No. 24-275

In the Supreme Court of the United States

DONTE PARRISH, PETITIONER

v.

UNITED STATES OF AMERICA

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

REPLY BRIEF FOR RESPONDENT SUPPORTING PETITIONER

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Under Section 2107 of Title 28, a district court may reopen the time for appeal for a period of 14 days if the party files a motion to reopen within a specified deadline and the court finds that the party did not receive timely notice of the judgment and that the reopening would not prejudice any party. 28 U.S.C. 2107(c). No one disputes that a party who files after that 14-day reopened period expired has missed the jurisdictional deadline and cannot pursue his appeal. See *Bowles* v. *Russell*, 551 U.S. 205, 209 (2007). But petitioner here filed his notice of appeal *before* the district court granted the motion to reopen and before the 14-day period began to run. The prematurity of that filing should not doom petitioner's appeal.

This Court has long instructed courts to disregard technical defects in notices of appeal so long as the filing occurs before the jurisdictional deadline expires, pro-

vides adequate information regarding what is being appealed, and does not prejudice another party. Those requirements are satisfied here, and that should be sufficient to allow petitioner's appeal to proceed.

The contrary argument of the amicus appointed by the Court to defend the judgment below depends on his assertions that Section 2107 requires a notice of appeal to be filed after reopening is granted, and that the beginning of the 14-day statutory appeal period after reopening is granted must have the same jurisdictional significance as the end of that period. But that conclusion —that petitioner's premature notice of appeal is jurisdictionally barred—cannot be squared with this Court's holding that premature notices of appeal filed before the entry of judgment can relate forward to the date of such entry. See *FirsTier Mortg. Co.* v. *Investors Mortg. Ins. Co.*, 498 U.S. 269, 273 (1991). In *FirsTier*, as here, the notice of appeal was filed before the statutory appeal period began to run. The Court should permit relation forward here, just as it did there.

The Federal Rules of Appellate Procedure confirm that premature notices of appeal can relate forward. And the principles underlying those rules apply equally to a notice of appeal filed before the granting of a motion to reopen the appeal period. Amicus nonetheless asserts that because Rule 4 specifically addresses relation forward only for notices of appeal filed before judgment is entered or before certain posttrial motions are decided, relation forward is unavailable for all other notices of appeal. But courts—including this Court—validated premature notices of appeal before that rule was adopted. As a rule of judicial procedure, Rule 4 is best interpreted as consistent with established judicial practice, not displacing it *sub silentio*. Thus, while Rule 4

now provides a framework for addressing some of the most common circumstances involving premature notices of appeal, it has not categorically displaced or foreclosed the availability of relation forward in circumstances it does not specifically address.

Indeed, the Advisory Committee was in the process of considering an amendment to the Federal Rules of Appellate Procedure to address this situation when the Court granted certiorari in this case. See Gov't Br. in Opp. 16-17. Having nevertheless granted certiorari, the Court should decline to conclude that the rules themselves implicitly preclude validation of premature notices of appeal in all contexts not specifically addressed. Rather, the Court should embrace precedent and common sense and permit petitioner's notice of appeal to relate forward. That holding would provide clarity to lower courts, prevent the need for duplicative notices of appeal, and preserve the ability of courts of appeals to address the merits rather than requiring dismissal on the basis of technical defects that do not prejudice any party.

Amicus also errs in suggesting that this Court can affirm on the alternative ground that the court of appeals had discretion to decline to recognize relation forward here and that the court did not abuse its discretion in doing so. The court based its decision on a legal error, *i.e.*, the incorrect view that Section 2107 prohibits relation forward—not on any exercise of discretion. Nor could the court exercise any discretion to override the government's waiver of a nonjurisdictional defense. Regardless, this Court's precedents do not suggest that application of the relation-forward principle is left to the court of appeals' discretion. This Court should therefore reverse the judgment below and remand to

allow the court of appeals to address the merits of petitioner's appeal.

