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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Amicus backs away from the Fourth Circuit's reasoning. He barely defends the court's primary rationale—the distinction between "extending" and "reopening." Indeed, he acknowledges that his theory likely precludes ripening in both contexts. *See* Am.Br. 35 n.7 ("circuit court decisions embracing" ripening for extensions "may well be incorrect"). And he concedes that the Fourth Circuit was wrong to insist that Mr. Parrish's notice of appeal could no longer serve as a notice of appeal after being construed as a motion to reopen. *See id.* at 43 n.9.

Amicus also cedes most of the remaining ground. He acknowledges the ripening principle's long history. *See id.* at 10, 24–25. He accepts that § 2107(a)—the only statutory provision that contains a notice-of-appeal requirement—is consistent with ripening. *See id.* at 18, 29. And he does not attempt to argue that ripening upon reopening prejudices anyone. The conclusion should follow directly: Premature notices of appeal ripen in the reopening context, just as they do in others.

Amicus tries to escape that straightforward logic by advancing a new theory—one that no court has ever embraced. According to Amicus, the ripening principle applies only to notices of appeal filed before final judgment; after final judgment, litigants must take "action" during the appeal period. That gerrymandered rule does not reflect the longstanding "general practice in the courts of appeals." *FirsTier Mortg. Co. v. Inves. Mortg. Ins. Co.*, 498 U.S. 269, 273 (1991). It finds no support in statutory text. It has no basis in precedent. And it does not reflect any

conceivable congressional purpose. With no support in the statute, Amicus falls back on the Federal Rules. But rules cannot create jurisdictional requirements. And Rule 4 is consistent with ripening, in any event.

Amicus's last-ditch argument that the Fourth Circuit exercised permissible discretion is meritless. Courts lack discretion to decline jurisdiction; the Fourth Circuit did not purport to exercise discretion; and it would be an abuse of discretion to refuse ripening in this case anyway.

This Court should reverse the decision below and remand for a ruling on the merits.

ARGUMENT

I. THE FOURTH CIRCUIT WAS WRONG TO DISMISS MR. PARRISH'S APPEAL FOR LACK OF JURISDICTION.

Historical practice, statutory text, this Court's precedent, and common sense all compel the conclusion that Mr. Parrish's notice of appeal ripened—and the Fourth Circuit gained jurisdiction—when the appeal period reopened. Amicus shoots a few arrows at each of these targets. All miss their mark. And his repeated attempts to rely on the Federal Rules only highlight the weakness of his position on the statute.

A. Courts have long embraced ripening, both before and after final judgment.

There has long been a "general practice in the courts of appeals of deeming certain premature notices of appeal effective." *FirsTier*, 498 U.S. at 273; *see also* Fed. R. App. P. 4, Advisory Committee Notes on 1979 Amendment (ripening applied "quite

generally" for decades); Pet.Br. 22–27 (collecting cases); Lammon Br. 3–11 (same). In the absence of prejudice, courts treat "notice[s] of appeal filed too early" as taking effect "when the window to appeal begins." *Winters v. Taskila*, 88 F.4th 665, 671 (6th Cir. 2023) (Sutton, J.). That practice reflects "the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *see also Chambers v. NASCO*, 501 U.S. 32, 43 (1991) (discussing courts' "implied powers"); Fed. R. App. P. 47(b) ("A court of appeals may regulate practice in a particular case in any manner consistent with federal law, these rules, and local rules[.]").

