

No. _____

**In the
Supreme Court of the United States**

INDIEZONE, INC., EOBUY, LIMITED,
CONOR FENNELLY, CEO, and DOUGLAS
RICHARD DOLLINGER, Counsel,

Petitioners,

v.

TODD ROOKE; et al.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

Jose Z. Marin, Esq.
Counsel of Record
Jose Marin Law, Inc.
44 Page Street, Ste 600.
San Francisco, CA 94102.
Tel/ Fax: (415) 753-3538.
E-mail: jose@josemarinlaw.com
Counsel for Petitioners

QUESTIONS PRESENTED

Federal Rules of Appellate Procedure-Rule 4(a) (“Fed R. App. P.”) provides that in a civil case the notice of appeal required by Fed R. App. P. 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from. In matters of late filing Fed. R. App. P. 4(a)(5)(A)(ii) provides the district court may extend time for filing a notice of appeal upon a showing of “excusable neglect” or “good cause.”

Congress unmistakably intended these two terms to be treated separately. In *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993), the Court had the occasion and previously acknowledged that Congress intended to distinguish each of these terms and recognized a district court’s discretion in matters of excusable neglect, citing equitable powers to deny or grant an application to file late based on a four-factor analysis explaining that the factors to be considered include “[1] the danger of prejudice to the [nonmovant], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith.” *Id.* at 395. Although *Pioneer* settled the dispute among the lower courts by guiding the district court’s in applying equitable powers to forgive late filings based on “excusable neglect” with review of its powers weighed against the four *Pioneer* factors for an abuse of discretion, it did not articulate guidance, or a standard of review

concerning the lower court's limited powers based on "good cause" where "intervening circumstances" are present, understanding that Congress intended to excuse a late filing in the absence of a filers fault, essentially in matters of impossibility or similar circumstances. The result is that the lower courts have subsumed the "good cause" term without due consideration of its separate domain erroneously applying *Pioneer's* 3rd and 4th equitable factors "the reason for the delay, including whether it was within the reasonable control of the movant" and "whether the movant acted in good faith." Doing so ignores situations where "intervening circumstances" show there is no fault on the part of the filer making it nondiscretionary mandating *de novo review for clear error of fact and law as congress intended*.

The questions presented are:

1. Whether in overview of the textual language set forth in Fed. R. App. P 4(a)(5)(A)(ii) did Congress afford differing terms allowing the lower courts to exercise their full *discretion* in asserting equitable powers when granting or denying relief for "excusable neglect", but limited the power to deny a late filing, one for "good cause" differing it based upon a showing of intervening circumstances without fault of the filer mandating a standard of *de novo review* under a *clear error of fact and law* standard.
2. Whether the Court should clarify its holdings and guidance in *Pioneer* creating a national standard concerning the distinctions between "excusable neglect" and "good cause" setting apart *Pioneer's* 3rd and 4th balancing factors, "the reason for the delay, including whether it was within the reasonable

control of the movant” and whether the movant acted in good faith based on a district court’s discretion differing it from good “intervening circumstances” claims eliminating them from discretionary review where the right to file late can be readily determined not due to any fault on the part of a filer, thus providing a single rule of uniformity, including:

- a. Whether when a registered filer of record to a pending case, who is locked out of a district court’s Electronic Court Filing System (“ECF”) without fault of their own, and resorts to pre-ECF filing procedures timely serving a notice of appeal by email on all counsel of record and by overnight service provider on the district court clerk’s office, is the filing late barring appellate review for lack of jurisdiction or does it constitute a non-jurisdictional claim processing event which must be reviewed *de novo* under the good cause standard limiting the district courts equitable powers as congress intended, excusing late filings for intervening circumstances not caused or under the control of a registered filer.
- b. Whether the district courts inherent power allows it to shorten Rule 4’s 30-day period to file a notice of appeal as of right “inappropriately penalizing” a filer who is locked out of the system without fault of their own, but who has timely filed within the structure of Rule 4, pre-ECF filing rules, as well as in compliance with Civil LR 5-1(d) each establishing a showing in support of

intervening circumstances constituting good cause.

- c. Whether a district court commits *clear error of law* subject to *de novo review* when it holds that a registered filer of record in a designated ECF case must do more than register for filing privileges absent a reason placing the filer on notice to inquire about their current and continued filing privileges, thus creating a *per se rule* placing fault on filers impermissibly eliminating the separate factor analysis of independent intervening circumstances constituting good cause.
- d. Whether for uniform and national procedural rules a district court clerk's office is required to provide an alternative email drop-box so that registered ECF filers can timely file in the alternative when intervening circumstances cause a filer's ECF access to be denied or blocked under circumstance where the clerk's office is closed or otherwise inaccessible to assist in timely removing a block or technical defect, and the afterhours courthouse mailbox is also inaccessible.