A. Amicus Fails To Show That Section 2107 Or The Federal Rules Of Appellate Procedure Preclude Giving Effect To Petitioner's Notice Of Appeal

Neither Section 2107(c) nor Rule 4(a)(6) explicitly addresses the proper treatment of a notice of appeal filed after the standard appeal period has expired but before the district court grants a motion to reopen. Amicus's argument boils down to the contention that the failure of Section 2107(c) or Rule 4(a)(6) to address that scenario means that such a notice of appeal is jurisdictionally barred. But this Court has already recognized that the statutory text does not preclude premature notices of appeal, and the rules do not purport to address all scenarios in which relation forward is permissible. Validation of premature notices predated the rules and can continue to exist in appropriate circumstances, consistent with pre-existing judicial practice.

1. Amicus spends much of his brief explaining (Br. 13-18, 28-30) that Section 2107(c) and Rule 4(a)(6) contemplate that a litigant who seeks to reopen the appeal period will file a notice of appeal during that reopened 14-day period. The government does not disagree with amicus's description of the typical scenario, on which the language admittedly focuses. Under Section 2107(a), a notice of appeal is to be filed "within thirty days after the entry of" the relevant judgment, order, or decree—a time period that is extended to sixty days, if the federal government or its agencies or officials are a party. 28 U.S.C. 2107(a) and (b). And Section 2107(c) authorizes "reopen[ing] the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal" if a timely motion to reopen is filed. 28

U.S.C. 2107(c). The quoted language plainly suggests that Congress envisioned the situation in which a notice of appeal is filed during that reopened period. Rule 4(a)(6) uses similar language, to similar effect. See Fed. R. App. P. 4(a)(6).

That the statute and rules envision notices of appeal filed within the 14-day period does not resolve this case, however. Section 2107 also provides that a notice of appeal will be filed "after" the entry of judgment. Yet, in *FirsTier*, *supra*, this Court held that a notice of appeal filed *before* a judgment was entered was not "fatally premature," but could instead "relate forward to judgment and serve as an effective notice of appeal *from the final judgment*." 498 U.S. at 272, 275. That relation-forward principle had been adopted by Rule 4(a)(2), but this Court recognized that the rule had simply "codif[ied] a general practice in the courts of appeals of deeming certain premature notices of appeal effective." *Id.* at 273. And the Court plainly did not view that prior practice—or the rule endorsing it—as at odds with Section 2107, or any other statute. See *id.* at 275 (rejecting the argument that the relation-forward principle contravened 28 U.S.C. 1291 because the ruling was not final when appealed).

Under that same logic, a notice of appeal that is premature because it is filed before the district court reopens the appeal period may relate forward to the beginning of the 14-day reopened period without running afoul of Section 2107(c)'s text.

2. Amicus nevertheless asserts (Br. 18-20, 24-28) that premature notices of appeal may be validated only in the specific circumstances explicitly articulated in Rule 4. The government agrees that Rule 4 limits the circumstances in which a notice of appeal that is filed

"before the entry of the judgment," Fed. R. App. P. 4(a)(2), or "before [the court] disposes," of posttrial motions, Fed. R. App. P. 4(a)(4)(B)(i), may relate forward. For example, this Court recognized that Rule 4(a)(2) applies when an "unskilled litigant who files a notice of appeal from a decision that he reasonably but mistakenly believes to be a final judgment," but not when an appellant files a "notice of appeal from a clearly interlocutory decision." *FirsTier*, 498 U.S. at 276. Insofar as lower courts have applied a relation-forward principle to prejudgment notices of appeal that is broader than this Court's construction of Rule 4(a)(2), that would be error. See *Outlaw* v. *Airtech Air Conditioning & Heating, Inc.*, 412 F.3d 156, 160 (D.C. Cir. 2005) (Roberts, J.) (holding that "prior lines of precedent" discussing premature appeals that ripen "'when the district court's judgment becomes final prior to disposition of the appeal'" "must be limited" in light of *FirsTier*'s construction of Rule 4(a)(2)) (citation omitted). As then-Judge Roberts explained, a "broader notion of when a notice of appeal filed before entry of judgment may be effective" cannot survive *FirsTier*'s "narrower construction of the specific appellate rule governing such notices of appeal, without rendering the rule largely if not entirely superfluous." *Id.* at 160 n.2.