Amicus acknowledges the ripening principle, which originated well "[b]efore the enactment of . . . Section 2107(c)'s reopening provisions." Am.Br. 10. But he insists that ripening has always been limited to "premature notice[s] of appeal filed *before* entry of judgment." *Id.* at 25 (emphasis added). "None of petitioner's cases," Amicus submits, "suggests that a notice of appeal filed too late after the order appealed from can ever be effective." *Id.*

That is incorrect. For one thing, courts of appeals have unanimously held that notices of appeal filed after the original appeal period expires ripen when an extension is granted. *See* Pet.Br. 27 (collecting cases). Even the Fourth Circuit recognizes ripening in that context. *See* Pet.App.11a (citing *Evans v. Jones*, 366 F.2d 772, 772–73 (4th Cir. 1966)). For another, "every court of appeals to consider the question, other than the Fourth Circuit in this case, has concluded that granting a motion to reopen the appeal period

validates a premature notice of appeal." U.S. Br. 23 (collecting cases).

No court appears ever to have drawn the final judgment–based line Amicus dreams up. For good reasons. Notices of appeal filed after the original appeal period expires are premature with respect to the extended or reopened appeal period in the same sense that notices of appeal filed before final judgment are premature with respect to the original appeal period. Moreover, notices filed after final judgment do not implicate the finality and notice interests that arguably cut against ripening in some pre-judgment contexts. *Cf. FirsTier*, 498 U.S. at 276 ("notice of appeal from a clearly interlocutory decision" could not "serve as a notice of appeal from the final judgment"). And in the reopening context, the prejudice inquiry on which ripening turns is baked right in to the statute. *See* Pet.Br. 32–33.

B. The text supports ripening, not Amicus's "action" requirement.

Amicus effectively concedes that § 2107(a)—the provision that contains the notice-of-appeal requirement—is consistent with ripening. *See* Am.Br. 10, 29. That concession was wise, given that rejecting ripening under subsection (a) would require overruling *FirsTier* and invalidating at least two Federal Rules. *See* Fed. R. App. P. 4(a)(2), 4(a)(4)(B)(i). But Amicus insists that § 2107(c) is different. *See* Am.Br. 29. According to Amicus, subsection (c)—unlike subsections (a) and (b)—contains an implicit "action" requirement that precludes ripening. *See id.* at 9–10, 12.

Amicus is wrong. Nothing in § 2107(c)'s text displaces the background ripening principle that applies in every other context.

1. Congress "legislate[s] against a background of common-law . . . principles." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991). As a result, this Court presumes that a statute "ret[ains] . . . long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952); *see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts, 318 (2012) ("[S]tatutes will not be interpreted as changing the common law unless they effect the change with clarity."). Ripening—including after final judgment—was a settled background principle when § 2107(c) was enacted. *See supra* Part I.A; Pet.Br. 22–27; Lammon Br. 3–11. Nothing in the text of § 2107(c) overrides it.

Moreover, there is no dispute that Congress "codif[ied] th[e] common-law practice" in subsection (a), Am.Br. 10, or that the notice-of-appeal requirement works the same way under subsection (b). The same must be true under subsection (c). *Cf. Clark v. Martinez*, 543 U.S. 371, 378 (2005) (term that "applies without differentiation to" different "categories" should hold the same "meaning for each"). And there is certainly no way to read that provision—which says nothing about appellants, much less any action appellants must take—to impose a jurisdictional "action" requirement. *Cf. Wilkins v. United States*, 598 U.S. 152, 158–60 (2023) (jurisdictional requirements require "clear statement[s]").

2. Amicus points out that subsection (c) uses different language than subsection (a). Am.Br. 14–15, 29–30. If anything, that difference in language makes ripening an even more natural fit with subsection (c) than subsection (a): Whereas subsection (a) requires that a "*notice of appeal* is *filed*[] within 30 days *after*," subsection (c) does not mention notices, filing, or anything happening "within" some period "after." Moreover, none of the language on which Amicus relies—"reopen," "time for appeal," "period of 14 days," and "from the date of entry," *id.* at 14–15—precludes ripening. After all, a premature notice of appeal is "still on file" when the appeal period opens and "g[i]ve[s] full notice after that date, as well as before." *Lemke v. United States*, 346 U.S. 325, 326 (1953) (per curiam).

