No. 24-275

IN THE
Supreme Court of the United States

DONTE PARRISH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

INTRODUCTION

The Government's Brief in Opposition confirms that this case is an excellent candidate for this Court's review. The Government acknowledges that the circuits are split. It agrees that the decision below is wrong. And it identifies no vehicle problems.

The Government's arguments for nonetheless denying certiorari are meritless. *First*, the Government insists that the Question Presented does not arise often enough to deserve the Court's attention. The many examples cited in the Petition—plus three more that have arisen in the short time since the Petition was filed—prove otherwise. *Second*, the Government tries to minimize the significance of the Fourth Circuit's error by suggesting that, going forward, litigants can simply adhere to its baseless ruling by filing a second notice of appeal. That let-them-eat-cake argument ignores that pro se litigants may not even learn of a reopening order fast enough to timely file a second notice of appeal; after all, these litigants by definition previously did not receive notice of the judgment against them within the original appeal period. *Third*, the Government suggests that the Advisory Committee might amend the Rules of Appellate Procedure to address this issue. But only this Court can clarify the scope of appellate jurisdiction under 28 U.S.C. § 2107(c).

There is a clear and acknowledged split on the Question Presented. The decision below is wrong. And this issue deserves this Court's attention—just as the incarcerated people whom it primarily affects deserve a fair chance to appeal. Certiorari should be granted.

ARGUMENT

I. The Government's Brief Confirms that Certiorari Is Warranted.

The Government agrees that the key markers of certworthiness are present. The Government acknowledges that the circuits are split on the Question Presented. BIO 12 (discussing *Winters v. Taskila*, 88 F.4th 665, 671 (6th Cir. 2023)). It concedes that "the decision below is incorrect." BIO 12; *see also id.* at 10–12. And it fails to identify any potential vehicle problems.

1. On the circuit split, the Government recognizes that, in *Winters*, the Sixth Circuit "squarely addressed the jurisdictional question that petitioner seeks to present here"—and, unlike the Fourth Circuit, answered it correctly. BIO 12. There is thus no dispute that the Courts of Appeals are split at least 1-to-1 on the Question Presented in published decisions.

As the Petition explains, however, the split is deeper than that. The Ninth Circuit's published decision in *United States v. Withers*, 638 F.3d 1055 (9th Cir. 2011), is directly on point. *See* Pet. 18. And the Third, Seventh, and Tenth Circuits have also addressed the Question Presented—some on more than one occasion. *See* Pet. 19–21. All of these courts sided with the Sixth Circuit (and against the Fourth), holding that a previously filed notice of appeal ripens when a district court grants reopening. *See* Pet. 18–21.

The Government's attempts to write off these cases and minimize the split fall flat. The Government first contends that *Withers* did not actually address the Question Presented—despite reaching a result that the Government acknowledges "is inconsistent with the

result reached by the Fourth Circuit." BIO 13. But the Ninth Circuit squarely held that the appellant's "notice of appeal should have been generously construed as *both* a notice of appeal and a motion to reopen," so the district court had "erred when it found that Withers's notice of appeal was untimely." *Withers*, 638 F.3d at 1062 (emphasis added). That is no "drive-by jurisdictional ruling[]." BIO 13 (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998)). To the contrary, the Ninth Circuit's position was both considered and clear: No second, post-reopening notice of appeal is required, because granting reopening validates the previously filed notice of appeal. *See Withers*, 638 F.3d at 1062. The Ninth Circuit has applied that rule as recently as last month. *See, e.g.*, *Jackson v. Jackson*, No. 24-6266, ECF No. 5 (9th Cir. Nov. 14, 2024) (explaining that the appeal would proceed based on a notice of appeal filed before a motion to reopen was granted).

The Government's attempts to discount the Third, Seventh, and Tenth Circuit's rulings fare no better. Yes, as the Government points out, those courts have weighed in on the split in unpublished decisions. *See* Pet. 19 (acknowledging as much). But the Government does not dispute that each of those courts decided "the same jurisdictional question" as the Fourth and Sixth Circuit. BIO 13.[1] And its insistence that "[t]hose

[1] The Government suggests that one of the two on-point Tenth Circuit cases is inapposite because the appellant mailed a notice of appeal together with his motion to reopen and asked to court to process the notice after granting the motion. *See* BIO 14 n.2 (discussing *Farrow v. Tulupia*, 2022 WL 274489 (10th Cir. Jan. 31, 2022)). But as the Tenth Circuit recognized, a paper is "filed" when it is delivered to the clerk. *Farrow*, 2022 WL 274489, at *1

nonprecedential decisions would not preclude a future panel from reaching a different conclusion," BIO 14, rings hollow, given that any "different conclusion" would only deepen the split in what the Government agrees is the *wrong* direction.