Such superfluity concerns do not exist when considering the relation-forward principle outside of the contexts that the rules themselves address, however. Absent those concerns tied to specific provisions of Rule 4, neither that rule nor this Court's decision in *FirsTier* should be read to foreclose the relation-forward principle in other, comparable circumstances. Indeed, this Court rejected a similar argument in *Scarborough* v. *Principi*, 541 U.S. 401 (2004). There, the Court addressed

whether an amended fee application that corrected a deficiency after the application deadline could "relate back" to the date of the timely, but deficient, application. *Id.* at 422. The government had argued that the "relation-back regime" as "codified in Rule 15(c) of the Federal Rules of Civil Procedure" applied only to "pleadings," not fee applications. *Id.* at 417 (citation omitted). This Court declined to limit the principle to the circumstances addressed in Rule 15(c). Instead, the Court explained that "'relation back' was not an invention of the federal rulemakers," but had roots in equity and had been applied by the Court well before the federal rules adopted it, as the Advisory Committee itself recognized. *Id.* at 417-418.

The same reasoning applies here. Just as with the relation-back principle, validating premature notices of appeal is a practice that predated the Federal Rules, including in this Court. See, *e.g.*, *Lemke* v. *United States*, 346 U.S. 325 (1953) (per curiam); see Gov't Br. 17-18. Just as the *Scarborough* Court discussed with respect to Rule 15(c), the Advisory Committee recognized in amending Rule 4 that "courts of appeals quite generally have held premature appeals effective," even in the absence of a rule. See Fed. R. App. P. 4 advisory committee's note (1979 Amendment); see *FirsTier*, 498 U.S. at 273 (noting that "Rule 4(a)(2) was intended to codify a general practice" as to "certain premature notices of appeal"). And similar to the equitable roots of the relation-back principle, this Court originally considered the relation-forward principle as stemming from the longstanding approach of disregarding harmless errors that do not affect substantial rights. *Lemke*, 346 U.S. at 326; Gov't Br. 22-23.

Amicus disputes (Br. 24-26) the relevance of courts' practices before the adoption of Rule 4, contending that

those decisions largely addressed circumstances that are now encompassed by Rule 4(a)(2). But decisions predating the rules also validated notices of appeal filed after the general appeal period ended and before an extension was granted, a scenario not covered by Rule 4(a)(2). See Gov't Br. 18 (citing *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* v. *Jones*, 366 F.2d 772, 773 (4th Cir. 1966) (per curiam)). Those decisions are the most analogous decisions available because until its 1991 amendment, Section 2107 did not authorize reopening the appeal period, but only allowed a district court to "extend the time for appeal not exceeding thirty days from the expiration of the original time * * * upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree." 28 U.S.C. 2107 (1964). That courts repeatedly gave effect to notices of appeal filed before an extension was granted is therefore instructive here.

Amicus asserts (Br. 35 n.7) that those holdings may be incorrect following the adoption of Rule 4. But no negative inference is warranted from the fact that Rule 4 approves certain premature notices of appeal. The rule simply addresses common circumstances in which premature notices of appeal are filed, and provides a framework for addressing those circumstances.

By contrast, as the government explained in its Brief in Opposition (Br. 14-15), the confluence of events that must exist to give rise to the question presented here are rare. A litigant must fail to receive notice of the entry of judgment or order within 21 days of its entry, 28 U.S.C. 2107(c)(1)—an uncommon occurrence given the availability of electronic filing, even for many *pro se* lit-

igants. The litigant must then make a timely request to reopen the appeal period, but file a notice of appeal before reopening is granted and not after. And the court must determine that granting reopening will not prejudice any party and otherwise choose to exercise its discretion to grant the motion. 28 U.S.C. 2107(c)(2). It is not surprising that Rule 4 does not directly address that uncommon scenario.

