No. 24-275

IN THE

Supreme Court of the United States

DONTE PARRISH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

Brief of Bryan Lammon as Amicus Curiae Supporting Petitioner

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Interest of Amicus Curiae*

Bryan Lammon is a lawyer and law professor who studies federal appellate jurisdiction, particularly if, when, and how litigants can appeal. Through his scholarship and other writings, he works to bring clarity and consistency to the law in this area. He has given particular attention to the issue in this case, *i.e.*, the effect of premature notices of appeal. *See* Bryan Lammon, *Cumulative Finality*, 52 GA. L. REV. 767 (2018); Bryan Lammon, *Proposed Amendment to Federal Rule of Appellate Procedure 4(a)(2)*, No. 20-AP-A (Feb. 9, 2020), *available at* https://www.uscourts.gov/rules-policies/archives/suggestions/bryan-lammon-20-ap. He seeks to aid this Court in its exposition and application of the law of federal appellate jurisdiction, a notoriously complicated area of law.

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* No party or party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than amicus and its counsel contributed money that was intended to fund preparing or submitting this brief.

Summary of the Argument

Both the Petitioner's brief and the Respondent's brief explain that (1) the general background rule of federal appellate practice is cumulative finality—*i.e.*, giving effect to premature notices of appeal; and (2) nothing in 28 U.S.C. § 2107(c) or Federal Rule of Appellate Procedure 4(a)(6) displaces this background rule. Amicus writes to expand on the first point, providing further background on the cumulative-finality doctrine and explaining why this Court's guidance on that doctrine would be useful.

For over half a century, the federal courts have given effect to many notices of appeal filed before the time to appeal started running. *See, e.g.*, *Lemke v. United States*, 346 U.S. 325, 326 (1953), *superseded on other grounds by* FED. APP. P. 3(a)(2); *Evans v. Jones*, 366 F.2d 772, 773 (4th Cir. 1966); *Firchau v. Diamond Nat'l Corp.*, 345 F.2d 269, 271 (9th Cir. 1965). This practice of relating forward premature notices of appeal goes by many names but is perhaps most commonly called "cumulative finality." *See, e.g.*, *Houck v. Substitute Tr. Servs., Inc.*, 791 F.3d 473, 478–79 (4th Cir. 2015) (applying "the doctrine of cumulative finality"); *see generally* Bryan Lammon, *Cumulative Finality*, 52 GA. L. REV. 767 (2018); *see also* 15A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3914.9 (3d ed. 2022); 16A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & CATHERINE T. STRUVE, FEDERAL PRACTICE & PROCEDURE § 3950.5 (4th ed. 2008). While this longstanding doctrine has been partially codified in multiple procedural rules, it continues to provide the default background rule of federal appellate practice. It also makes good sense—

premature notices of appeal notify the court and parties of an appeal before the time to appeal expires, and they rarely (if ever) cause any harm.

The cumulative-finality doctrine dictates the outcome in this case. In holding as much, this Court can give the courts of appeals some much-needed guidance in this area.

Argument

A. Cumulative finality's default rule of federal practice gives effect to many premature notices of appeal.

For at least half a century, the cumulative-finality doctrine has guided federal courts in their treatment of premature notices of appeal. This longstanding doctrine tells courts to give effect to many of these notices. And although the doctrine has been partially codified in procedural rules, it continues to apply in cases specific rules do not cover.

1. The cumulative-finality doctrine comes from numerous decisions giving effect to premature notices of appeal.

Cumulative finality's roots can be traced back at least to this Court's decision in *Luckenbach S.S. Co. v. United States*, 272 U.S. 533, 535 (1926), which held that a premature application to appeal from a Court of Claims decision "was not a nullity." Other early examples include this Court's decision in *Lemke*, which held that a notice of appeal filed before entry of judgment was effective, 346 U.S. at 326, and

the D.C. Circuit's decision in *Hamilton v. United States*, 140 F.2d 679, 679–80 (D.C. Cir. 1944), which gave effect to a notice of appeal filed in the Municipal Court for the District of Columbia while a new-trial motion was pending.

Cumulative finality emerged as a coherent doctrine about half a century ago in a series of decisions concerning notices of appeal filed before the entry of a final judgment. *See* Lammon, *supra*, at 781–87. The entry of a final judgment normally starts the appeal clock. *See* FED. R. APP. P. 4(a)(1). So a notice filed before entry of that judgment is premature. Courts nevertheless held that these notices—as well as other premature notices of appeal—were valid. *See* FED. R. APP. P. 4 advisory committee's note to 1979 amendment (noting that even without an express procedure rule, "the courts of appeals quite generally have held premature appeals effective").

