No. 24-275

In the Supreme Court of the United States

DONTE PARRISH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under 28 U.S.C. 2107(c), a district court may "reopen the time for appeal for a period of 14 days" after the deadline for filing a notice of appeal has already passed in certain circumstances involving parties who did not receive timely notice of the entry of a judgement or order. In this case, petitioner, while proceeding *pro se*, filed a notice of appeal after the deadline for filing such a notice had already passed. The district court found that the requirements of Section 2107(c) were satisfied, and the court exercised its authority under that provision to reopen the time for appeal. Petitioner did not then file a further notice of appeal. The court of appeals concluded that petitioner could not rely on his earlier notice of appeal and that the court lacked appellate jurisdiction. The question presented is:

Whether a court of appeals has appellate jurisdiction when a civil litigant who did not receive timely notice of an adverse judgment files an untimely notice of appeal, the district court then reopens the appeal period for 14 days under Section 2107(c), and the litigant fails to file a further notice of appeal within the 14-day period.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 74 F.4th 160. An earlier opinion of the court of appeals (Pet. App. 56a-58a) is not published in the Federal Reporter but is reprinted at 827 Fed. Appx. 327. The order of the court of appeals denying rehearing en banc and opinions respecting that order (Pet. App. 63a-69a) are not published in the Federal Reporter but are available at 2024 WL 1736340. The opinion of the district court (Pet. App. 44a-55a) and the report and recommendation of the magistrate judge (Pet. App. 23a-43a) are not published in the Federal Supplement but are available, respectively, at 2020 WL 1330350 and 2019 WL 9068337. An additional order of the district court (Pet. App. 59a-62a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 2023. Petitions for rehearing were denied on April 23, 2024 (Pet. App. 63a-64a) and April 25, 2024 (Pet. App. 70a). On June 28, 2024, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 9, 2024, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In civil cases in federal court, the time limits for filing a notice of appeal are specified by 28 U.S.C. 2107, which is implemented by Rule 4 of the Federal Rules of Appellate Procedure. Section 2107 generally provides that, in order to perfect a timely appeal from a judgment, order, or decree entered in a civil case, a notice of appeal must be filed "within thirty days after the entry of such judgment, order or decree." 28 U.S.C. 2107(a); see Fed. R. App. P. 4(a)(1)(A). If the United States is a party to the litigation, the deadline is 60 days for all parties, rather than 30 days. 28 U.S.C. 2107(b); see Fed. R. App. P. 4(a)(1)(B). The statutory deadlines are "mandatory and jurisdictional." *Bowles* v. *Russell*, 551 U.S. 205, 209 (2007) (citation omitted).

This case concerns Section 2107(c), which sets forth two exceptions to those default deadlines. First, under the first sentence of Section 2107(c), the district court may "extend the time for appeal upon a showing of excusable neglect or good cause," but only if a motion for such an extension is filed "not later than 30 days after the expiration of the time otherwise set for bringing an appeal." 28 U.S.C. 2107(c). That authority is implemented in Rule 4(a)(5). Under the second sentence of Section 2107(c), at issue here, the court may "reopen the

time for appeal" if the court finds that a party entitled to notice of the entry of the judgment or order at issue "did not receive such notice from the clerk or any party within 21 days of its entry" and that "no party would be prejudiced." 28 U.S.C. 2107(c)(1) and (2). That authority is implemented in Rule 4(a)(6).

The district court's authority to reopen the time for appeal under the second sentence of Section 2107(c) is subject to several additional limitations. The court may reopen the appeal period only "upon motion filed within 180 days after entry of the judgment or order" at issue, or "within 14 days after" the party that failed to receive notice of the entry of the judgment or order receives such notice, "whichever is earlier." 28 U.S.C. 2107(c); see Fed. R. App. P. 4(a)(6)(B). And the court may reopen the time for appeal under Section 2107(c) only "for a period of 14 days from the date of entry of the order reopening the time for appeal." 28 U.S.C. 2107(c); see *Bowles*, 551 U.S. at 213 (holding that the 14-day limit "on how long a district court may reopen" the period for appeal is jurisdictional).