PARTIES TO THE PROCEEDINGS

Petitioners-Plaintiffs below are Indiezone, Inc., (“Indiezone”) a domestic corporation formed under Delaware law, eoBuy Licensing Ltd (“eoBuy Licensing”) a company duly formed under the laws of Ireland as the proposed substitute Plaintiff and the assignee of intellectual property, copyright and trade secrets, which belonged to eoBuy Ltd, the assignor, a defunct Irish company (2008), their CEO, Conor Fennelly (“CEO Fennelly”) and their Attorney, Douglas R. Dollinger (“Attorney Dollinger”).

Respondents-Defendants below did not appear or oppose the motion or the appeals below. Respondents are Todd Rooke (“Rooke”), Joe Rogness (“Rogness”) are two former work-for-hire employees of the Petitioner corporation Indiezone and of the defunct entity eoBuy Ltd. The claims asserted against them alleged illegal conduct (copyright and trade secret infringement) individually and as officers of Respondents Jingit LLC, Jingit Holdings, LLC, Jingit Financial Services, LLC, Music.Me, LLC. The remaining Respondents are secondary infringers, employees of those entities, including Phil Hazel; Sam Ashkar, Holly Oliver, Shannon Davis, Justin James, Chris Ohlsen, Dan Frawley, Dave Morehouse, II; Tony Abena, Chris Karls and John E. Fleming; and, also secondary infringers, retailers U.S. Bank; Wal-Mart Stores Inc; General Electric Company; Target.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioners Indiezone Inc, putative plaintiff eoBuy Licensing Ltd, state that they are private entities and that no parent company and no publicly held corporation owns 10 percent or more of Petitioners' common stock.

TABLE OF CONTENTS

QUESTION PRESENTED.....	i
PARTIES TO THE PROCEEDINGS.....	v
RULE 29.6 CORPORATE DISCLOSURE STATEMENT	vi
TABLE OF CONTENTS.....	vii
TABLE OF AUTHORITIES.....	xi
OPINIONS BELOW.....	1
JURISDICTION.....	1
STATUTES AND RULES INVOLVED.....	2
SUMMARY OF PROCEEDING & CONTENTIONS.....	4
REASONS FOR GRANTING THE WRIT.....	9
I. The Ninth Circuit’s Standard of Review Relating to the District Court’s Inherent Powers to Grant or Deny Rule 4 Relief for Good Cause is a Departure from this Court’s Methodology and Guidance on Statutory Interpretation	9
II. Review is Needed to Establish a Nationwide Rule on an Important Issue Concerning Congressional Intent and the Right to File Late a Notice of Appeal Where Good Cause Shows That a Filer is Without Fault	13
III. This Case Presents the Proper Vehicle to Address and Answer an Important Issue Concerning a Showing of Good Cause and the Limits on the Lower Court’s Equitable Powers to Deny Late Filings	16

IV.	The Decision Below was Incorrect Petitioner Fed. R. App. P. 4(A)(5)(ii) Motion was Timely, and presented a Good Cause Claim Processing Application Where any Objection to File Late was Forfeited.....	17
(a)	Rule 4(A)(5)(ii) is a Claim Processing Rule and non-jurisdictional.....	18
(b)	The Decision Below Violates the Federal Rules of Appellate Procedure 4(A)(5)(ii).....	19
(c)	The Ninth Circuit’s decision also contravenes the very purpose behind Rule 4 as Congress intended and as presented in the 2002 Advisory Committee’s Note.....	20
	CONCLUSION.....	22
	APPENDIX	
Appendix A	Opinion in the United States Court of Appeals for the Ninth Circuit (May 23, 2023).....	App. 1 ¹
Appendix B	Order in the United States District Court for the Northern District of California (January 28, 2021).....	App. 6 ²

¹ The Motion and Declaration for Recusal may be viewed on the District Court’s Docket at 198. The Motion and Declarations for Rule 60 Relief may be viewed on the District Court’s Docket at 199.

² The Notice of Appeal Motion and Declaration in Support of Late Filing may be viewed on the District Court’s Docket at 203 & 207.

Appendix C	Order in the United States District Court for the Northern District of California (November 20, 2020).....App. 8
Appendix D	The United States District Court for the Northern District of California (July 15, 2021).....App. 10
Appendix E	Order Denying Petition for Rehearing and Rehearing En Banc in the United States Court of Appeals for the Ninth Circuit (September 8, 2023).....App. 11