Courts held, for example, that the entry of a written judgment saved notices of appeal filed after the district court announced its decision but before that entry. *See, e.g.*, *Hodge v. Hodge*, 507 F.2d 87, 89 (3d Cir. 1975); *Markham v. Holt*, 369 F.2d 940, 941–43 (5th Cir. 1966). Courts held that notices filed after the district court dismissed a complaint (but not the entire action) took effect once the district court dismissed the action. *See, e.g.*, *Firchau*, 345 F.2d at 271. Courts held that the subsequent resolution of all claims in a multi-claim action saved notices of appeal filed after the resolution of only some claims. *See, e.g.*, *Richerson v. Jones*, 551 F.2d 918, 922–23 (3d Cir. 1977). And courts gave effect to notices of appeal filed before the district court extended the time to appeal under Federal Rule of Appellate Procedure

4(a)(5). *See, e.g.*, *Bryant v. Elliott*, 467 F.2d 1109, 1109 (5th Cir. 1972) (per curiam); *Reed v. Michigan*, 398 F.2d 800, 801 (6th Cir. 1968) (per curiam); *Evans*, 366 F. 2d at 773. Other examples abound.[1]

To be sure, not every decision from this time deemed premature notices effective. *See, e.g.*, *Williams v. Bernhardt Bros. Tugboat Serv., Inc.*, 357 F.2d 883, 885 (7th Cir. 1966) (dismissing a premature appeal despite a subsequent entry of judgment, reasoning that the district court lacked jurisdiction to enter the judgment after the appeal had been filed). But much of the caselaw did. And courts continue to do so in a variety of scenarios. *See, e.g.*, *Williamson v. Stirling*, 912 F.3d 154, 170 (4th Cir. 2018); *Jimenez-Morales v. U.S. Att'y Gen.*, 821 F.3d 1307, 1309 (11th Cir. 2016); *In re Woolsey*, 696 F.3d 1266, 1269–71 (10th Cir. 2012); *Bldg. Indus. Ass'n of Superior Cal. v. Norton*, 247 F.3d 1241, 1244–45 (D.C. Cir. 2001); *In re Rimsat, Ltd.*, 212 F.3d 1039, 1044 (7th Cir. 2000).

The early cases recognized that premature notices of appeal fulfill their notification purpose and rarely

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[1] *See, e.g.*, *Boettger v. Moore*, 483 F.2d 86, 87 (9th Cir. 1973) (holding that a subsequent partial judgment under Federal Rule of Civil Procedure 54(b) saved a notice of appeal filed after the dismissal of claims against some, but not all, defendants); *Song Jook Suh v. Rosenberg*, 437 F.2d 1098, 1099–1101 (9th Cir. 1971) (holding that the denial of a new-trial motion saved a notice of appeal filed while that motion was pending); *Eason v. Dickson*, 390 F.2d 585, 588 (9th Cir. 1968) (holding that subsequent dismissal of an action saved a notice of appeal filed after refusal to convene a three-judge panel); *Curtis Gallery & Library, Inc. v. United States*, 388 F.2d 358, 360 (9th Cir. 1967) (holding that the computation of damages saved a notice of appeal filed after a determination of liability).

(if ever) cause any harm. *See, e.g.*, *Sanchez v. Maher*, 560 F.2d 1105, 1107 n.2 (2d Cir. 1977); *see also Dougherty v. Harper's Magazine Co.*, 537 F.2d 758, 762 (3d Cir. 1976) (giving effect to a premature notice of appeal and stating that "to do otherwise would be a travesty of justice"); Pet. Br. at 34–35 (explaining the sound policy behind cumulative finality); Resp. Br. at 23–25 (same). And these cases established cumulative finality's default rule of federal appellate practice: a notice of appeal is normally effective despite being filed before the time to appeal has started to run.

2. The Federal Rules of Appellate Procedure include specific applications of the cumulative-finality doctrine.

The cumulative-finality doctrine can be seen in at least four provisions of the Federal Rules of Appellate Procedure. These rules do not capture all aspects of the doctrine, as each addresses a specific cumulative-finality scenario. But they illustrate the default rule for premature notices, as each provides that a notice of appeal is effective despite being filed before the time to appeal has started to run.