2. In 2017, petitioner brought this action *pro se* in the United States District Court for the Northern District of West Virginia. Pet. App. 23a. Petitioner was incarcerated at the time at "USP Big Sandy in Inez, Kentucky," serving a 180-month term of imprisonment. *Ibid.* (footnote omitted); see *id.* at 4a. Petitioner alleged that he was wrongfully placed in administrative segregation within the federal prison system for three years while under suspicion of having murdered a fellow inmate. See *id.* at 27a, 45a. Ultimately, federal law enforcement authorities declined to pursue criminal charges against petitioner for the murder, and the Bureau of Prisons found insufficient evidence to sustain

any disciplinary charges. Gov't C.A. Br. 3, 5. The gravamen of the complaint was that petitioner's conditions of confinement during the murder investigation were tortious—*e.g.*, that he was falsely imprisoned, or the victim of an abuse of process. *Id.* at 8; see Pet. App. 27a.

Petitioner's complaint invoked the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.* The FTCA waives the sovereign immunity of the United States and creates a cause of action for damages for certain torts committed by federal employees acting within the scope of their employment. See *Brownback* v. *King*, 592 U.S. 209, 211-212 (2021). To be actionable under the FTCA, a claim must be brought against "the United States." 28 U.S.C. 1346(b)(1). Petitioner's complaint complied with that requirement and named the United States as the defendant. Pet. App. 4a.

The government moved to dismiss the complaint or, in the alternative, for summary judgment, and the case was referred to a magistrate judge. The magistrate judge recommended granting the government's motion. Pet. App. 23a-43a. The district court largely adopted the magistrate judge's report and recommendation and dismissed all of petitioner's FTCA claims, concluding that one was time-barred and that the others had not been administratively exhausted (as required by the FTCA). *Id.* at 44a-57a; see 28 U.S.C. 2675(a).

The district court's order was dated and entered on the docket on March 23, 2020. Pet. App. 55a. The following day, the clerk of court entered a separate judgment in favor of the United States. D. Ct. Doc. 131 (Mar. 24, 2020). Under the provision in Section 2107(b) applicable to civil actions in which the United States is a party, the deadline for filing a notice of appeal was 60 days from the entry of judgment. See 28 U.S.C. 2107(b);

Fed. R. App. P. 4(a)(1)(B). Accounting for a weekend, see Fed. R. App. P. 26(a)(1)(C), any notice of appeal was therefore due on or before Monday, May 25, 2020.

On July 13, 2020, the district court received and docketed a handwritten notice of appeal from petitioner, bearing a postmark of July 9, 2020. See D. Ct. Docs. 137 and 137-1 (July 13, 2020). In the notice, petitioner stated that, due to his transfer from federal to state custody, he had not received the court's prior judgment until June 25, 2020. Pet. App. 4a. That notice was "clearly untimely." *Id.* at 57a. It was filed not only after the May 25 deadline for noticing an appeal but also outside the additional 30-day period in which petitioner could have filed a motion to extend the time for appeal under Section 2107(c)'s first sentence and Rule 4(a)(5). See Fed. R. App. P. 4(a)(5)(A)(i).

The district court transmitted the notice of appeal to the court of appeals, which remanded in an unpublished, per curiam opinion. Pet. App. 56a-58a. The court of appeals charitably "construe[d] the notice of appeal as a motion to reopen the appeal period under Rule 4(a)(6)." *Id.* at 58a. The court observed that, according to petitioner, he had "not receive[d] a copy of the [district] court's judgment until 93 days after entry, and he filed the notice of appeal within 14 days after he purportedly received" notice of the judgment, *ibid.*—allegations which, if true, could support a motion to reopen the appeal period. The court of appeals remanded to the district court to address petitioner's motion in the first instance. *Ibid.* The court of appeals also stated that, after the district court determined whether to reopen the appeal period, "[t]he record, as supplemented, will be returned" to the court of appeals "for further consideration." *Ibid.*

On remand, the district court determined that petitioner "satisfied the requirements of Federal Rule of Appellate Procedure 4(a)(6)." Pet. App. 61a; see *id.* at 59a-62a. The court found that, apparently as a result of being transferred from federal to state custody, petitioner did not receive notice of the entry of the court's prior judgment "within 21 days after entry," Fed. R. App. P. 4(a)(6)(A); petitioner filed what the court of appeals had construed as a motion to reopen the appeal period "within 14 days after" receiving belated notice of the judgment, Fed. R. App. P. 4(a)(6)(B); and "no party would be prejudiced" by reopening the appeal period, Fed. R. App. P. 4(a)(6)(C). See Pet. App. 57a, 61a. The court granted petitioner's motion and "reopen[ed] the time for [petitioner] to file his appeal for fourteen (14) days following the entry of this [o]rder," *i.e.*, 14 days following January 8, 2021. *Id.* at 61a.[1] That reopened period for appeal expired on January 22, 2021.