TABLE OF AUTHORITIES

<i>Ahanchian v. Xenon Pictures, Inc.</i> , 624 F.3d 1253 (9th Cir. 2010).....	10-11
<i>Eberhart v. United States</i> , 546 U.S. 12 (2005)	10,16,19
<i>Hamer v. Neighborhood Hous. Servs. of Chicago</i> , 138 S. Ct. 13 (2017).....	18
<i>Hazel-Atlas Glass Co. v Hartford-Empire Co.</i> , 322 U.S. 238 (1944).....	5
<i>Henderson ex rel. Henderson v. Shinseki</i> , 562 U.S. 428 (2011).....	10,18
<i>Henry Schein, Inc. v. Archer & White Sales, Inc.</i> , 586 U.S. 139, S. Ct. 524 and <i>Henry Schein</i> , 592 U.S. _ (2021).....	6
<i>Holder v. Humanitarian Law Project</i> , 130 S. Ct. 2705 (2010).....	10
<i>Hoy v. Yamhill</i> , 693 Fed. Appx. 664 (2017).....	19
<i>Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach</i> , 523 U.S. 26 (1998).....	10
<i>Lolatchy v. Arthur Murray, Inc.</i> , 16 F.2d 951 (4th Cir. 1987).....	11
<i>Lorenzen v. Employees Retirement Plan</i> , 896 F.2d 228 (7th Cir. 1990).....	21
<i>Pincay v. Andrews</i> , 389 F.3d 853 (9th Cir. 2004) (<i>en banc</i>).....	8, 10, 12, 13, 17

<i>Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership, 507 U.S. 380 (1993)</i>	7, 8, 10, 11, 20, 22
<i>Pullman-Standard v. Swint, 456 U.S. 273 (1982)</i>	10
<i>Russello v. United States, 464 U.S. 16 (1983)</i>	10
<i>Thomas v. Brennan, 961 F.2d 612 (7th Cir. 1992)</i>	11
<i>United States v. Hyman, 884 F.3d 496 (4th Cir. 2018)</i>	18
<i>United States v. Navarro, 800 F.3d 1104 (9th Cir. 2015)</i>	7
<i>Venegas-Hernandez v. Sonolux Records, 370 F.3d 183 (1st Cir. 2004)</i>	11
Federal Rule Appellate Procedure.	
Fed. R. App. P. 3	1
Fed. R. App. P. 4	2, 3, 6-12, 14-20, 22
Fed. R. App. P. 4(a)(5)(A)(ii)	1, 6, 11, 16
Federal Rule of Civil Procedure.	
Fed. R. Civ. P. 6(b)(1)	11
Fed R. Civ. P. 60	1, 5, 6, 9
United States Codes.	
18 U.S.C. § 1927	5, 13
28 U.S.C. § 144	3, 4, 6, 9
28 U.S.C. § 455	1, 4, 9

28 U.S.C. § 1254(1)	2
---------------------------	---

Civil Local Rules.

Local Rule 5-1(d)(5).....	3, 7, 12
---------------------------	----------

Local Rule 3-14.....	3, 6
----------------------	------

OPINIONS BELOW

Petitioners' Rules 144 & 455 Motions in the United States District Court, Northern District of California (Case 3:13-cv-04280-VC Document 198.) Petitioners' Rule 60 Motion in the United States District Court, Northern District of California (Case 3:13-cv-04280-VC Document 199.) The combined Order denying the Motion for Recusal Rules 144 & 455 and Rule 60 Relief in the United States District Court, Northern District of California (Case 3:13-cv-04280-VC Document 202 .)The Rule 4 (a)(5)(A)(ii) Motion to File Late is reprinted Case 3:13-cv-04280-VC Document 207). The Order denying the late filing of the Notice of Appeal in the United States District Court, Northern District of California Case 3:13-cv-04280-VC Document 213.) The unpublished Memorandum Order of the United States Court of Appeals for the Ninth Circuit affirming the District Court's Order denying Petitioners' motion to file their notice of appeal late reprinted at (App A.) The unpublished Order denying petition for *rehearing and rehearing en banc* in the United States Court of Appeals for the Ninth Circuit (September 8, 2023) is reprinted (App E.)

JURISDICTION STATEMENT

The Ninth Circuit issued its memorandum opinion on May 23, 2023. Petitioners filed a timely petition for *rehearing and rehearing en banc*, which the Ninth Circuit denied on September 8, 2023. On November 28, 2023, Petitioners filed their motion for an enlargement of time to file the writ for certiorari review on December 2, 2023, and received an enlargement of their time to file their Petition until

January 22, 2024, from the Honorable Elena Kagan. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

This Petition involves the statutory interpretation concerning the powers of the lower courts congress intended to grant when reviewing the differing domains of either fault based excusable neglect or good cause-intervening circumstances without fault on the part of a filer and the degree of discretion allowed under Fed R. App. P. 4. Additionally, is a question of whether bias or prejudice are factors which must be considered when the motion to file late is denied.

* * * *

Federal Rules of Appellate Procedure-Rule 4 provides:

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case . . . the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

Under the rule, Petitioners' appeal should have been filed by December 23, 2020, and was in fact timely, or at best one-day late, ECF filed on December 24, 2020, for intervening circumstances constituting “good cause”.

In matters of late filing, Section (a)(5) of Rule 4, however, provides as follows:

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

- (i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and
- (ii) . . . that party shows excusable neglect or good cause.

* * * *

Civil LR 5-1(d)(5) Technical Failure.