First is Rule 4(a)(2), which provides that "[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." FED. R. APP. P. 4(a)(2). Rule 4(a)(2) thus saves notices of appeal filed before the district court enters the judgment that would start the appeal clock. For example, a notice of appeal is effective despite being filed after the district court has orally announced its decision but before any

written judgment. *See FirsTier Mortg. Co. v. Investors Mortg. Ins. Co.*, 489 U.S. 269, 277 (1991). The same goes for a notice filed after the district court has resolved some (but not all) of the claims in a multi-claim action, so long as the district court subsequently enters a judgment, whether that is a final judgment under Federal Rule of Civil Procedure 58(a) or a partial final judgment under Federal Rule of Civil Procedure 54(b). *See, e.g.*, *Outlaw v. Airtech Air Conditioning & Heating, Inc.*, 412 F.3d 156, 162–63 (D.C. Cir. 2005); *see also* 16A WRIGHT ET AL., *supra*, § 3950.5 (citing examples).

Second is Rule 4(a)(2)'s criminal analogue, Rule 4(b)(2). It says that "[a] notice of appeal filed after the court announces a decision, sentence, or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry." FED. R. APP. P. 4(b)(2). Like Rule 4(a)(2), Rule 4(b)(2) saves notices of appeal filed before the time to appeal began running. *See, e.g.*, *United States v. Messner*, 37 F.4th 736, 740 n.4 (1st Cir. 2022).

Finally are Rules 4(a)(4) and 4(b)(3), which address the effect of notices of appeal filed before the resolution of certain post-judgment motions. The filing of these motions resets the appeal clock, which starts anew when the district court disposes of the last post-judgment motion (or, in criminal cases, enters the judgment of conviction). *See* FED. R. APP. P. 4(a)(4)(A); 4(b)(3)(A). These premature notices become effective once the district court disposes of the post-judgment motions. *Id.* 4(a)(4)(B)(i); 4(b)(3)(B). So like Rules 4(a)(2) and 4(b)(2), Rules 4(a)(4) and 4(b)(3) save notices of appeal filed before the time to appeal began running.

Rule 4(a)(4)'s history is particularly instructive.

Before the rule was amended in 1993, Rule 4(a)(4) expressly required that would-be appellants file a new notice of appeal after the district court disposed of the last post-judgment motion. *See* FED. R. APP. P. 4(a)(4) (1988) ("A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above."). As the Petitioner's Brief notes, this was an express deviation from the background rule of cumulative finality. *See* Pet. Br. at 24. And this old version of Rule 4(a)(4) frequently resulted in the inadvertent loss of the right to appeal, as "[m]any litigants, especially pro se litigants, fail[ed] to file the second notice of appeal." FED. R. APP. P. 4 advisory committee's note to 1993 amendment. The rule thus created "a trap for an unsuspecting litigant." *Id.*

To disarm this trap, this Court amended Rule 4(a)(4) in 1993. The time to appeal still runs from the district court's disposition of the last post-judgment motion. *See* FED. R. APP. P. 4(a)(4)(A). But if a notice of appeal is filed before the district court disposes of these post-judgment motions, "the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered." *Id.* 4(a)(4)(B)(i).

Each of these rules is a specific application of the general cumulative-finality doctrine. As the Tenth Circuit noted in *Hinton v. City of Elwood*, 997 F.2d 774, 778 (10th Cir. 1993), Rules 4(a)(2) and 4(a)(4) "stand for the proposition that a premature notice of appeal retains its validity only when the order appealed from is likely to remain unchanged in both its form and its content." Indeed, Rule 4(a)(2)

expressly stemmed from some of the early cumulative-finality decisions, *see* FED. R. APP. P. 4 advisory committee's note to 1979 amendment (citing, among others cases, *Hodge* and *Firchau*), and the advisory committee's notes to Rule 4(a)(2) recognized that even without an express procedure rule, "the courts of appeals quite generally have held premature appeals effective," *id.*

3. The cumulative-finality doctrine continues to exist outside the specific scenarios addressed in procedural rules.

To be sure, there is no express procedural rule of cumulative finality that applies to this case. But none is needed. The codified instantiations of cumulative finality do not limit the doctrine's application in other contexts. The doctrine instead exists alongside those rules.

