No. 21-1211

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MICHAEL H. MCGINLEY
DECHERT LLP
1900 K Street, NW
Washington, DC 20006

LINCOLN DAVIS WILSON
Counsel of Record
MONICA I. GORNY
DECHERT LLP
Three Bryant Park
1095 Sixth Avenue
New York, New York
10036
(212) 698-3500
lincoln.wilson@dechert.com

Counsel for Petitioner Constance George

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INTRODUCTION

In the decision below and two prior published opinions, the Ninth Circuit has held, contrary to the plain language of Rule 3(d), that a notice of appeal must be "served upon the other parties" to establish jurisdiction. App.14; *In re Sweet Transfer*, 96 F.2d 1189, 1193 (9th Cir. 1990); *Rabin v. Cohen*, 570 F.2d 864, 866 (9th Cir. 1978). That rule of over four decades cannot survive under this Court's precedents. In fact, just after Ms. George filed her Petition, this Court in *Cameron v. EMW Women's Surgical Center* repudiated a similar attempt to impose an atextual limit on appellate jurisdiction. 142 S. Ct. 1002, 1009 (2022). This Court refused to "read a statute or rule to impose a jurisdictional requirement unless its language clearly does so." *Id.* That holding necessarily bars the Ninth Circuit from imposing a jurisdictional duty to serve the notice of appeal, which Rule 3(d) expressly disclaims.

Yet Respondents do not even mention *Cameron*. Nor do they dispute that every other circuit to weigh in holds service is not an element of jurisdiction. Instead, they try to dodge the Ninth Circuit's conflict with Rule 3 and the other circuits by reframing its rule as demanding "notice," not service. HOH.Br.7-10; Program.Br.1. But here, that is just a different word for the same thing. The only question of "notice" in this case is procedural—i.e., service. The Ninth Circuit's jurisdictional dismissal did not rest on substantive notice because it held that Ms. George's timely filing provided the notice required by Rule 3(c). App.13, 32. Rather, the dismissal turned on the argument the Program Respondents expressly made

below: that under the Ninth Circuit's published decisions in *Rabin* and *Sweet Transfer*, "[w]ithout service," there was no jurisdiction. COA.Dkt.61.13-14. That was why the decision below quoted *Sweet Transfer*'s demand that the notice be "served upon the other parties." App.4, 14. And no matter how Respondents try to spin any purported "notice" requirement, it is still *something more* than Rule 3 demands for jurisdiction and so conflicts with every other court of appeals. Amici.Br.7.

Respondents also try to avoid review by offering purported alternate grounds for affirmance, but these evaporate on scrutiny. They raise only one alternate ground for jurisdictional dismissal: that Ms. George's filing did not give substantive notice of intent to appeal. But the decision below correctly rejected that argument as contradictory to both the law and the record. App.14. And Respondents' other grounds were not addressed below and are not jurisdictional. Non-jurisdictional grounds cannot sustain a jurisdictional dismissal, and a court can reach them only after it confirms its jurisdiction. They pose no barrier to review.

The Ninth Circuit's misguided jurisdictional service rule is the only question here, and this case is an ideal vehicle to address it. Unchecked, that rule will work great harm on the pro se cases in the Ninth Circuit that comprise nearly 10 percent of the federal appellate docket. Amici.Br.13. Review is warranted.

I. The Ninth Circuit's Jurisdictional Service Rule Conflicts With Rule 3 And Every Other Court Of Appeals To Address The Question.

A. The Jurisdictional Service Rule Violates *Cameron*.

This Court's intervening decision in *Cameron* forecloses any defense of the jurisdictional service rule. *Cameron* rejected an attempt to impose an appellate jurisdiction requirement on a motion to intervene because "no provision of law limits the jurisdiction of the courts of appeals in the way respondents suggest." 142 S. Ct. at 1009. The purported requirement in *Cameron*—like the jurisdictional service rule here—was not found "in either 28 U.S.C. § 2107, the Federal Rules of Appellate Procedure 3 and 4, or any other provision of law." *Id.* Here, there is even less warrant for an extra appellate jurisdiction requirement. Not only does no provision of law require service, but Rule 3 expressly disavows it. "The district clerk's failure to serve notice does not affect the validity of the appeal." Fed. R. App. P. 3(d)(3).[1] So if in *Cameron* there was "no basis for holding that petitioner's motion was jurisdictionally barred," 142 S. Ct. at 1009, then the Ninth Circuit's outlier jurisdictional service rule stands on even flimsier footing here.