Technical Failure. The Clerk shall deem the ECF system to be subject to a technical failure on a given day if the system is unable to accept filings continuously or intermittently over the course of any period of time greater than one hour after 12:00 noon that day. Filings due on the day of a technical failure which were not filed solely due to such technical failure shall be due the next court day. Such delayed filings shall be accompanied by a declaration or affidavit attesting to the filer's failed attempts to file electronically at least two times after 12:00 noon separated by at least one hour on each day of delay due to such technical failure.

* * * *

Civil LR 3-14- Disqualification of Assigned Judge.

Whenever an affidavit of bias or prejudice directed at a Judge of this Court is filed pursuant to 28 U.S.C. § 144, and the Judge has determined not to recuse him or herself and found that the affidavit is neither

legally insufficient nor interposed for delay, the Judge shall refer the request for disqualification to the Clerk for random assignment to another Judge.

28 U.S. Code § 144 - Bias or prejudice of judge.

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias, or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

* * * *

SUMMARY OF PROCEEDING & CONTENTIONS

The uncontested and unopposed record in these proceedings shows that Petitioners' were appealing the District Court's November 23, 2020, denial of their motions for disqualification of the assigned judge pursuant to 28 U.S.C. §§144 and 455(a). The Petition was based personal bias and prejudice showing by sworn declaration the Court's impartiality was reasonably questioned in the favor of the Defendants below and in fact caused by the core defendants false in court statements. In a related filing Petitioners also

moved for appointment of a magistrate to oversee a hearing and obtain an unbiased review of their claims pursuant to Fed R. Civ. P. Rule 60 establishing their actual innocence to findings of bad faith and fraud in seeking substitution of a named Plaintiff, citing this Court's holdings in *Hazel-Atlas Glass Co. v Hartford-Empire Co.*, 322 U.S. 238 (1944) establishing irrefutable proof of the core Defendants fraud on the District Court. The District Court summarily denied each of the motions without comment.³ (App-C).

³ Petitioners' Rule 60 Motion were seeking relief from an award of \$93,000+ in monetary sanctions pursuant to the district court's inherent powers and 18 USC § 1927 as well as from dismissal of their claims with prejudice. The Order granting Sanction and Dismissal may be viewed Dist. Ct. Dkt-146-147). The question presented before this Court is not whether the District Court was either bias of prejudice in the underlying proceedings, but whether Petitioners were wrongly denied a review of the factors establishing good cause allowing their late filing on the basis of intervening circumstances not of their fault, thus denying them the right to appeal the issue of bias or and otherwise present their claims of actual innocence under Rule 60 to the lower courts. Although not reviewed based on the denial of the late filing of the Petitioners' Notice of Appeal, the record below establishes the District Court's bias and overall prejudice-favoritism was brought about by the core Defendants' untruthful statements of Petitioner's criminality in timely substituting a plaintiff. The claim was ultimately proven untrue and itself was a fraud on the court orchestrated by the core Defendants below. (Dist. Ct. Dkt-221). Their misconduct set the wheels in motion bringing into the case bias and prejudice concerning petitioners' prejudgment motions resulting in the District Court's lack of neutrality in its decision-making process, and its lingering effect in review of their post judgment motions. The Panel's decision avoids a review of what amounts to systemic bias-prejudice by a

On December 23, 2020, within the 30 days provided by Rule 4 Petitioners' Counsel, a registered filer with the district ECF System and attorney of record made multiple timely attempts to lodge a notice of appeal on the district court's ECF system seeking review from the district court's denial of their motions but was denied access due to a system lockout; that the clerk's office was unavailable during regular business hours to timely assist and correct or remove the block; that the after-hours drop box was also inaccessible each due to COVID-19 shelter in place protocols; that Petitioners' Counsel using pre-ECF procedures timely served their Notice of Appeal on all parties by email and multiple copies by overnight courier to the clerk's office on December 23, 2020 the last day to file, filing it again the next day via ECF, and timely moved to file late asserting good cause under Fed. R. App. P. 4(a)(5)(A)(ii) on December 30, 2020

sitting judge. Based on the sworn Declaration of Petitioners' Counsel under the Code 28 USC 144 and Civil LR's 3-14, the judge was required to recuse himself. (Dist. Ct Dkt-198). Likewise, it impact may be seen in the District Court's and the Panel's denial and refusal to conduct the required analysis concerning Petitioners' Rule 60 Motion of June 2021. (Dist. Ct. Dkt-199). The Motion was on all four's concerning a change in the law under this Court's holding in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 139 S. Ct. 524 and *Henry Schein*, 592 U.S. __ (2021).) (Dist. Ct. Dkt-221). The failure to do so is simply additional evidence of the systemic bias in this case, especially if this Court recognized the District Court lack the power to deny discovery and award sanction once it determined a valid agreement to arbitrate existed between the parties. *Henry Id.* (App. A & D).

in compliance with Local Rule 5-1(d)(5).⁴

The District Court denied the Petitioners' Motion to file late citing *United States v. Navarro*, 800 F.3d 1104, 1109 (9th Cir. 2015); and Fed. R. App. P. 4 Advisory Committee's Note to 2002 Amendments, but constructively ignored the Note and then applied the 3rd and 4th Pioneer factors ignoring the actual showing of good cause intervening circumstances of COVID-19, and the absence-availability of the clerk's office to remove the block ruling Petitioners were *per se* inexcusably negligent, despite their timely efforts and actual timely filing of their Notice of Appeal.