Petitioner did not file an additional notice of appeal, or anything else, during the 14-day period following the district court's order of January 8, 2021. Pet. App. 5a. "On January 27, 2021, five days after the 14-day period had closed, [petitioner] mailed a document to" the court of appeals, which the clerk of that court docketed as "a supplemental informal brief." *Ibid.*

3. After the remand, the court of appeals appointed counsel to represent petitioner. Pet. App. 5a. Through counsel, petitioner filed a brief taking the position that the court had appellate jurisdiction based on the combination of petitioner's untimely notice of appeal (filed on July 13, 2020) and the district court's subsequent order

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[1] The district court's order contains a typographical error, listing the date as "January 8, 2020." Pet. App. 62a. In fact, the order was entered on January 8, 2021. See *id.* at 5a.

reopening the appeal period under Rule 4(a)(6). Pet. C.A. Br. 1, 18-22. The government "agree[d] with [petitioner's] jurisdictional statement," Gov't C.A. Br. 1, and the parties joined issue on the merits.

The court of appeals dismissed the appeal for lack of appellate jurisdiction, over the dissent of then-Chief Judge Gregory. Pet. App. 1a-22a. The court acknowledged that when a litigant files an untimely notice of appeal and the district court subsequently *extends* the time for appeal under the first sentence of Section 2107(c) and Rule 4(a)(5) to encompass the date on which the litigant had already filed a notice of appeal, the district court's action has been held to "validate[]" the prior notice, such that the litigant need not then file a second notice of appeal within the extended period. *Id.* at 11a (citation omitted). But the court rejected petitioner's arguments for treating a *reopening* of the appeal period under the second sentence of Section 2107(c) and Rule 4(a)(6) the same way, instead taking the view that the statute "requires that a notice of appeal be filed within" the reopened 14-day appeal period. *Id.* at 12a. Accordingly, the court determined that it lacked jurisdiction here because petitioner had failed to file a new notice of appeal "within 14 days of the entry of the order" granting his motion to reopen. *Id.* at 10a.

Chief Judge Gregory dissented. Pet App. 14a-22a. In his view, "[n]othing in the text of 28 U.S.C. § 2107(c) compels" adopting what he described as a "formalistic and hollow" requirement for litigants who have already filed an untimely notice of appeal to then file a second notice after the period for appeal has been reopened. *Id.* at 14a. He would therefore have held, consistent with the case law under Rule 4(a)(5), that a district court's order reopening the appeal period under Rule

4(a)(6) "validates an earlier untimely notice of appeal," *id.* at 16a, at least as long as the earlier notice continues to provide "'sufficient notice to other parties and the courts' that the appellant intends to seek appellate review," *id.* at 17a (quoting *Smith* v. *Barry*, 502 U.S. 244, 248 (1992)). And he would have found that standard satisfied here, observing that there was no dispute in this case that petitioner's "July 2020 notice of appeal continued to convey his intent to seek appellate review in January 2021." *Id.* at 22a.

Petitioner's appointed counsel then moved to withdraw, explaining that petitioner wished to seek rehearing en banc but that counsel would not file such a petition "in light of the relatively confined universe of appellants [the panel] ruling is likely to apply to and the stringency of Rule 35's direct conflict or exceptional importance requirements." C.A. Doc. 54, at 2 (Aug. 28, 2023). The court of appeals granted that motion, and petitioner filed a *pro se* petition for rehearing en banc. C.A. Doc. 55 (Aug. 31, 2023). After petitioner obtained new counsel, the court also permitted him to file a supplemental petition through counsel. C.A. Doc. 72 (Jan. 30, 2024). The government filed responses to both petitions, arguing in relevant part that the jurisdictional question was not sufficiently important to warrant en banc review. See C.A. Doc. 84, at 2 (Feb. 29, 2024); C.A. Doc. 61, at 7 (Sept. 14, 2023).