a. Start with "reopen." Amicus contends that the word "reopen" "presumes that the period to appeal has already closed before the motion is filed." Am.Br. 14. But even if "reopen" implies prior closure in some contexts, it doesn't here: As Amicus acknowledges, "a motion to reopen can technically be filed . . . before the original appeal period close[s]." *Id.* at 37 n.8; *see* Pet.Br. 42–43. But even assuming that reopening did imply prior closure, that would only raise the ripening question. Ripening, after all, is only ever relevant when a notice is filed while no appeal period is open. *See* Pet.Br. 43–44.

b. Next consider "time for appeal." Amicus asserts that the "'time for appeal' is the only time during which an appeal can be commenced," and that "commencing an appeal always requires an action—specifically, filing a notice of appeal." Am.Br. 14. "Time for appeal," however, says nothing about

notices filed before the clock starts ticking. Indeed, § 2107 is entitled "Time for appeal to court of appeals," and subsection (b) uses the shorthand "time." Amicus effectively concedes that notices of appeal filed before the "time for appeal" (or the "time") can ripen under subsections (a) and (b). *See id.* at 10, 29. So too under subsection (c).

c. Now take "period." Amicus submits that "[a] 'period' in the context of a procedural statute means a time during which a litigant must act." *Id.* at 15. Like "reopen" and "time for appeal," however, nothing about the word "period" undermines the validity of notices filed before the "period" begins.

Amicus's supposed authority (*id.*) only proves that point. Two of his statutes expressly provide that a *particular document* should be *filed* within the period in question. *See* 28 U.S.C. § 2263(b)(3) (time limits for habeas applications "shall be tolled . . . during an additional period not to exceed 30 days, if . . . a *motion* for an extension of time is *filed*" (emphases added)); 11 U.S.C. § 1121(e)(1) ("only the debtor may *file* a *plan* until after 180 days after the date of the order for relief" (emphases added)). Section 2107(c), by contrast, references neither a document nor an action. In any event, neither of those statutes—which set a tolling period and an exclusivity period, respectively—precludes pre-"period" filings. *See* 28 U.S.C. § 2263(a) (habeas applications "must be filed . . . not later than" a particular date); 11 U.S.C. § 1121(a) (plan may be filed "at any time").

The third statute—which also sets a tolling period—is even clearer. Amicus quotes *Artis v. D.C.*, 583 U.S. 71, 75 (2008), for the proposition that "28

U.S.C. § 1367 sets a 'period for refiling.'" Am.Br. 15. But that is the reading of the statute *Artis rejected*. 583 U.S. at 75 ("Because the D.C. Court of Appeals held that § 1367(d) . . . merely provided a 30-day grace period for refiling . . . , we reverse the D.C. Court of Appeals' judgment."). Indeed, *Artis* held that the petitioner's claims had been timely refiled even though she did *not* refile (or take any other action) within the "period of 30 days." *See id.* at 78, 92.

d. Finally, consider "from the date of entry." According to Amicus, "'from' the 'date of entry' strengthens" the anti-ripening inference "because the word 'from' is used to indicate a starting-point in time, or the beginning of a period." Am.Br. 15 (cleaned up). But § 2107(b) uses a similar phrase—"from such entry"—and no one disputes that premature notices can ripen under § 2107(b). Just like "after the entry" in subsection (a), the "from" phrases in subsections (b) and (c) just specify which day to start counting. *See* Pet.Br. 29–30. "Period of 14 days from the date of entry" in § 2107(c) does not preclude early notices of appeal any more than "period of 90 days from the date of the final order of removal" in 8 U.S.C. § 1253(a)(1)(A) imperils individuals who depart the United States before that period begins. *See* 8 U.S.C. § 1253(a)(1)(A) (setting penalties for "[a]ny alien . . . who . . . willfully fails or refuses to depart from the United States within a period of 90 days from the date of the final order of removal").