The Panel failed to address the proof of the intervening circumstances of the COVID-19 disruption despite the lack of any fact of record in support of fault or neglect or Petitioners timely filing under the pre-ECF rules. By ignoring the separate domain of good cause, the Panel unjustifiably allowed a *per se rule* created by the District Court to stand, that it was Petitioners fault they did not have ECF access, never conducting a basic good caused fact and law analysis on their own under a *de novo* standard for clear error of fact and law, instead holding the review was limited to an abuse of discretion standard, that could not be reversed based on the district court's discretion, explaining that the court "must affirm" unless there was a definite and firm conviction that the district

⁴ Petitioners' met the requirements of the rule and more. (Dist. Ct. Dkt-207). After communicating with the clerk's office for the absence of a systemwide failure as instructed moved by Rule 4 to file late. Both the District Court and Panel ignored the facts, Petitioners' timely filing and instead adopted a *per se rule* in opposition to the law and facts. (App. A & B).

court committed a clear error of judgment citing circuit precedent *Pincay v. Andrews*, 389 F.3d 853, 858 (9th Cir. 2004) (*en banc*).

The effect is the District Court applied the *Pioneer* factors 3 & 4 (despite its lack of express reference to them) where the methodology was adopted by the panel such that it operated to subsume the separate domain of good cause-intervening circumstances in violation of Rule 4 and congresses intent to allow late filings without fault under Rule 4.

REASONS FOR GRANTING THE PETITION

- I. The Ninth Circuit's Standard of Review Relating to the District Court's Inherent Powers to Grant or Deny Rule 4 Relief for Good Cause is a Departure from this Court's Methodology and Guidance on Statutory Interpretation.

Petitioners respectfully request writ of certiorari seeking review of the Ninth Circuit's Memorandum Decision finding they lacked Jurisdiction of the District Court's November 23, 2020, denial of their motions for review concerning disqualification of the assigned judge pursuant to 28 U.S.C. §§144 and 455(a) and Rule 60 relief with the loss of review being caused by reason of the late filing of Petitioners' Notice of Appeal. (App. A).

Under Federal Rule of Appellate Procedure 4(a)(5)(ii), a district court "may extend the time to file a notice of appeal if ... th[e] party [seeking an extension] shows excusable neglect or good cause."

This case presents a repeated error concerning the discretion and power granted the lower courts during appellate review concerning the separate terms of "excusable neglect" and "good cause" as set forth in Fed R. App. Civ. 4. The issue before this Court involves whether the Panel has correctly interpreted and applied the law to the facts in the matter of Petitioners' good cause claim because by its failure to do so it granted the district court unlimited discretion in its equitable powers, where its power in matters of good cause-intervening circumstances the power is

limited by clear language used to convey congresses intent. The Court of Appeals erred in the review of the claim by limiting its review to an abuse of discretion relying on *Pincay v. Andrews*, 389 F.3d 853, 858 (9th Cir. 2004) (*en banc*). The Panels' finding that it lacked jurisdiction to review Petitioners Motions, ignores the District Court's use of its inherent powers in excess of what congress intended. It was required to conduct *de novo* review under the clearly erroneous standard where the Panel should have recognized the error and reversed the judgment remanding the matter for further proceedings. and provided in Rule 4. *Pullman-Standard v. Swint*, 456 U.S. 273, n.19 (1982)*Pullman Id.*, at n.19.

This Court consistently holds [the] legislature says ... what it means and means ... what it says.'” (quoting *Dodd v. United States*, 545 U.S. 353, 357 (2005); holding that a statute's language must be interpreted in light of other sections of the statute. *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 36 (1998), such that “it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion and exclusion[]” of its words and there meaning). *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2717-18 (2010); *Russello v. United States*, 464 U.S. 16, 23 (1983) The Panel's opinion ignores this fundamental principle of statutory construction as this Court had defined thus allowing the terms excusable neglect and good cause to be conflated or otherwise subsumed in their reliance on *Pincay v. Andrews*, 389 F.3d 853, 858 (9th Cir. 2004) (*en banc*). It also ignores the prior guidance in applying the balancing test this court provided in *Pioneer*

Investment Services Co. v. Brunswick Associates Limited Partnership, 507 U.S. 380 (1993).