The court of appeals denied petitioner's motion for rehearing en banc by a 9-6 vote. Pet. App. 63a-64a. Judge Niemeyer, who had authored the panel opinion, issued a statement in support of denying rehearing en banc in which he reiterated his view that Section 2107(c) and Rule 4(a)(6) did not authorize "resurrection of [petitioner's] earlier notice of appeal." *Id.* at 66a. Chief

Judge Gregory, who had authored the panel dissent, also issued a dissent from the denial of rehearing en banc, which Judges Thacker and Berner joined. *Id.* at 67a-69a. Those dissenting judges took the view that, although the jurisdictional question would "impact only a few individuals," it was nonetheless significant enough to warrant en banc review. *Id.* at 69a. They also stated that Section 2107(c) and Rule 4(a)(6) do not expressly address "whether an untimely notice of appeal may be validated by a district court's subsequent grant of a Rule 4(a)(6) motion," and that "guidance from the Advisory Committee on the Federal Rules of Appellate Procedure may be necessary." *Id.* at 67a-68a.

ARGUMENT

Petitioner renews (Pet. 28-34) his contention that his July 2020 notice of appeal was sufficient to bring this case within the jurisdiction of the court of appeals, in light of the district court's later order reopening the appeal period for 14 days under Section 2107(c) and Rule 4(a)(6)—notwithstanding petitioner's failure to file any further notice of appeal during the 14-day period. Although the government continues to adhere to the view that the court of appeals had appellate jurisdiction under the circumstances of this case, petitioner fails to show that the jurisdictional question warrants further review by this Court. The issue can arise only after an apparently rare combination of circumstances. Moreover, petitioner fails to show that, as long as the jurisdictional rule is clear *ex ante*, the choice of one rule or another will have any significant practical importance even in the rare cases in which it arises. Review is also unwarranted at this time because the Advisory Committee on the Federal Rules of Appellate Procedure has formed a subcommittee to study the issue, and the

rulemaking process could resolve the question presented without this Court's intervention. The petition for a writ of certiorari should be denied.

1. The court of appeals erred in concluding that it lacked appellate jurisdiction. To be sure, petitioner could have forestalled any jurisdictional issue by filing a notice of appeal after the district court reopened the period for appeal under Section 2107(c) and Rule 4(a)(6). But petitioner's failure to do so did not deprive the court of appeals of jurisdiction under the circumstances of this case.

The second sentence of Section 2107(c) provides that, when the district court finds that a party who was entitled to notice of a judgment or order in a civil case failed to receive such notice within 21 days of entry, and no other party would be prejudiced, the court "may * * * reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal." 28 U.S.C. 2107(c). The court may exercise that authority only if the party seeking relief files a motion during the 180-day period after entry of the judgment or order at issue, or within 14 days of when the party received the notice that it previously failed to receive—whichever occurs earlier. *Ibid.*; see Fed. R. App. P. 4(a)(6)(B).

The court of appeals emphasized that those provisions give the district court limited authority to "*reopen* the time for appeal," as distinct from the court's separate authority to "*extend* the time for appeal" under the first sentence of Section 2107(c). 28 U.S.C. 2107(c) (emphases added). In the court of appeals' view, Congress used the term "reopen" in deliberate contrast to "extend[]," so as to signal that the reopening provision applies when the appeal period has already closed and a

new period is being opened. Pet. App. 10a. And there is no dispute that if petitioner had filed a notice of appeal during the new 14-day period authorized by the district court, the court of appeals would have then had jurisdiction over his appeal. Petitioner has never identified any practical impediment that would have prevented him from filing such a notice. Cf. Pet. 13.

Nonetheless, the court of appeals' textual distinction between reopening and extending the time for appeal does not resolve the question presented here. Both 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. See Fed. R. App. P. 4(a)(2) ("A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry."); *FirsTier Mortg. Co.* v. *Investors Mortg. Ins. Co.*, 498 U.S. 269, 272-277 (1991) (applying Rule 4(a)(2) to sustain appellate jurisdiction and explaining that the provision "codif[ied] a general practice in the courts of appeals of deeming certain premature notices of appeal effective").