Moreover, until the court of appeals' decision below, all courts that had addressed that scenario had come to the same conclusion and permitted the notice of appeal to relate forward upon reopening, providing little need for the Advisory Committee to intervene. See Gov't Br. 23 (collecting cases). Following the disagreement created by the court of appeals below, the Sixth Circuit observed that the Advisory Committee "may be a profitable next stage for this debate." *Winters* v. *Taskila*, 88 F.4th 665, 672 (2023) (Sutton, C.J.). And the Advisory Committee in fact proceeded to form a subcommittee to address issues implicated by the disagreement among the circuits. See Gov't Br. in Opp. 16-17; see also 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). That subcommittee began to look into "whether a notice of appeal must be filed after a motion to reopen the time to appeal has been granted." Committee on Rules of Practice & Procedure, *Minutes* 16-17 (Jan. 7, 2025), *reprinted in Advisory Committee on Appellate Rules*, Tab 2A, at 56-57 (Apr. 2, 2025). When this Court granted certiorari while "aware of the Advi-

sory Committee's actions" to consider the issue, the "subcommittee decided not to meet this spring" and will instead "await the decision" in this case. See Memorandum from Edward Hartnett to the Advisory Committee on the Federal Rules of Appellate Procedure, *Reopening Time to Appeal 24-AP-M* 2 (Mar. 1, 2025), *reprinted in Advisory Committee on Appellate Rules*, Tab 6B, at 832 (Apr. 2, 2025).

There is thus no basis to conclude that the absence of a rule addressing premature notices of appeal in this atypical context must indicate that the rules preclude relation forward. The more appropriate inference is that, until this circuit split emerged, this particular issue had not arisen with sufficient frequency to come to the Advisory Committee's attention. In these circumstances, the rule should be interpreted as consistent with established judicial practice, not as impliedly displacing that practice.[*]

3. Amicus next assumes (but does not endorse) the conclusion that premature notices of appeal may be given effect by granting an extension, but maintains that the same would not be true for reopening because Section 2107 and Rule 4 draw a "textual difference" between "'extension'" and "'reopening.'" Br. 34; see Br. 34-38. That textual difference does not have the significance amicus suggests.

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[*] If this Court were to view Rule 4 as creating a negative inference that precludes relation forward here, reversal would still be warranted. That interpretation of Rule 4 would not affect the court of appeals' subject-matter jurisdiction. See *Hamer* v. *Neighborhood Hous. Servs. of Chicago*, 583 U.S. 17, 20 (2017) ("Only Congress may determine a lower federal court's subject-matter jurisdiction."). At most, Rule 4 would impose a mandatory claim-processing rule that could be waived, see *ibid.*, and the government waived the application of any such rule here, see p. 19, *infra*.

As the government has explained (Br. 25-27), Congress's use of different terms in referring to an "extension" and a "reopening" of the appeal period simply reflects the different procedural postures of the cases covered by the two provisions of Rule 4, and it indicates that there are corresponding differences in the showing required and the time within which the motion may be filed. Congress itself also created the 14-day period for reopening, but did not set a limit for extensions. As this Court has recognized, the consequence of Congress's actions is that the deadline for reopening is jurisdictional whereas Rule 4's time constraints for an extension are not. See *Hamer* v. *Neighborhood Hous. Servs. of Chicago*, 583 U.S. 17, 23-25 (2017). But nothing about any of those differences answers the question whether a notice of appeal filed after the regular appeal period has expired should be rendered valid upon granting either motion. Indeed, amicus seems to acknowledge as much in suggesting (Br. 35 n.7) that the court of appeals may be incorrect in its view that premature notices of appeal are validated when an extension is granted.