As much can be seen in courts' treatment of notices of appeal filed before a district court extends the time to appeal under Federal Rule of Appellate Procedure 4(a)(5). *See, e.g.*, *McNicholes v. Subotnik*, 12 F.3d 105, 107 (8th Cir. 1993) (holding that an extension of the time to appeal under Rule 4(a)(5) "retroactively validated" a prior notice of appeal; no new notice of appeal was necessary). The same is true for notices filed before a district court reopens the time to appeal under Rule 4(a)(6) (at least outside of the Fourth Circuit). *See, e.g.*, *Winters v. Taskila*, 88 F.4th 665, 671 (6th Cir. 2023) (holding that an appellant need not file a new notice of appeal after the appeal period is reopened). No procedural rule expressly addresses these scenarios. But the courts of appeals hold that a notice is valid despite

being filed before a Rule 4(a)(5) extension or Rule 4(a)(6) reopening. Courts have also applied cumulative finality's general background rule in other contexts, such as immigration and bankruptcy appeals. *See, e.g.*, *Martinez v. Barr*, 941 F.3d 907, 919 (9th Cir. 2019) (applying cumulative finality in the immigration-appeal context); *Shepherd v. Holder*, 678 F.3d 1171, 1178–79 (10th Cir. 2012) (same); *Jiminez-Morales*, 821 F.3d at 1309 (same); *Woolsey*, 696 F.3d at 1269–72 (same, but in the bankruptcy-appeal context); *Rimsat*, 212 F.3d at 1044 (same).

* * *

The default federal rule is thus one of cumulative finality: courts should give effect to a notice of appeal filed before the time to appeal started running so long as no party is prejudiced.

This is not to say that a notice filed at any time is effective. The notice must come after the decision that a party wants to appeal. *See Manrique v. United States*, 581 U.S. 116, 120 (2017) (noting that Rule 4(b)(1)(A)(i) "contemplate[s] that the defendant will file the notice of appeal after the district court has decided the issue sought to be appealed"); *Wall Guy, Inc. v. Federal Deposit Ins. Corp.*, 95 F.4th 862, 870–71 (4th Cir. 2024) ("[A] notice of appeal filed before the district court has even announced a decision on a future or pending motion cannot confer appellate jurisdiction over an appeal from a later order related to that motion."); *cf.* FED. R. APP. P. 4(a)(4)(B)(ii) (requiring a second or amended notice of appeal to challenge the resolution of a post-judgment motion). So there should be no concern (as a Ninth Circuit judge once worried) that a plaintiff can file its "notice of appeal as an appendage to his original complaint." *Ruby v. Sec'y of U.S. Navy*, 365 F.2d 385, 389 (9th

Cir. 1966) (Chambers, J., concurring). Such a tactic would not only display a lack of confidence in one's case. It would also be ineffective to appeal any subsequent decisions.

B. The cumulative-finality doctrine gives effect to notices of appeal filed before a district court reopens the time to appeal.

As the Petitioner's and Respondent's Briefs explain, nothing in the relevant statutes or rules requires a new notice of appeal after a district court reopens the time to appeal under Rule 4(a)(6). *See* Pet. Br. at 27–34; Resp. Br. at 25–27. *Cf.* FED. R. APP. P. 4(a)(4) (1988) (expressly requiring a new notice of appeal if one is filed before the district court resolved all post-judgment motions). In other words, no statute or rule upsets the background cumulative-finality rule in this context. So that background rule applies: a notice of appeal is effective even if filed before a district court reopens the time to appeal under Rule 4(a)(6).

The Fourth Circuit's decision is thus wrong. The Petitioner's notice of appeal came after the district court resolved all of his claims but before the reopened time to appeal started running. Everyone had notice of Parrish's intent to appeal. And no one would be harmed from giving effect to the premature notice. Applying the cumulative-finality doctrine, the Fourth Circuit should have validated Parrish's premature notice of appeal.

C. This Court should take this opportunity to expressly recognize the background rule of cumulative finality.

The cumulative-finality doctrine is all this Court needs to decide this case. And this Court should expressly recognize the doctrine, which would give the courts of appeals some much needed guidance in this area.