2. On the merits, the Government acknowledges that the Fourth Circuit "erred in holding that it lacked appellate jurisdiction." BIO 10. As the Government correctly points out, "[b]oth the Federal Rules of Appellate Procedure and this Court's precedent recognize that a prematurely filed notice of appeal can become effective at a later date." BIO 11 (citing Fed. R. App. P. 4(a)(2) and *FirsTier Mortg. Co. v. Investors Mortg. Ins. Co.*, 498 U.S. 269, 272–77 (1991)); *see* Pet. 28–29. The Government also agrees that the "textual distinction between reopening and extending the time for appeal" does not justify the Fourth Circuit's approach. BIO 11; *see* Pet. 31–33.

3. Finally, the Government does not even attempt to argue that this case is anything but a strong vehicle. For good reason: This case tees up the Question Presented perfectly. *See* Pet. 34–35.

II. The Government's Efforts to Minimize the Importance of the Question Presented Fail.

So why does the Government nevertheless ask this Court to deny certiorari? Apparently because, in the

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n.1 (recognizing that the appellant had "filed a motion to reopen … along with a notice of appeal"); *see* Fed. R. Civ. P. 5(d)(2) ("A paper not filed electronically is filed by delivering it … to the clerk[.]"). Accordingly, the court held that the notice of appeal had been filed prematurely but "became effective" when the district court granted reopening, *Farrow*, 2022 WL 274489, at *1 n.1—in direct conflict with the decision below.

Government's view, pro se litigants' ability to vindicate their right to appeal when they do not receive timely notice of a judgment against them is insufficiently important to merit this Court's attention. The Government is wrong. This issue recurs frequently; there is no viable workaround for many litigants; and only this Court can resolve the split.

1. The Government's first argument against certiorari is that the Question Presented "does not arise frequently." BIO 14. In support of that view, the Government complains that the petition "identified fewer than ten opinions on point." *Id.* Those words were carefully chosen: By "fewer than ten," the Government means *nine*; and with the word "opinions," the Government excludes five additional appeals that generated *orders*. *See* Pet. 22 (citing cases).

As the Petition also demonstrated, this issue appears to be gaining steam—perhaps because it was previously going unnoticed. *See id.* Two appeals presenting this issue were decided in just one week in December 2023. *Id.* (citing *Winters*, 88 F.4th 665, and *Holden v. Att'y Gen. of N.J.*, 2023 WL 8798084 (3d Cir. Dec. 20, 2023)). And the Fourth Circuit decided three of these appeals in June 2024. *See id.* (citing *Sparks v. Russell*, 2024 WL 2862119 (4th Cir. June 6, 2024); *Hammond v. Burns*, 2024 WL 3102794 (4th Cir. June 24, 2024) (consolidating two appeals)).

If that were not enough, at least three more appeals have presented the same issue since the Petition was filed in early September. In *Brik v. McConnell*, the Sixth Circuit construed a notice of appeal as a Rule 4(a)(6) motion and remanded to the district court. No. 24-3481, ECF No. 8 (6th Cir. Sept. 6, 2024). The

district court granted the motion. No. 20-cv-1825, ECF No. 52 (N.D. Ohio Oct. 15, 2024). And consistent with *Winters*, the case returned to the Sixth Circuit based on the previously filed notice of appeal. *See* No. 24-3481, ECF No. 9 (6th Cir. Oct. 15, 2024) ("Because Plaintiff already filed his notice of appeal on May 28, 2024, that notice is deemed timely filed."). The same pattern unfolded in the Ninth Circuit in *Jackson v. Jackson*, consistent with *Withers*. *See* No. 24-6266, ECF No. 3 (9th Cir. Oct. 24, 2024) (remanding); No. 23-cv-5988, ECF No. 45 (W.D. Wash. Nov. 6, 2024) (reopening); No. 24-6266, ECF No. 5 (9th Cir. Nov. 14, 2024) ("[T]his appeal will proceed based on appellant's October 10, 2024 notice of appeal."). By contrast, in *Blanchard v. Frosh*, the Fourth Circuit followed the decision below and dismissed an appeal in the same posture. *See* 2024 WL 4471726 (4th Cir. Oct. 11, 2024). As these additional cases confirm, the Government is simply wrong to claim that this issue does not arise frequently.