Overall, the Ninth Circuit's recognizes that "[g]ood cause" is a non-rigorous standard that is to be construed broadly across procedural and statutory contexts. . See, e.g., *Venegas-Hernandez v. Sonolux Records*, 370 F.3d 183, 187 (1st Cir. 2004); *Thomas v. Brennan*, 961 F.2d 612, 619 (7th Cir. 1992); *Lolatchy v. Arthur Murray, Inc.*, 816 F.2d 951, 954 (4th Cir. 1987). *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1259 (9th Cir.2010) (discussing "good cause" in the context of Fed. R. Civ. P. 6(b)(1). However, the cases do not fully address granting or denying Rule 4 relief for good cause-intervening circumstances with no fault of a filer. The above precedents defining good cause are limited and are subject to an unnecessary and unrelated degree of discretion based on presumed fault applying Pioneers 3rd and 4th factors to the relief requested but ignore the limits-restrictions congress intended would be imposed for of good cause-intervening circumstances concerning the distinction of differing domains and the lack of discretion to deny a good cause late filing upon a showing of no fault.

The Panel never addresses the Petitioner's predicament which clearly demonstrates the "good cause" existed without fault, never discussing the limits to the District Court's inherent powers in matters of good cause or its misapplication of the facts, the law or the effects concerning the claims of bias-prejudice, finding instead a lack of jurisdiction to do so. Effectively the Panel ignored the showing of bias and even condoned the District Court's excessive use of its inherent power, allowing it to create an

impermissible *per se rule* despite the Petitioners' compliance with Local Rule 5-1(d)(5), or their compliance with pre-ECF filing protocols.

Because the District Court's order erroneously blended separate domains of excusable neglect with good cause terms to achieve its goal, ignoring the intervening facts of COVID-19 or Petitioners' timely filing, where it did not engage in an analysis to include intervening circumstances, although it was plainly evident to the Panel that the district court avoided doing so when it imposed the more strictly defined Rule 4 fault term, it misapplied the law relying on its holding in *Pincay v. Andrews*, 389 F.3d 853, 858 (9th Cir. 2004) (*en banc*) as a fault analysis improperly limiting it to a review under and abuse of discretion standard.

Under the circumstances, the decision impermissibly reduces Rule 4's statutory 30 days period provided by Congress for filing a notice of appeal reducing it from 30 to 29 days. Doing so was an impressive application in the methodology concerning statutory interpretation allowing an uncertainty to exist when the differing terms of excusable neglect and good cause are blended in matters of late filings and the right to appeal. This occurred because the Panel's holding adopts the District Court's strict fault and impermissible *per se rule* requiring a filer to make more than a showing of good cause. The methodology subsumes the questions of intervening circumstances without fault on the part of filers, simply ignoring any recognition of the differing domains as Congress intended. The Panel's Decision unjustly leaves intact without appellate review Petitioners' Motions

(claiming bias-prejudice and actual innocence (App.) surrounding the District Court's monetary award of \$93,000 as punitive sanctions against the Petitioners' jointly and severally under the court's inherent powers and 28 USC § 1927. (App. A).

This Court should in its review find and provide guidance to lowers court's defining and limiting their power and impose a separate standard of review concerning good cause as Congress intended their separate domains to be recognized. The Panel's Ruling presents a question of what the law means, its statutory interpretation on the powers and standard of review required to be met as Congress intended. By not recognizing the intended distinction between the two terms, the Panel erred in assessing whether the District Court abused its discretion exceeding its powers and did not recognize Congress intended to limit those powers. Because the panel failed to access the facts as a non-fault claim allowing it to be subsumed to include the Pincay fault analysis and accepted an impermissible *per se* rule of fault, allowing it to erroneously mandate filers to have ECF access without review of intervening circumstances concerning a system lockout through no fault of the filer.

II. Review is Needed to Establish a Nationwide Rule on an Important Issue Concerning Congressional Intent and the Right to File Late a Notice of Appeal Where Good Cause Shows That a Filer is Without Fault.

The questions presented are of critical legal and practical significance:

- a. Whether when a registered filer of record to a pending case, who is locked out of a district court's Electronic Court Filing System ("ECF") without fault of their own, and in good faith resorts to pre-ECF filing procedures timely serving a notice of appeal by email on all counsel of record and by overnight service provider on the district court clerk's office, is the filing late barring appellate review for lack of jurisdiction or does it constitute a non-jurisdictional claim processing event which must be reviewed *de novo* under the good cause standard limiting the district courts equitable powers as Congress intended Rule 4 to mean, excusing late filings for intervening circumstances not caused or under the control of a registered filer.
- b. Whether a district court commits *clear error of law* subject to *de novo review* when it holds that a registered filer of record in a designated ECF case must do more than register for filing privileges absent a reason placing the filer on notice to inquire about their current and continued filing privileges, thus creating a *per se rule* placing fault on the filer impermissibly eliminating the separate factor analysis of independent intervening circumstances constituting good cause.
- c. Whether a district court can exercise its inherent power by shortening Rule 4's

30-day period to file a notice of appeal as of right "inappropriately penalizing" a filer who is locked out of the system without fault of their own, but has timely filed withing the structure of Rule 4, establishing independent intervening circumstances constituting good cause.