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[1] The Program Respondents still say the district court did not serve them with the notice of appeal. Program.Br.5. This is both false and immaterial. The only evidence of record shows they were served by the clerk via ECF, *see* Pet.7, 26, and anyway, Rule 3(d)(3) says lack of service by the district court does not impair jurisdiction.

B. The Jurisdictional Service Rule Was The Sole Basis For The Dismissal Below.

Respondents do not dispute that six circuits have recognized that lack of service does not impair jurisdiction. Pet.15-18. Instead, they try to avoid a circuit split by recasting the Ninth Circuit's rule as requiring not service, but "notice," which they say accords with *Smith v. Barry*, 502 U.S. 244 (1992). HOH.Br.7-8; Program.Br.1. But this misreads *Smith* as well as the decision below. Both use the term "notice," yet *Smith* refers to substantive notice, while the decision below rests on procedural notice (i.e., service). Equivocation about "notice" cannot save the Ninth Circuit's outlier rule from review.

This Court's decision in *Smith* concerns substantive notice: whether the appeal document contains the necessary ingredients under Rule 3(c). In deciding that an appellate brief could serve as a notice of appeal, *Smith* held that courts should look to "*the document*'s sufficiency as a notice of appeal." 502 U.S. at 248 (emphasis added). Thus, it considered whether "the notice afforded by *[the] document*" met the requirements of Rule 3(c), not whether that document was transmitted to the appellees. *Id.* (emphasis added). And here, the decision below held that Ms. George met *Smith*'s substantive requirements because her timely filing "gave notice of her intent to appeal the court's final judgment." App.13 (citing *Smith*, 502 U.S. at 248). Substantive notice, then, is not at issue.

Instead, the record shows that the Ninth Circuit's jurisdictional dismissal rests on the procedural concern of lack of service. Below, the Program Respondents invoked *Rabin* and *Sweet Transfer* to

argue that "[w]ithout service," Ms. George's timely filing "cannot be treated as a notice of appeal." COA.Dkt.61.14. Ms. George disagreed. COA.Dkt.74.19-20. But the court below followed *Sweet Transfer* and sided with the Program Respondents, holding there was no jurisdiction because Ms. George "*did not serve* her notice of appeal" on them. App.3 (emphasis added). Service was central to Ms. George's rehearing petition, which argued that "'failure to serve notice does not affect the validity of the appeal.'" App.59. And in response, the Program Respondents doubled down and urged the court not "to revisit Ninth Circuit 43-year-old precedent" in *Rabin*, App.63, and to require the notice to be "served upon the other parties." App.67.

The Ninth Circuit likewise made the role of service clear in its amended decision. App.13-14. All that the amended decision did was swap out the phrase "did not serve her notice of appeal" and replace it with "did not provide adequate notice." App.13. It still held Ms. George met *Smith*'s substantive notice requirement. App.13. It still relied on *Sweet Transfer*, quoting its holding that "required the document in question to have been *served* upon the other parties." App.14 (quoting *Sweet Transfer*, 896 F.2d at 1193). And it did not describe any fact other than lack of service to show a failure to "provide adequate notice." App.13. The only notice at issue is service.

Respondents search in vain for some other meaning of "notice." Trying to explain why the decision below treated the various Respondents differently even though Ms. George served *none* of them, *see* Pet.21-22, they suggest dismissal was

proper as to the Program Respondents because of some difference in the "notice" they received. HOH.Br.9. But they fail to explain what this tertium quid "notice" is or how it is neither substantive nor service.

Respondents also suggest the special "notice" requirement applies only if the appeal document is incorrectly captioned, Program.Br.9, but this still leads back to the same conflict. Rule 3 does not impose one set of requirements for notices of appeal and another for "functional equivalents." *See Smith*, 502 U.S. at 250 (Scalia, J., concurring). And so the Ninth Circuit's demand for something more—whatever Respondents say it is—still conflicts with *Cameron*, Rule 3, and every other court of appeals. *See* Amici.Br.7 (collecting cases).