Amicus nevertheless repeats the court of appeals' contention that the term "'reopen'" refers to a "discontinuity," such that proceedings had been closed before an action is taken to open them again. Br. 37; see Pet. App. 10a. But amicus does not explain why the same cannot be true for an extension. Like a motion to reopen, a motion for an extension under Section 2107(c) may be filed after the appeal period has lapsed. And while amicus disputes (Br. 35-36) the relevance of *HollyFrontier Cheyenne Refining, LLC* v. *Renewable Fuels Association*, 594 U.S. 382 (2021), in part because the Court in that case was careful not to "suggest that every use of the word 'extension' must be read the same

way," *id.* at 392, the Court expressly cited Section 2107(c) as an example of a statute permitting an extension where "the timer can start, run, finish, and then *restart*," *id.* at 391.

More fundamentally, the presence or absence of discontinuity is not relevant for purposes of determining whether a notice of appeal that was premature when filed may be given effect if a motion to extend or reopen the appeal deadline is granted. Amicus appears to reason (Br. 38) that discontinuity "bars any attempt to relate forward a tardy notice of appeal" because the reopened period has "a fixed start and end." But this Court has never suggested that the beginning of the applicable appeal period has jurisdictional significance, such that a court may not allow a premature notice of appeal to relate forward.

Indeed, if the beginning of an appeal period had the same jurisdictional significance as the close of that period, *FirsTier* would have come out differently. That case also involved a notice of appeal filed before the beginning of the applicable appeal period. The *FirsTier* Court recognized at the outset that the notice of appeal —filed before entry of judgment—was premature under the language of Section 2107, see 498 U.S. at 272-273, because that statute refers to a notice of appeal being filed "after the entry" of judgment, 28 U.S.C. 2107(a). If the Court had instead understood Section 2107 to set only an end date for the appeal period (as amicus must imagine in order to square *FirsTier* with his theory), the notice of appeal would not have been considered premature and there would have been no need for the notice to "relate forward" to the date judgment was entered, or for Rule 4(a)(2) to treat the notice of appeal "as filed after such entry." 498 U.S. at 275

(quoting Fed. R. App. P. 4(a)(2)). Instead, the Court viewed relation forward as necessary to fall within Section 2107's terms, and also viewed such relation forward as a permissible approach that did not unlawfully "enlarg[e] appellate jurisdiction." *Ibid.* The Court's reasoning thus confirms that the beginning of the appeal period—unlike the end—is not itself jurisdictional.

For the same reason, amicus's invocation (Br. 21) of this Court's precedents "demanding strict compliance with jurisdictional rules" lacks force. As just explained, the beginning of the appeal period is not jurisdictional, and amicus cannot dispute that petitioner filed his notice of appeal before the time limit that is jurisdictional —the expiration of the 14-day reopened period. In those circumstances, a different line of cases applies: those in which this Court has consistently declined to hold that technical irregularities may prevent courts from adjudicating the merits of appeals. See Gov't Br. 19-23 (discussing *Lemke*, 346 U.S. at 326; *Foman* v. *Davis*, 371 U.S. 178, 181-182 (1962); *Smith* v. *Barry*, 502 U.S. 244, 248-250 (1992); *Becker* v. *Montgomery*, 532 U.S. 757, 767 (2001)). Under those cases, the prematurity of petitioner's notice of appeal is an "imperfection[]" that does not implicate the core requirements for a notice of appeal and that should not render it invalid. *Becker*, 532 U.S. at 767.

B. Amicus's Remaining Arguments That The Court Of Appeals Lacked Jurisdiction Are Unpersuasive

Amicus's remaining arguments, most of which sound more in policy than in law, are meritless. He expresses concern that permitting petitioner's premature notice of appeal would evade the limits Congress set for reopening the appeal period, create confusion for lower courts and parties, and undermine uniformity in the ap-

plication of procedural requirements. Giving effect to petitioner's notice of appeal would not lead to those results.