- d. Whether for uniform and national procedural rules a district court clerk's office is required to provide an alternative email drop-box so that registered ECF filers can timely file in the alternative when intervening circumstances cause a filer's ECF access to be denied or blocked under circumstance where the clerk's office is closed or otherwise inaccessible to assist in timely removing a block or technical defect, and the afterhours courthouse mailbox is also inaccessible.

Resolution of these questions will provide a national rule of uniformity affecting the ability of both plaintiffs and defendants filers' alike allowing them to obtain appellate review of their claims without the need to make more than a showing of good cause for late filings caused by intervening circumstances not of their own fault absent a system wide ECF malfunction. If the Court adopts and mandates a procedural rule requiring each district court clerks' office to provide a general email drop-box for registered ECF filers sperate from the ECF system, just as it has a physical after-hours courthouse drop-box, any email-document timely received by midnight prior to its last due date of filing would result in

nothing more than the clerk's office confirming the time of its filing and administratively entering the filing as timely lodged for good cause. Any objection could be raised by adversarial motion contesting the filing as timely, with absence of any such objection a forfeited. *Eberhart v. United States*, 546 U.S. 12, 15, 19 (2005) (per curiam)).

Fed. R. App. P. 4(a)(5)(A)(ii) exists to allow late filing. The process proposed not only creates efficacy but helps promote differing domain for good cause exception as Congress intended and provided in Rule 4. If a filer timely emails their notice of appeal the act will eliminate the differing terms of excusable neglect and good cause limiting the lower courts to exercise inherent powers within the limits congress intended allowing filing without fault.

III. This Case Presents the Proper Vehicle to Address and Answer an Important Issue Concerning a Showing of Good Cause and the Limits on the Lower Court's Equitable Powers to Deny Late Filings.

This Court has not yet had an opportunity to fully address whether a good cause claim without fault concerning late filings and the degree of discretion the lower courts may exercise or the standard appellate courts should afford the lower courts concerning the exercise of their powers in review of an order denying or granting a motion to file late upon a showing of good cause-intervening circumstances or what a filer must show beyond the inability to timely file.

The panel's decision creates a matter of exceptional importance for this Court's review, because it unnecessarily subsumes the distinction between excusable neglect and good cause domains as Congress intended. Under the holding present in *Pincay Id.*, the court "must affirm" the district court's finding allowing a *per se* rule to exist requiring a filer to have access to the ECF system without fault or notice of their being locked out shifting or otherwise mandating compliance without affording a filer's showing of good cause intervening circumstances in situations where the clerk's office is unavailable during regular business hours to cure a filer's individual system lock out and the courthouse is otherwise inaccessible.

IV. The Decision Below was Incorrect Petitioner Fed. R. App. P. 4(A)(5)(ii) Motion was Timely, and presented a Good Cause Claim Processing Application Where any Objection to File Late was Forfeited.

Among the issues for certiorari are the Ninth Circuit's decision finding a lack of jurisdiction. Because the Panel's decision is inconsistent with the Rule 4's purpose and this Court's precedent holding that that Rule 4 is a claim processing rule where the right to object to a late filing may be waived it contravenes congresses intent of differing domains present in the 2002 Advisory Notes and Rule 4's statutory provision, allowing for an extension of the time to file late a notice of appeal for good cause not the fault of the filer; and finally it violates Federal Rule of Appellate Procedure 4 right to file late.

This Court’s intervention is needed because the decision below is wrong, the Panel’s denial of Petitioners right to appeal finding a lack of jurisdiction improperly conflates the time provided for claim processing rules with the lack of jurisdiction. Filing a notice of appeal late with a showing of good cause is a type of mandatory claim-processing rule available under Fed R. App, P. 4. This Court is aware, and has consistently ruled in its prior decisions, congressionally mandated time limits are jurisdictional, however, claim processing rules are not and an objection to a late filing may be waived or forfeited.

(a) Rule 4(A)(5)(ii) is a Claim Processing Rule and non-jurisdictional.

Rule 4(A)(5)(ii) is not jurisdictional. Instead, Rule 4(a) is a non-jurisdictional claim-processing rule providing leave to file a notice of appeal late. *See United States v. Hyman*, 884 F.3d 496, 498 (4th Cir. 2018). *See id.*; *see also Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 17–18 (2017) (describing distinction between jurisdictional rules and non-jurisdictional claim-processing rules).

Claim Processing Rules “seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times.” *Id.* (quoting *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)). Thus, a “claim-processing rule may be ‘mandatory’ in the sense that a court must enforce the rule if a party ‘properly raise[s]’ it,” but the objection “may be forfeited ‘if the party asserting the rule waits too long

to raise the point.” *Id.* (quoting *Eberhart v. United States*, 546 U.S. 12, 15, 19 (2005) (per curiam)).