3. Amicus's passing swipes that reading § 2107(c) to permit ripening conflates "reopening" with "extension" (Am.Br. 34–35) and creates superfluity (*id.* at 15) are meritless.

Reopening and extension have many similarities. *See* Pet.Br. 45–46; *Hamer v. Neighborhood Housing Services of Chicago*, 583 U.S. 17, 24 n.8 (2017) ("The 'reopening' period is the functional equivalent of an extension."). But they are not "the same thing." Am.Br. 35. The two terms refer to different mechanisms with different standards, different deadlines, and different forms of relief. *See* Pet.Br. 44–45. The fact that both permit ripening thus in no way renders the variation in terminology meaningless. Indeed, Amicus does not appear to attribute the variation to ripening, either. *See* Am.Br. 35 n.7 ("circuit court decisions embracing" ripening for extensions "may well be incorrect").

Nor does ripening render the 14-day reopening period superfluous. When litigants seek reopening before filing a notice of appeal, the 14-day period sets the deadline for a notice of appeal to be filed.

C. This Court has consistently embraced ripening.

This Court has repeatedly recognized that premature notices of appeal ripen when an appeal period opens. It did so in *FirsTier*. *See* Pet.Br. 22–23. It did so in *Lemke*. *See* Pet.Br. 23–24. And it did so even earlier in *Luckenbach S.S. Co. v. United States*, 272 U.S. 533 (1926). *See id.* at 535 ("[W]hile the application was thus premature, it was not a nullity."); Lammon Br. 3 (tracing the doctrine's roots back "at least" that far). This Court has never held that "the technical defect of prematurity" alone "extinguish[es] an otherwise proper appeal." *FirsTier*, 498 U.S. at 273.

Amicus's efforts to cobble together a precedent-based argument fall flat. He overreads *Bowles*. His attempts to limit *FirsTier* fail. And functional approach cases favor ripening.

1. Amicus first asserts that this Court effectively answered the Question Presented in *Bowles v. Russell*, 551 U.S. 205 (2007). Am.Br. 15–16. That would be news to the courts of appeals. *See, e.g.*, *Winters*, 88 F.4th at 669, 671 (citing *Bowles* and holding that the appellant "did not need to file a new notice of appeal after the district court granted the motion to reopen"); *Hammer v. Bortz*, 2024 WL 2559204, at *3 (7th Cir. May 24, 2024) (same). *Bowles* is about notices of appeal filed *after* the reopening window closes; it says nothing about notices filed *before* the window opens. *See* 551 U.S. at 207, 213.

True, *Bowles* occasionally refers to the reopening period as a "time for filing" or "filing period." Am.Br. 15–16 (quoting *Bowles*, 551 U.S. at 208). *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 433 (2011), and *Hamer*, 583 U.S. at 18–19, use similar language in discussing *Bowles*. *See* Am.Br. 16. But those unremarkable phrases don't reject ripening any more than the phrases actually used in § 2107(c): "time for appeal" and "period." *See supra* 6–8.

2. *FirsTier*, unlike *Bowles*, actually does address ripening. But Amicus is wrong to argue that *FirsTier* limited ripening to the circumstances delineated in Rules 4(a)(2) and 4(a)(4)(B)(i). Am.Br. 18–19, 26–27. As an initial matter, Rule 4(a)(4)(B)(i) did not even exist when *FirsTier* was decided. *See* Pet.Br. 25–26; Fed. R. App. P. 4, Adv. Comm. Notes (1993). That Amicus accepts Rule 4(a)(4)(B)(i) confirms that

FirsTier cannot be read to "cabin[ ]" the ripening principle's "scope." Am.Br. 18.