1. Amicus asserts (Br. 23-24) that permitting petitioner's notice of appeal to relate forward to the date of reopening would upset the balance Congress struck in providing only a limited window for relief in certain cases in which a party failed to receive timely notice of a judgment. But permitting petitioner's notice of appeal to relate forward does not upend the limits that Congress imposed.

The motion to reopen must still be "filed within 180 days after entry of the judgment or order or within 14 days after receipt of such notice, whichever is earlier." 28 U.S.C. 2107(c). The district court must still determine that the litigant was entitled to notice of the entry of the judgment or order and "did not receive such notice from the clerk or any party within 21 days of its entry" and "that no party would be prejudiced" by granting the motion. 28 U.S.C. 2107(c)(1) and (2). The district court must then determine whether to exercise its discretion to grant the motion in light of the circumstances. 28 U.S.C. 2107(c) (stating that the "district court *may*" grant the motion to reopen after making those findings) (emphasis added). And in order to take advantage of the reopened appeal period, a litigant must file a notice of appeal before expiration of the 14-day window, and that filing must "give[] the notice required by Rule 3." *Smith*, 502 U.S. at 249.

Those limits ensure that "not every party that fails to receive timely notice of a judgment will succeed in reopening his appeal." Amicus Br. 24. But there is no sound basis for placing petitioner in that category. Allowing petitioner's appeal to move forward will not per-

mit notices of appeal to be filed after the congressionally enacted 14-day period has closed. Nor will it prejudice other parties. In filing his notice of appeal before that period, petitioner provided the government with the requisite notice of his intention to appeal earlier than contemplated by Section 2107(c). And the government has repeatedly acknowledged that petitioner's notice of appeal was sufficient and declined to assert that it suffered prejudice from the reopened period—or from the lack of a duplicative notice of appeal filed after the district court reopened the appeal period. See Gov't Br. 9-12. The circumstances here are simply not among those that Congress wanted to prevent in imposing limitations upon reopening.

The extent of amicus's position on the proper balance is also unclear. In some cases, for example, a litigant has filed a motion to reopen the appeal period along with a notice of appeal, while asking the court to defer entering the notice unless and until the court grants reopening. See *Farrow* v. *Tulupia*, No. 21-1027, 2022 WL 274489, at *1 n.1 (10th Cir. Jan. 31, 2022). If amicus's position were adopted, could a court agree to hold the notice of appeal in abeyance until acting on the motion to reopen? If so, then amicus's proposed rule would have little force, except to prevent those litigants who lack sufficient knowledge and experience to ask for such treatment. If not, it is unclear why Congress would adopt such a policy, which would prevent litigants concerned about receiving timely notice if their motions to reopen are granted from taking action to ensure that they do not lose their appellate rights forever.

2. Amicus also expresses (Br. 32) a need to adopt a rule that provides certainty for parties and administrative staff in the courts. But permitting a premature no-

tice of appeal to relate forward is a clear rule that likewise promotes certainty. If this Court clarifies that granting a motion to reopen validates a premature notice of appeal, then courts, administrative staff, and parties will all be on notice of that fact. When a district court grants a motion to reopen, it will know whether a premature notice of appeal has been filed and can expressly recognize that any such notice relates forward and is validated. Notably, validation of such notices of appeal has been the rule in five circuits—including for more than two decades in the Tenth Circuit, see *United States* v. *Marshall*, 166 F.3d 349, 1998 WL 864012, at *2 (Dec. 14, 1998) (Tbl.), cert. denied, 528 U.S. 861 (1999)—and amicus has not pointed to any difficulties in administering the rule.