2. Next, the Government argues that the Question Presented "lacks practical significance," because, so long as the rule is clear, it will not be "particularly difficult" for litigants to file a second notice of appeal if need be. BIO 14, 16. If only that were true. In the real world, a duplicative notice requirement will preclude many pro se litigants—particularly incarcerated litigants—from pursuing their appeals. The fact that some pro se litigants are able to file electronically does not solve the problem.

a. As an initial matter, the Government's position simply writes off litigants like Mr. Parrish, for whom the rule was *not* "clear *ex ante*." BIO 9–10. The same apparently goes for litigants in the circuits where this issue has yet to be resolved.

Even in the Fourth Circuit, where the rule is now clear, it will be impossible for some pro se litigants to comply. *See* Pet. 23–27. *Every litigant* who obtains reopening under 28 U.S.C. § 2107(c), by definition, "did not receive" "notice of the entry of a judgment" "within *21 days*" (emphasis added). The Fourth Circuit's rule, however, requires those *same litigants* to file a second notice of appeal within *14 days* of reopening. *See* Pet.App.12a–13a. The Government offers no reason to expect that these litigants will somehow receive notice of reopening within that shorter time period.

Even when a pro se litigant does receive notice of reopening during the 14-day period, the Government's position assumes that he will be able to quickly discern that a duplicative notice of appeal is required. But as the Sixth Circuit recognized, the Fourth Circuit's rule does not follow from the text of § 2107(c) or the Appellate Rules. *See Winters*, 88 F.4th at 671. So checking those sources would not help. Perhaps the idea is that this pro se litigant will know to search for, and then successfully identify, the decision below? A rule that "is clear *ex ante*" from the caselaw may be good enough for counseled parties. It is something else entirely for the pro se litigants that § 2107(c) almost exclusively affects. *Cf.* Fed. R. App. P. 4 advisory committee's note to 1993 amendment (recognizing that a rule that required a duplicative notice of appeal in certain circumstances "created a trap for an unsuspecting litigant" because, despite a clear rule, "[m]any litigants, especially pro se litigants, fail[ed] to file the second notice of appeal").

Even the relatively short history of the Fourth Circuit's rule bears that out. In *Blanchard*, the court construed a pro se appellant's untimely notice of appeal

as a reopening motion and remanded for a decision by the district court. 2024 WL 3220298, at *1 (4th Cir. June 28, 2024). The remand order even instructed that "[i]f the district court reopens the appeal period, Blanchard will have to file a new notice of appeal," citing the decision below. *Id.* at *1 n.2. Despite the clear rule established by the decision below and the explicit reminder in the remand order, Blanchard still failed to file a new notice of appeal within the 14-day reopening period. The Fourth Circuit accordingly dismissed his appeal as untimely. *See Blanchard*, 2024 WL 4471726, at *1.

b. The Government's rejoinder that some courts now permit pro se litigants to file electronically does not diminish the practical significance of the Question Presented. *See* BIO 14. For one thing, it is cold comfort to pro se litigants who have no access to electronic filing systems. For another, the Government overstates the availability of electronic service to pro se litigants, especially those who are incarcerated.

A recent Federal Judicial Center study found that more than a third of district courts nationwide do not allow any pro se litigants to use the CM/ECF system. *See* Federal Judicial Center, *Federal Courts' Electronic Filing by Pro Se Litigants* 7 (2022) ("*FJC Report*"), https://www.fjc.gov/sites/default/files/materials/20/FederalCourtProSeECF.pdf. Access to CM/ECF is even more limited for incarcerated pro se litigants. *See id.* at 1, 3, 7. Many jurisdictions that allow nonincarcerated pro se litigants to file electronically exclude incarcerated litigants from that privilege. That is true, for example, in the district where this case was filed. *See* N.D. W. Va., *Admin. Proc. For Elec. Case Filing* R. XI(C) (Apr. 2018) ("Incarcerated pro se parties are

not permitted to file electronically."). And even in jurisdictions where incarcerated litigants can theoretically access electronic filing systems, their ability to actually do so "depends upon procedures developed by the prisons." *FJC Report* 3. For all these reasons, "it is seldom feasible" for incarcerated people to file electronically through CM/ECF. *Id.* at 1.