FirsTier focused on ripening under Rule 4(a)(2) because that was the question presented. *See FirsTier*, 498 U.S. at 270 ("The question presented is whether the bench ruling is a 'decision' under Rule 4(a)(2)."). In answering it, the Court recognized the "general practice in the courts of appeals of deeming certain premature notices of appeal effective." *Id.* at 273. Those notices, the Court explained, "do not prejudice the appellee and . . . the technical defect of prematurity therefore should not be allowed to extinguish an otherwise proper appeal." *Id.* It further held that the application of ripening reflected in Rule 4(a)(2) does not "enlarg[e] appellate jurisdiction." *Id.* at 275. The Court nowhere suggested that the Rules could somehow limit appellate jurisdiction. *See Hamer*, 583 U.S. at 19, 27 (holding the opposite).

FirsTier had no occasion to address ripening in the post-judgment context. But its reasoning extends to notices of appeal filed before reopening is granted. "[P]ermitting [those notices] to become effective" when the appeal period is reopened "does not catch the appellee by surprise" or "enlarg[e] appellate jurisdiction." 498 U.S. at 275–76. And "[l]ittle would be accomplished by prohibiting the court of appeals from reaching the" appeal's merits. *Id.* at 276.

To be sure, *FirsTier* recognized that not every notice of appeal filed before final judgment is effective. In particular, "a notice of appeal from a clearly interlocutory decision," cannot "serve as a notice of appeal from the final judgment." 498 U.S. at 276. As this Court made more explicit in *Manrique v. United*

States, 581 U.S. 116 (2017), a notice of appeal filed before "the court has . . . decided the issue that the appellant seeks to appeal" does *not* provide adequate notice. *Id.* at 124. That principle disposes of the hypothetical horribles Amicus attempts to parade. *See* Am.Br. 27–28.

3. *Smith v. Barry*, 502 U.S. 244 (1992), and the other functional approach cases support ripening, too. *See* Pet.Br. 20–22. Consistent with those precedents, a notice of appeal filed before the jurisdictional deadline is sufficient so long as it leaves "no genuine doubt . . . about who is appealing, from what judgment, [and] to which appellate court." *Becker v. Montgomery*, 532 U.S. 757, 767 (2001). Pre-reopening notices that are otherwise sufficient fit that bill precisely.

Mr. Parrish has never argued, however, that "ripening is always warranted upon reopening," full stop. Am.Br. 10, 12, 31, 42 (quoting Pet.Br. 33). The passage Amicus is so fond of quoting continues on: "*assuming, of course, that a notice of appeal is otherwise adequate*." Pet.Br. 33 (emphasis added). Mr. Parrish has also never taken the position that "notice alone" is sufficient. Am.Br. 27. A notice of appeal must be functionally adequate. *See* Pet.Br. 20–21, 33–34. And it must be filed "before the jurisdictional deadline." Pet.Br. 35; *see Bowles*, 551 U.S. at 210. Mr. Parrish's notice of appeal checks both boxes.

D. Reading § 2107(c) to preclude ripening would undermine the provision's purpose.

Mr. Parrish's opening brief described the profound practical problems with the Fourth Circuit's reading of § 2107(c). *See* Pet.Br. 34–42. The reopening mechanism was created to allay "the plight of th[e] litigant" who "first learn[s] of the entry of judgment" more than 21 days later. 16A Fed. Prac. & Proc. § 3950.6 (5th ed.). Such litigants are often incarcerated people litigating pro se. *See* Pet.Br. 35–39. Holding that they must file a second notice of appeal during the reopening period will "defeat the point" of reopening in many cases, *Abramski v. United States*, 573 U.S. 169, 181 (2014), since litigants who do not receive notice of a judgment within 21 days may not receive notice of reopening within 14 days. And at that point there is nothing a court can do to remedy the injustice, because reopening is a ticket good for one 14-day ride only. *See Bowles*, 551 U.S. at 213. As the United States agrees, no one benefits from that result. U.S. Br. 12 ("[R]equiring a duplicative notice of appeal would serve no purpose.").