Despite cumulative finality's pedigree in the federal courts, this Court has only once addressed it at any length. In *FirsTier*, this Court held that Federal Rule of Appellate Procedure 4(a)(2) saved a notice of appeal filed after a district court had announced from the bench its decision to dismiss a case but before it formally entered the final judgment of dismissal on the docket. 498 U.S. at 277. But *FirsTier* gave little guidance on the cumulative-finality doctrine, whether in the specific context of Rule 4(a)(2) or more generally. One member of this Court has noted that *FirsTier* left "a vast middle ground of uncertainty." *Outlaw*, 412 F.3d at 161 (Roberts, J.). Another member of this Court has described *FirsTier*'s discussion of Rule 4(a)(2) as "cryptic and arguably tangential" and noted that the opinion is "open to many different understandings." *Woolsey*, 696 F.3d at 1271 (Gorsuch, J.); *see also* Lammon, *Cumulative Finality*, *supra*, at 815–26 (criticizing *FirsTier* and its reading of Rule 4(a)(2)).

FirsTier has left the courts of appeals with insufficient guidance on the cumulative-finality doctrine. This lack of direction has led to a variety of circuit splits, including the split that this case implicates. *See* Lammon, *Cumulative Finality*, *supra*, at 802–14. Courts of appeals disagree, for example,

about whether a notice of appeal filed after the district court resolves some claims is saved by the subsequent resolution of all remaining claims. *Compare Outlaw*, 412 F.2d at 162 (holding that a notice of appeal filed after the resolution of some claims was saved by the subsequent resolution of all remaining claims), *with Miller v. Special Weapons, L.L.C.*, 369 F.3d 1033, 1035 (8th Cir. 2004) (rejecting "the doctrine of 'cumulative finality'" and holding that a premature notice of appeal filed after resolution of the plaintiff's claims was not saved by the subsequent resolution of the defendant's counterclaim). Courts of appeals disagree about whether a notice filed after a determination of liability for damages, attorneys fees, or sanctions is saved by the subsequent calculation of those damages, fees, or sanctions. *Compare DL Res., Inc. v. FirstEnergy Sols. Corp.*, 506 F.3d 209, 213–16 (3d Cir. 2007) (giving effect to such a notice), *and Harbert v. Healthcare Servs. Grp., Inc.*, 391 F.3d 1140, 1144–46 (10th Cir. 2004) (same), *with Feldman v. Olin Corp.*, 692 F.3d 748, 758–59 (7th Cir. 2012) (deeming a notice of appeal ineffective because the order appealed from "explicitly reserved the calculation of fees"). They even disagree about the relationship between codified rules and the cumulative-finality doctrine. *Compare Outlaw*, 412 F.3d at n.2 (concluding that Rule 4(a)(2)—as interpreted in *FirsTier*—limited prior cumulative-finality decisions), *with Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581, 586 (3d Cir. 1999) (concluding that Rule 4(a)(2) exists alongside the cumulative-finality doctrine that preceded it); *see also Woolsey*, 696 F.2d at 1270 ("[I]t is a matter of some debate whether Rule 4(a)(2)—and so *FirsTier*'s gloss on it—supplies

the sole means for a court of appeals to secure jurisdiction over a prematurely filed appeal.").[2]

This case will of course not resolve all of these disputes. But it could provide much-needed guidance on the cumulative-finality doctrine that could assist the courts of appeals in resolving these splits themselves.

Uniformity and certainty in this area of the law are particularly important. The timely filing of a notice of appeal in civil cases is a jurisdictional requirement. *See* 28 U.S.C. § 2107(a); *Bowles v. Russell*, 551 U.S. 205, 214 (2007). When courts hold that a premature notice of appeal does not relate forward, the result is often a missed opportunity to appeal. After all, by the time the court of appeals deems the premature notice ineffective, the time to appeal will have long expired (precisely what happened in this case). *See also, e.g.*, *Norton v. High*, 793 F. App'x 218, 219 (4th Cir. 2020) (mem.) (after the time to appeal had expired, refusing to give effect to a premature notice of appeal). Uncertainty over a notice of appeal's effect is thus unacceptable. This Court can provide the necessary guidance.

This case is an ideal vehicle to provide that guidance. No statute or procedural rule addresses the specific circumstance of a reopened appeal window under Rule 4(a)(6). The general cumulative-finality doctrine thus decides this case, giving this Court the perfect opportunity to address that doctrine.

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[2] Atop the various inter-circuit splits are a variety of intra-circuit splits. *See* Lammon, *Cumulative Finality*, *supra*, at 802–14 (reviewing the state of each circuit's Rule 4(a)(2) caselaw).

Conclusion

The long-standing cumulative-finality doctrine is all that this Court needs to validate the notice of appeal in this case. And this case provides an excellent opportunity for this Court to provide much-needed guidance on that doctrine.

Respectfully submitted,

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