Moreover, electronic *filing* is different from electronic *notice*. Some courts that allow pro se litigants to file electronically do not allow pro se litigants to be served electronically. *See, e.g.*, 6th Cir. R. 25(b)(2)(A) (permitting non-incarcerated pro se litigants to file by emailing documents to the court); 6th Cir. Guide to Electronic Filing 10.1 (clarifying that the rules still require "conventional" *service* on pro se litigants who submit filings via email). And "[m]any prisons do not" accept electronic notice, so individuals in those facilities still "must be served with other parties' filings and court filings by regular mail." *FJC Report* at 8.

3. Finally, the Government suggests that the Court's intervention is unnecessary because the Advisory Committee on Appellate Rules has recently "taken steps to study" the circuit split. BIO 16. As an initial matter, surely the Committee would not waste its time on a question that, in the Government's words, "lacks practical significance." BIO 14. Apart from underscoring the existence and importance of the split, the Committee's study is immaterial for two reasons.

First, as the Government recognizes, this case is about the scope of federal appellate jurisdiction under 28 U.S.C. § 2107(c). It does not turn on the meaning of the rules implementing that statute. *See* BIO 2 ("This case concerns Section 2107(c)[.]"); *id.* 12 (discussing

"the jurisdictional question that petitioner seeks to present"); Pet.App.2a ("Because Donte Parrish did not file a timely notice of appeal from the judgment in this civil action, we dismiss his appeal for lack of jurisdiction. *See* 28 U.S.C. § 2107."); *id.* 10a ("[T]he text of § 2107(c) require[s] that Parrish file his notice of appeal during the reopened period"); *Winters*, 88 F.4th at 668 (explaining that "Congress sets the time to appeal" and discussing the text of § 2107(c)). The Committee has no power to alter the scope of § 2107(c). Only Congress can create federal jurisdiction, and only this Court can definitively interpret a federal statute. *See Kontrick v. Ryan*, 540 U.S. 443, 452 (2004).

To be sure, the Rules of Appellate Procedure are relevant insomuch as multiple provisions reflect the fundamental principle that filing a notice of appeal too early does not "extinguish an otherwise proper appeal." *FirsTier*, 498 U.S. at 273; *see* Pet. 29 (discussing the implications of the Rules). But a rule amendment that requires *more* than the statute conferring jurisdiction cannot destroy jurisdiction. *See Hamer v. Neighborhood Hous. Servs. of Chi.*, 583 U.S. 17, 26 (2017) (explaining that lower court erred in this way by "conflating Rule 4(a)(5)(C) with § 2107(c)"). Nor can a rule amendment that requires *less* than the statute create jurisdiction. *See Bowles v. Russell*, 551 U.S. 205, 211–12 (2007) (pointing out the "distinction between court-promulgated rules and limits enacted by Congress," in a case about an attempt to extend the reopening period).

Second, the Court regularly resolves Rules-based circuit splits notwithstanding the theoretical possibility that a Rule will be amended. *See, e.g.*, *Waetzig v. Halliburton Energy Servs., Inc.*, No. 23-971 (U.S.)

(considering split on whether voluntary dismissal under Civil Rule 41 is a "final judgment, order, or proceeding" under Civil Rule 60(b)); *Diaz v. United States*, 144 S. Ct. 1727 (2024) (resolving split about the scope of permissible expert testimony under Evidence Rule 704(b)); *Dupree v. Younger*, 598 U.S. 729 (2023) (resolving split about whether a post-trial motion is required under Civil Rule 50 to preserve a purely legal issue raised at summary judgment); *Kemp v. United States*, 596 U.S. 528 (2022) (resolving split about whether Civil Rule 60(b)(1) permits relief from a judge's error of law); *City of San Antonio v. Hotels.com, L. P.*, 593 U.S. 330 (2021) (resolving split about cost awards under Appellate Rule 39(e)). Again, this case turns on the meaning of a statute, not the meaning of a Rule. But the relevance of Rule 4 is no reason for this Court to stay its hand.

CONCLUSION

The petition for a writ of certiorari should be granted.

December 4, 2024

Respectfully submitted,

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