Although the specific provision in Rule 4(a)(2) regarding premature notices of appeals does not apply to the circumstances here, the court of appeals did not identify any compelling reason to adopt a different approach under Rule 4(a)(6). By the time the district court reopened the appeal period here, petitioner had already filed a notice of appeal from the same underlying judgment, and the court had found that no party would be prejudiced by allowing petitioner to "refile his appeal." Pet. App. 61a. Under those circumstances, petitioner's July 2020 notice of appeal is best viewed as "premature" to the reopened period, and "the technical

defect of prematurity * * * should not be allowed to extinguish an otherwise proper appeal." *FirsTier Mortg.*, 498 U.S. at 273; cf. Pet. App. 16a-18a (Gregory, C.J., dissenting) (drawing additional support from circuit precedent giving effect to untimely notices of appeal filed before the time for appeal is extended under Rule 4(a)(5)).

2. Although the decision below is incorrect, petitioner fails to identify any compelling basis for further review, particularly while the Advisory Committee is studying the issue and has the authority to amend the rules in a manner that could obviate any need for additional guidance from this Court. See pp. 16-17, *infra*.

Petitioner principally contends (Pet. 15-22) that the decision below implicates a division of authority within the courts of appeals, but petitioner overstates the degree of any such conflict. District courts have had the authority to reopen the time for appeal under Section 2107(c) since 1991. See Pub. L. No. 102-198, § 12, 105 Stat. 1627; see also Fed. R. App. 4 advisory committee's note (1991 Amendment). But petitioner identifies (Pet. 17-18) only one other published decision in which a court of appeals squarely addressed the jurisdictional question that petitioner seeks to present here. See *Winters* v. *Taskila*, 88 F.4th 665, 671 (6th Cir. 2023) (Sutton, C.J.) (concluding that a litigant who filed an untimely notice of appeal and then successfully moved for reopening of the appeal period "did not need to file a new notice of appeal after the district court granted [his] motion to reopen," under the principle that "[a] notice of appeal filed too early, generally speaking, ripens when the window to appeal begins") (citing, *inter alia*, *FirsTier Mortg.*, 498 U.S. at 273).

Petitioner also relies (Pet. 18) on the Ninth Circuit's decision in *United States* v. *Withers*, 638 F.3d 1055 (2011), but that case did not expressly resolve the same jurisdictional issue. The Ninth Circuit instead perceived the key jurisdictional issue to be whether a *pro se* litigant's untimely notice of appeal should have been "construed * * * as a motion to reopen" the appeal period. *Id.* at 1061. After concluding that the district court should have construed the untimely notice as a motion to reopen and should have granted the motion, the court of appeals did not then proceed to address whether the *pro se* litigant needed to file any further notice of appeal during the reopened period. *Id.* at 1061-1062. The Ninth Circuit instead appears to have assumed that its jurisdiction was proper under those circumstances. See *id.* at 1062. While that result is inconsistent with the result reached by the Fourth Circuit here, the precedential force of *Withers* remains unclear. This Court does not afford precedential effect to analogous "drive-by jurisdictional rulings." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 91 (1998).

As petitioner acknowledges (Pet. 19-21), the other circuits to have addressed the same jurisdictional question have done so only in unpublished decisions. See *Hammer* v. *Bortz*, No. 23-1842, 2024 WL 2559204, at *3 (7th Cir. May 24, 2024); *Holden* v. *Attorney General of N.J.*, No. 21-1862, 2023 WL 8798084, at *1 n.4 (3d Cir. Dec. 20, 2023); *Farrow* v. *Tulupia*, No. 21-1027, 2022 WL 274489, at *1 n.1. (10th Cir. Jan. 31, 2022), cert. denied, 143 S. Ct. 454 (2022); *Norwood* v. *East Allen Cmty. Schs.*, 825 Fed. Appx. 383, 386-387 (7th Cir. 2020); *United States* v. *Marshall*, 166 F.3d 349, 1998 WL 864012, at *2 (10th Cir. Dec. 14, 1998) (Tbl.), cert.

denied, 528 U.S. 861 (1999).[2] Those nonprecedential decisions would not preclude a future panel from reaching a different conclusion and thus do not necessarily show that the outcome of this case would have been different had it arisen in one of those circuits. And even counting generously, petitioner has identified fewer than ten opinions on point since reopening motions became available in 1991. The paucity of such decisions underscores that the jurisdictional question does not arise frequently—and when it does, the courts of appeals have rarely considered it sufficiently important to warrant a published opinion.