Nor do the events in this case suggest there was any issue determining that petitioner intended to proceed with his appeal. The same day the district court granted petitioner's motion to reopen, the docket reflects that the record was transmitted back to the court of appeals, with a citation to petitioner's earlier notice of appeal. 17-cv-70 Docket entry no. 145 (Jan. 8, 2021). Amicus speculates (Br. 34) that the delay between the transfer to the court of appeals and the next steps in the case should be attributed to confusion caused by the lack of a new notice of appeal. Given the immediate transmission of the record and the supplemental informal opening brief petitioner filed shortly thereafter, that is unlikely. See C.A. Doc. 13 (Feb. 2, 2021). It is far more likely that the lapse in time was due to the court of appeals considering whether to appoint counsel for petitioner, a step the court eventually took. See C.A. Doc. 16 (Sept. 6, 2022). Indeed, the nine months that passed between the transmission of the record and the appoint-

ment of counsel appears to be within the normal range for that process in the Fourth Circuit. See, *e.g.*, *Henderson* v. *Harmon*, No. 22-6029 Doc. 2 (Jan. 5, 2022), and Doc. 22 (Aug. 22, 2023) (more than one-and-a-half years between appeal docketing and appointment of counsel); *Tate* v. *Harmon*, No. 21-6109 Doc. 3 (Jan. 21, 2021), and Doc. 23-1 (Feb. 10, 2022) (more than one year between appeal docketing and appointment of counsel); *Desper* v. *Clarke*, No. 19-7346 Doc. 3 (Sept. 24, 2019), and Doc. 13-1 (Aug. 21, 2020) (nearly eleven months between appeal docketing and appointment of counsel).

3. Amicus finally contends (Br. 38-41) that "[j]urisdictional rules should be applied uniformly to all litigants," and strict adherence to such rules is required, such that petitioner's status as a pro se plaintiff should not counsel in favor of adopting a more forgiving approach. The government agrees that this Court's holding regarding premature notices of appeal will apply to all litigants. But for the reasons already explained, pp. 4-5, 12-13, *supra*, the opening of an appeal period is not itself jurisdictional, so whatever rule the Court adopts is not the type of jurisdictional rule that must be strictly applied in all circumstances.

Outside of the class of cases in which the Court is construing a jurisdictional requirement, this Court has repeatedly declined to demand strict adherence to procedural rules, particularly in cases involving notices of appeal. That is the case regardless of whether the parties appear *pro se*. See *Lemke*, 346 U.S. at 326 (appellant represented by counsel); *Foman*, 371 U.S. at 181-182 (appellant represented by counsel); *Smith*, 502 U.S. at 248-249 (*pro se* appellant); *Becker*, 532 U.S. at 766-767 (*pro se* appellant). Whether the case involves a "misstep by counsel," *Foman*, 371 U.S. at 182, or that of

a *pro se* prisoner, see *Becker*, 532 U.S. at 759, this Court has long understood that "imperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court," *id.* at 767. When a notice of appeal is filed before a court reopens the appeal period, and otherwise satisfies those criteria, the prematurity of that notice should not prevent the court of appeals from considering the case on the merits.

C. Amicus's Alternative Argument Does Not Support Affirmance

As an alternative basis for affirmance, amicus argues (Br. 42-45) that even if the court of appeals *could* permit petitioner's notice of appeal to relate forward to the date the appeal period reopened, the court had discretion to decline to do so and did not abuse its discretion here. That argument fails.

As an initial matter, even if amicus were correct that courts of appeals have discretion whether to permit a premature notice of appeal to relate forward, the decision below could not be affirmed on that basis for two independent reasons. First, the court based its decision on the understanding that the "text of § 2107(c) require[d] that [petitioner] file his notice of appeal during the reopened period." Pet. App. 10a; see *id.* at 6a-10a. The court did not view its decision as discretionary or consider whether to exercise any discretion to permit the notice of appeal to relate forward. Thus, at the very least, this Court would have to vacate the decision below and remand the case to permit the court of appeals to make that determination with the proper understanding that relation forward is permissible in these circumstances.