At no time did the Respondents appear on the Motions or object to the late filing of the notice of appeal. Moreover, they did not appear on the Appeal and in fact waived any appearance. There was no objection other than by the district court itself, which is further proof of a systemic bias and prejudice in this case denying Petitioners their right to establish their actual innocence to finding of wrongdoing with the Panel’s finding ceiling the matter from review by holding a lack of jurisdiction to review. (App)

(b) The Decision Below Violates the Federal Rules of Appellate Procedure 4(A)(5)(ii).

The District Court denied Petitioners’ Motion to file late for the failure to show good cause, holding it was counsel’s fault that they had not ensured that they possessed the ability to electronically file a notice of appeal at the eleventh hour, and their neglect was not excusable, particularly given the litany of other miscues and rule violations committed by counsel throughout the course of this case. *See Hoy v. Yamhill*, 693 Fed. Appx. 664 (2017). (App. B).

The District Court’s findings and Ninth Circuit’s holding violate Petitioners’ right under Federal Rule of Appellate Procedure 4(A)(5)(ii) because it adopts an impermissible *per se rule* ignoring good cause-intervening circumstances. Rule 4 plainly provides for the lower court’s to extend the time to file a notice of appeal under the separate domain of good cause. The holding ignores a filers inability to file caused by intervening circumstances requiring ECF compliance

under all circumstances where the ability to opt out of ECF compliance may be granted allowing a party to comply with the statutory mailing rules and is then reviewed for objections under the claim processing rule.

There can be little doubt the *Pioneer factors*, *Id* at provide a proper set of rules to evaluate excusable neglect claims and are useful even in some circumstance of good cause, but there is a conflation of the third and fourth factors which subsumes the separate domain of good cause without fault. The Panel's review as limited to an abuse of discretion standard allows consideration of fault and bad faith which are not relevant to a good cause-intervening circumstance claim on the right to file late under the claim processing rules as Rule 4 reads.

(c) The Ninth Circuit's decision also contravenes the very purpose behind Rule 4 as Congress intended and as presented in the 2002 Advisory Committee's Note.

Subdivision 4(a)(5)(A)(ii) permits the district court to extend the time to file a notice of appeal if two conditions are met. First, the party seeking the extension must file its motion no later than 30 days after the expiration of the time originally prescribed by Rule 4(a). In this case the Notice of Appeal was due December 23, 2020. Petitioner's timely filed their Rule 4 motion on December 30, 2020, as advised. The second condition requires the party seeking the extension to show either excusable neglect or good cause, thus allowing the district court to grant an extension if a party shows either. Controlling the issue before the Court is Congressional intent concerning the basis for the lower courts to exercise

their discretion. The advisory committee expressly explained that good cause and excusable neglect standards have “different domains.” *Lorenzen v. Employees Retirement Plan*, 896 F.2d 228, 232 (7th Cir. 1990). Noteworthy is the guidance given that “they are not interchangeable, and one is not inclusive of the other. The excusable neglect standard applies in situations in which there is fault; in such situations, the need for an extension is usually occasioned by something within the control of the movant. The good cause standard applies in situations in which there is no fault—excusable or otherwise. In such situations, the need for an extension is usually occasioned by something that is not within the control of the movant. The committee provides an example of good cause such as where the Postal Service fails to deliver a notice of appeal. What is more, the committee recognized that it would be unfair to make the movant prove that its “neglect” was excusable, given that the movant may not have been neglectful at all.

The Ninth Circuit Decision impermissibly allowed the district court to alter Congresses intended bright-line rule with an impractical standard which subsumes the good cause-intervening circumstances exception it granted doing so by allowing the use of the court’s inherent powers creating a *per se rule* allowing a lower court to simply apply fault and deny as untimely motions for permission to appeal without a separate analysis of the facts surrounding a filers ECF lockout bypassing Congresses intended purpose of forgiveness where good cause and intervening circumstances are shown.

Because *Pioneer Id.*, was decided in 1993, Rule 4's Advisory Committee's Note clarifying that excusable neglect and good cause have different domains was published in 2002 and mandatory ECF Rules went into effect in 2018 each has an impact to the present-day analysis and use of the *Pioneer* factors, *Id.*, at. The Court should provide clarification-guidance concerning the limits of inherent powers the district courts may exercise and the standard of review appellate courts should apply when the issue under consideration involves a claim of good cause without fault-intervening circumstance.

Finally, the operative facts in this case are universal to all filers who are locked out of the ECF system without fault. This case presents an ideal vehicle for the Court to issue its mandate clarifying the limits to a district court's equitable powers concerning Rule 4 and the law defining the limits of those powers as they differ between excusable neglect and good cause where intervening circumstances eliminate a filers fault.

This Court should accept *certiorari*, and reverse on the questions presented returning the case to District Court for an analysis of the facts and if necessary to the Circuit court for its review.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Jose Z. Marin, Esq.
Counsel of Record
Jose Marin Law, Inc.
44 Page Street, Ste 600.
San Francisco, CA 94102.
Tel/ Fax: (415) 753-3538.
E-mail: jose@josemarinlaw.com
Counsel for Petitioners

January 22, 2024