3. In addition to the absence of any substantial conflict, further review is unwarranted because the question presented lacks practical significance. The question can arise only through an unlikely combination of procedural missteps. The district court may reopen the time for appeal only if it first finds that a party entitled to receive notice of the entry of a judgment or order failed to receive such notice within 21 days of the entry of the judgment or order. 28 U.S.C 2107(c)(1). But in the era of electronic filing, most litigants now receive immediate notice of orders and judgments. Petitioner emphasizes (Pet. 23) the possibility that *pro se* litigants may need to rely on notice via the mail, but "[m]any courts now allow electronic filing by pro se litigants with the court's permission," Fed. R. Civ. P. 5 advisory committee's note (2018 Amendment).

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[2] Petitioner's reliance (Pet. 21) on *Farrow* is misplaced for the additional reason that the litigant in that case simultaneously filed both a motion to reopen the appeal period and a notice of appeal, while asking the district court to defer entering the notice until after granting reopening. See 2022 WL 274489, at *1 n.1.

Moreover, even with respect to the presumably small number of litigants who fail to receive the requisite notice, the question presented only arises if one of those litigants wishes to appeal, the litigant cannot rely on the district court's separate authority to extend the time for appeal, and the litigant makes a timely request that the appeal period be reopened—but files a notice of appeal only before the reopening, not after. Notably, Section 2107(c) imposes an outer limit of 180 days to request reopening. See 28 U.S.C. 2107(c) (court may act upon a motion filed by the "earlier" of the expiration of 180 days from the entry of the judgment or order at issue or 14 days after the moving party receives notice). If that 180-day period expires before the litigant requests reopening, the question presented makes no difference because the district court lacks authority to reopen the appeal period in any event. And even for a timely request, the district court cannot reopen the appeal period unless it first finds that "no party would be prejudiced." 28 U.S.C. 2107(c)(2). Petitioner does not demonstrate that such a combination of circumstances is likely to occur frequently, and the limited number of appellate decisions addressing the question presented suggests it does not. Indeed, petitioner's own prior court-appointed counsel cited the "the relatively confined universe of appellants [the panel] ruling is likely to apply to" as one reason for declining to file a petition for rehearing en banc on petitioner's behalf. C.A. Doc. 54, at 2.

Petitioner also overstates (Pet. 22) the practical significance of the decision below within the Fourth Circuit itself. Although the decision below is incorrect, it establishes a clear and easily applied jurisdictional rule going forward. District courts in the Fourth Circuit may now advise *pro se* litigants of the need to file a new notice of

appeal in cases in which a motion to reopen the appeal period is granted. And although petitioner derides the filing of a second notice of appeal during the reopened period of appeal as a "hollow ritual," Pet. 30 (citation omitted), he does not show that filing a second notice will be particularly difficult for most or indeed any litigants affected by the Fourth Circuit's approach.

4. This Court's review is also unwarranted at the present time because the Advisory Committee has already taken steps to study whether changes to Rule 4(a) may be warranted. In *Winters*, the Sixth Circuit observed that the Advisory Committee is "charge[d] * * * to review issues of precisely this sort" and has the authority to "improv[e] the rules where needed." 88 F.4th at 672. The Sixth Circuit further observed that the Advisory Committee "may be a profitable next stage for this debate," *ibid.*—a sentiment endorsed by the dissenting judges in this case, see Pet. App. 68a (Gregory, C.J., dissenting from the denial of rehearing en banc).

On October 9, 2024, after the filing of the petition for a writ of certiorari in this case, the Advisory Committee voted to form a subcommittee to address the issues raised by the Sixth Circuit in *Winters* and the Fourth Circuit in the decision below. See Memorandum from Edward Hartnett to the Advisory Committee on the Federal Rules of Appellate Procedure, *New Suggestion from Judge Sutton* 1-3 (Sept. 5, 2024), reprinted in *Advisory Committee on Appellate Rules*, Tab 7A, at 292-295 (Oct. 9, 2024) (reporter's memorandum describing *Winters* and this case and proposing a subcommittee); see also Jacqueline Thomsen, *Administrative Stays Changes Weighed After Justices' Criticism*, Bloomberg Law News (Oct. 10, 2024) (noting that the Advisory Committee agreed to "look into the rule on reopening

the time to file an appeal" in light of Chief Judge Sutton's suggestion).

Because the relevant provisions in Rule 4(a)(6) may well change as a result of the rulemaking process, the question whether the current language of the rule supports petitioner may be of limited prospective importance. And the Advisory Committee is fully capable of addressing the policy concerns that petitioner raises here. See Pet. 22-27.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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