Nor can Respondents minimize the circuit conflict on this point. While other circuits mention the fact of service when addressing jurisdiction, *see* HOH.Br.9 n.3, that is a far cry from the Ninth Circuit's demand that the notice of appeal have been "*served* upon the other parties." *Sweet Transfer*, 896 F.2d at 1193. And while the Sixth Circuit has addressed lack of service under Rule 25(b), *see Garner v. Cuyahoga County Juvenile Court*, 554 F.3d 624, 644-645 (6th Cir. 2009), that has nothing to do with its holding concerning Rule 3(d). *Frieder v. Morehead State Univ.*, 770 F.3d 428, 430 (6th Cir. 2014) (Sutton, J.). There is no getting around the fact that the Ninth Circuit stands far apart from its sister circuits on this question.

C. The Jurisdictional Service Rule Is Firmly Fixed In Ninth Circuit Law.

In addition to the decision below, the Ninth Circuit has applied the jurisdictional service rule in two prior published decisions. Respondents search in vain for a way to read that rule out of those precedents.

First, they say that *Rabin*'s imposition of the service requirement was mere dictum. HOH.Br.14. But *Rabin*'s finding that the appellant met the service requirement is just as much holding as if it had found service lacking. 570 F.2d at 866.

Second, they say that no published Ninth Circuit decision has ever dismissed an appeal for lack of service. HOH.Br.16. But that is exactly what *Sweet Transfer* did in holding that an unserved "request for transcripts" and "letter to the bankruptcy court" did not amount to a notice of appeal. 896 F.2d at 1193. Though it was "arguable" whether those documents "clearly evince[d] the parties' intent to appeal," the Ninth Circuit dismissed for lack of jurisdiction because those documents were not "*served* upon the other parties." *Id.*

Third, they suggest that the Court need not be concerned with any incorrect service rule in *Rabin* and *Sweet Transfer* because *Smith* superseded them. HOH.Br.13. But *Smith* did not even address service under Rule 3(d); it addressed substantive notice under Rule 3(c). 502 U.S. at 248. And so the jurisdictional service rule is alive and well in the Ninth Circuit. That is why the decision below cited, quoted, and followed it to dismiss Ms. George's appeal. App.14. It ignored the one Ninth Circuit decision that got the

issue right (and which this Court reversed and vacated on other grounds). *Pollard v. The GEO Grp., Inc.*, 629 F.3d 843, 852 n.7 (9th Cir. 2010), *rev'd sub nom. Minneci v. Pollard*, 565 U.S. 118 (2012). And then it disposed of the appeal via unpublished memorandum because there was no need "to clarify the law of the circuit." 9th Cir. Gen. Orders 4.3.a. That means there is a desperate need to clarify the law in this Court.

II. This Case Is An Optimal Vehicle To Address The Ninth Circuit's Jurisdictional Service Rule.

This Petition provides a clear path to review the Ninth Circuit's jurisdictional service rule. Acting pro se, Ms. George did everything the rules required by timely filing a document stating her intent to appeal. App.13, 32; Fed. R. App. P. 3(a)(1)-(2). The Ninth Circuit dismissed based solely on its jurisdictional service rule. *See supra* Section I.B. Rejecting that rule here will give Ms. George the hearing on the merits the Ninth Circuit denied her. And with sophisticated counsel on both sides, this Petition is an excellent opportunity to decide a question that disproportionately impacts pro se appellants. "[T]he class of litigants potentially affected by the Ninth Circuit's rule is vast," amounting to an astounding 10% of the total federal appellate docket. Amici.Br.12-13.

Nor is the Court's review impaired by any alternate grounds for affirmance. Respondents raise only one alternative ground for jurisdictional dismissal: that Ms. George's timely filing did not meet the requirements of Rule 3(c). Program.Br.13; HOH.Br.7-8. But they ignore that the decision below

held the opposite—that Ms. George's filing "gave notice of her intent to appeal." App.13 (citing *Smith*, 502 U.S. at 248). 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." App.31-32. Respondents do not even attempt to argue this was error.

The other purported alternate grounds Respondents advance are illusory. For one, the decision below "did not reach … nor express any opinion" on those other grounds, *Massachusetts Mut. Life Ins. Co. v. Ludwig*, 426 U.S. 479, 481 (1976) (quotation omitted), and this Court will generally "not address arguments that were not the basis for the decision below." *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996). But more important, they are not alternate grounds for the judgment below because they do not concern jurisdiction. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38-39 (1989). Rather, a court can address them only *after* it determines it has jurisdiction. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). These arguments are for remand, and so Ms. George addresses them only briefly here.