Second, if the court of appeals had exercised discretion in this case, it would have been an abuse of discretion to decline to permit petitioner's notice of appeal to relate forward. The government expressly and repeatedly took the position that petitioner need not file a duplicative notice of appeal. See Gov't C.A. Br. 1, 11; Gov't C.A. En Banc Br. 2; Gov't C.A. Supp. Br. 7. In affirmatively declining to challenge the adequacy of petitioner's premature notice of appeal and instead encouraging the court of appeals to reach the merits of petitioner's appeal, the government waived reliance on any error petitioner made in failing to file a duplicative notice of appeal. As this Court has recognized, it would be an abuse of discretion for the court of appeals to sua sponte rely on a nonjurisdictional defense that the government has affirmatively waived. See *Wood* v. *Milyard*, 566 U.S. 463, 465-466 (2012) (finding that a court of appeals abused its discretion in overriding a State's "waiver" of a nonjurisdictional defense).

In any event, abuse of discretion is not the proper standard here. This Court has frequently reversed decisions from courts of appeals that have required strict adherence to procedural rules that are not jurisdictional when doing so would prevent an appeal. See p. 13, *supra*. In none of those cases has the Court suggested that mandating strict adherence was within the court of appeals' discretion. Rather, so long as the notice of appeal provided adequate notice and the opposing party would not be prejudiced, the Court has held that the court of appeals may not allow for "decisions on the merits to be avoided on the basis of * * * mere technicalities." *Foman*, 371 U.S. at 181.

Consistent with that understanding, the terms of Rules 4(a)(2) and 4(a)(4) do not provide courts with dis-

cretion to determine whether to treat premature notices of appeals as though they were filed after final judgment, or after the relevant posttrial motions are decided. Those rules simply instruct courts to "treat[]" the premature notice as "filed on the date of and after the entry" of the relevant judgment, Fed. R. App. P. 4(a)(2), or advise courts that the "notice becomes effective to appeal a judgment or order * * * when the order disposing of the last such remaining motion is entered," Fed. R. App. P. 4(a)(4). It would make little sense to treat relation forward as a different, discretionary option in the circumstances at issue here.

Unsurprisingly, amicus does not cite any case in which a court of appeals purported to exercise discretion to decline to give effect to a premature notice of appeal where the filing provided adequate notice and did not prejudice another party. Indeed, though some of the language in the cases that amicus cites suggests discretion, other aspects of the decisions do not. In *Richerson* v. *Jones*, 551 F.2d 918 (1977), for example, the Third Circuit reasoned that "[s]o long as the order is an appealable one and the non-appealing party is not prejudiced by the prematurity * * * the court of appeals should proceed to try the case on the merits, rather than dismiss on the basis of such a technicality." *Id.* at 923 n.6a. Similarly, in *Eason* v. *Dickson*, 390 F.2d 585, cert. denied, 392 U.S. 914 (1968), the Ninth Circuit stated that where there is no prejudice "'a notice of appeal directed to the nonappealable order *will be regarded* * * * as directed to the subsequently-entered final decision.'" *Id.* at 588 (citation omitted, emphasis added).

The other two cases amicus cites fare no better. In *Morris* v. *Uhl & Lopez Engineers, Inc.*, 442 F.2d 1247 (10th Cir. 1971), the appellant had filed a notice of ap-

peal after entry of the judgment against him, but before dismissal of a cross-claim and third-party complaint. One appellee filed a motion to have the appeal dismissed because no order had been entered under Rule 54(b), but the court of appeals instead "entered an order authorizing the trial court to entertain a motion to have the [existing] judgment given separable finality," while the court of appeals retained jurisdiction of the appeal. *Id.* at 1250. It was that course of conduct—holding the appeal until the district court dismissed pending claims—that the court of appeals referred to in concluding that the court "could refuse at the time to dismiss the appeal" and that it "had the right to continue the notice in effect." *Ibid.* And in *Duma* v. *CIR*, 534 Fed. Appx. 4 (D.C. Cir. 2013), the court addressed an appeal from the Tax Court—an appeal that is not subject to Rule 4(a)(2)—and held that even if that rule had applied, its requirements were not met. *Id.* at 5.

Thus, because abuse of discretion is not the proper standard and because reversal would be warranted even if it were, the Court should reject petitioner's alternative argument.

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The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

D. JOHN SAUER
Solicitor General

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