* https://cdn.ca9.uscourts.gov/datastore/uploads/forms/form30.pdf. The courts' ECF system automatically serves all parties electronically with filings docketed by the clerk—such service satisfies the clerk's obligation under Rule 3(d).

Incarcerated litigants and other *pro se* parties, in contrast, must file the notice of appeal by mailing a paper document to the court, trusting that the clerk will comply with Rule 3(d) and serve the parties. Unlike electronic filers, *pro se* parties do not receive electronic notification showing all parties who received electronic notice of a particular filing. Under the Ninth Circuit's rule, if a party is terminated from the case and no longer receives notification of filed documents, as the defendants assert happened here, a *pro se* litigant must discover that the terminated party no longer receives electronic notice. And the *pro se* party must then, under the Ninth Circuit's

rule, ensure that the terminated party receives the notice of appeal. Even if some incarcerated parties may manage to identify parties who no longer receive electronic notice, appellate jurisdiction cannot turn on satisfaction of such a burden found nowhere in Rule 3.

In 2020, nearly 45% of new *pro se* appeals filed in the Ninth Circuit involved incarcerated litigants.[6] The Court has noted the "situation of prisoners seeking to appeal without the aid of counsel is unique" because most incarcerated litigants are "[u]nskilled in law, unaided by counsel, and unable to leave the prison," and "prisoners cannot take the steps other litigants can take to monitor the processing of their notices of appeal." *Houston v. Lack*, 487 U.S. 266, 270–71 (1988).

In *amici*'s experience, Ms. George's mislabeled notice of appeal is a run-of-the-mill *pro se* filing. It is mostly handwritten but is legible. It is not labeled correctly, but the contents show the filer's objective to appeal, the rulings Ms. George sought to challenge, and the parties against whom the appeal was taken. The same could be said of *pro se* filings submitted daily in federal courts across the country. If a document like this gives insufficient notice despite being the functional equivalent of a notice of appeal—as the Ninth Circuit held here—other *pro se* litigants are

[6] The Ninth Circuit reported that of the 4,590 *pro se* appeals filed in 2020, 1,920 were prisoner cases. CA9 Annual Report, at 63.

prone to forfeiting appellate rights through a similar inadvertent omission, mistake of mere form, or error by the district court clerk. That is precisely what Rule 3 seeks to avoid. *See* Fed. R. App. P. 3 Notes of Advisory Committee on 1979 Amendments (amending subdivision (c), noting "it is important that the right to appeal not be lost by mistakes of mere form"); Notes of Advisory Committee on 1993 Amendments (noting it amended subdivision (c) "to prevent the loss of a right to appeal through inadvertent omission"); Notes of Advisory Committee on 2021 Amendments (noting it amended subdivision (c) "[t]o reduce the unintended loss of appellate rights"). And that is precisely what six other circuits recognize, in direct conflict with the position of the Ninth Circuit.

## CONCLUSION

The Court should grant the petition for certiorari on the Question Presented.

Respectfully submitted,

James S. Azadian
*Counsel of Record*
Cory L. Webster
Ryan J. VanOver
DYKEMA GOSSETT LLP
333 South Grand Ave.
Suite 2100
Los Angeles, CA 90071
(213) 457-1800
jazadian@dykema.com

*Counsel for Amici Curiae*

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