First, the Program Respondents say that Ms. George raised the jurisdictional issues in this Petition "for the first time in her petition for panel rehearing" and has thus waived them. Program.Br.16. This is wrong on both the law and the facts. It is wrong on the law because questions of jurisdiction "can never be waived or forfeited." *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012). And it is wrong on the facts because Ms.

George *did* argue this point in both her primary briefing and her rehearing petition. COA.Dkt.74.19-20; App.53-60.

Second, the Program Respondents argue that Rule 3(a)(2) gave the Ninth Circuit "discretion to dismiss [the] appeal." Program.Br.14. But Rule 3(a)(2) could not authorize the Ninth Circuit's jurisdictional dismissal. Rather, it allows a discretionary dismissal *only if* jurisdiction is present: "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." Fed. R. App. P. 3(a)(2) (emphasis added); *United States v. Bookhardt*, 277 F.3d 558, 562 (D.C. Cir. 2002). And in any case, a lack of service is not the "appellant's failure," Fed. R. App. P. 3(a)(2), because Rule 3(d) says service is the job of the district clerk. *Id.* (d)(3).

Third, the Program Respondents devote much of their brief to arguing that Ms. George's counsel forfeited her claims against them by not addressing them in the opening brief. Program.Br.6-15. Again, this alleged forfeiture is immaterial to jurisdiction. And beyond being immaterial, it is duplicitous. Its central premise is that Ms. George should have known from the outset that the original judgment was final as to the Program Respondents, even though it was only "ENTERED in favor of Defendants House of Hope Recovery and Patricia Barcroft." App.29.[2] But the

[2] Ms. George maintained below that only the second judgment was final, but she does not raise that issue in this Petition. In addition, the Program Respondents make much of the delay in

Program Respondents fail to mention the fatal flaw in that central premise: they too believed the original judgment was not final against them. They said so to Ms. George's counsel and confirmed it *in writing* when Ms. George's counsel inquired as to why the clerk had not included them on the appeal. App.49-51. It was only when the Ninth Circuit suggested the original judgment was final as to *all* defendants that the Program Respondents made their convenient about-face. Privately, they conceded they were reversing their position. App.50. But publicly, they maintained—and still maintain—that by believing exactly what they themselves had believed about the original judgment, Petitioner forfeited her claims against them. Program.Br.12; COA.Dkt.61.15. "You should know better than to trust me" is no basis for forfeiture. App.50-51; COA.Dkt.74.21.

Fourth, Respondents say that Ms. George's appeal as to the Program Respondents lacks merit. Program.Br.19; HOH.Br.11-13.[3] But the merits of the case are not a reason to deny review of a threshold jurisdictional question. Nor can the House of Hope

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adding them to the appeal from the original judgment. Program.Br.11. But this happened because the Ninth Circuit clerk—not Ms. George—did not include them, and Ms. George's first appointed counsel focused on mediating the appeal with the House of Hope Respondents. COA.Dkt.5-31. As soon as the counsel below was appointed, he spoke with the Program Respondents about their inclusion in this case. App.49-51.

[3] Ms. George's claims against the Program Respondents are not purely derivative of her claims against the House of Hope Respondents. HOH.Br.12. The former allege independent conduct, including that the Program Respondents "joined in discriminatory behavior." COA.Dkt.73.5-6.

Respondents shoehorn their merits argument into jurisdictional form by saying the lack of merit means a decision here would be an advisory opinion. HOH.Br.12-13. This is a "conflation of the two concepts" of standing and merits, *Bond v. United States*, 564 U.S. 211, 219 (2011), which would imply that a judgment that a claim fails means there was no justiciable "Case or Controversy" to begin with.

Respondents miss the irony of arguing that the merits of Ms. George's appeal provide good reasons not to reach the merits of her appeal. Ms. George, filing pro se, did everything Rule 3 demands and fought for years for an appellate hearing on her claims against the Program Respondents. She should receive one.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

MICHAEL H. MCGINLEY
DECHERT LLP
1900 K Street, NW
Washington, DC 20006

LINCOLN DAVIS WILSON
Counsel of Record
MONICA I. GORNY
DECHERT LLP
Three Bryant Park
1095 Sixth Avenue
New York, New York
10036
(212) 698-3500
lincoln.wilson@dechert.com

Counsel for Petitioner Constance George

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