Amicus insists that ripening will yield "uncertain[ty]," claiming confusion about "when the [premature] notice of appeal is effective" and bemoaning the burden on court staff tasked with "calculat[ing] deadlines." Am.Br. 33–34, 39. But ripening has been the rule for decades, and Amicus identifies no instance in which it caused deadline confusion or required anyone to "go sleuthing." *Id.* at 34. That's partly because ancillary deadlines are often set by court order and partly because this is not that complicated: Premature notices of appeal take

effect when the appeal period opens. If anything, ripening prevents confusion that might flow from competing notices of appeal.

Amicus also asserts that a notice of appeal filed before reopening does not actually provide adequate notice, because it is "reasonable for a putative appellee to ignore a tardy notice of appeal." *Id.* at 32. The appellee in this case certainly disagrees. *See* U.S. Br. 14, 23. A notice of appeal is no longer "tardy"—and cannot reasonably be ignored—once reopening is granted.

Finally, Amicus suggests that "any harshness associated with [his anti-ripening] rule has already been softened by . . . the prison mailbox rule"—and that this Court can soften it further by "instructing district courts to . . . include in every order granting a motion to reopen a clear direction to file a timely notice of appeal within 14 days." Am.Br. 41. The prison mailbox rule mitigates problems stemming from delayed outgoing mail; it does nothing to redress problems stemming from delayed incoming mail—which is the problem reopening was designed to solve. As for Amicus's proposed edict, suggesting that district courts instruct litigants that a duplicative notice of appeal is required only underscores the absence of that requirement in § 2107(c) itself. That instruction would also be no help to litigants who receive notice of reopening only after the reopening period expires.

E. Rule 4 does not impose a jurisdictional second-notice requirement.

Unable to justify his position on the statute, Amicus repeatedly falls back to Rule 4. But rules cannot

create jurisdictional requirements. *See Hamer*, 583 U.S. at 19, 27; *Bowles*, 551 U.S. at 212. In any event, Amicus's interpretation of Rule 4 is wrong—and certainly does not support his reading of § 2107(c).

1. With no textual hook to preclude ripening in § 2107(c) itself, Amicus homes in on a phrase in Rule 4(a)(6) that does not appear in § 2107(c): Whereas the statute says "time for appeal," the Rule says "time *to file* an appeal." Fed. R. App. P. 4(a)(6) (emphasis added). Amicus insists that the Committee's replacement of "for appeal" with "to file an appeal" in 1998 establishes that, under Rule 4(a)(6), a notice of appeal must be filed during the reopening period. Am.Br. 16–17. He then asks the Court to infer from "legislative history"—*i.e.*, a note from the Committee that the change was "intended to be stylistic only"—that "the Rule accurately reflects the meaning of the statutory text." *Id.* at 17.

Amicus far overstates the significance of "to file an." The Rules Committee knows how to create an exception to the ripening rule when it wants to. *See* Fed. R. App. P. 4(a)(4) (1979) ("A notice of appeal filed before the disposition of [certain post-judgment motions] shall have no effect."); Pet.Br. 24–26. It did not do that here. It did not even say, as it did in Rule 4(a)(5), "time to file *a notice of appeal*." Fed. R. App. P. 4(a)(5) (emphasis added). "Time to file an appeal" says no more about the validity of notices filed before reopening than "time for appeal" does. *See supra* 6–7.

Even assuming "time to file an appeal" somehow implicitly displaced the ripening rule for purposes of Rule 4(a)(6), the "legislative history" argument for reading that phrase into § 2107(c) (Am.Br. 17) is quite

the bankshot. The "history" in question—Rules Committee commentary from 1998—post-dates the enactment of § 2107(c)'s ripening mechanism in 1991. *See Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011) ("Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation."). It was produced by a different body (the Rules Committee) than the one that wrote the statute (Congress). *Cf. id.* (rejecting post-enactment legislative history because "[t]hose who voted on the relevant statutory language were not necessarily the same persons who crafted the statements"). And it relates to text ("to file an") entirely absent from the relevant statutory provision.

2. Amicus also attempts an *expressio unius*–type argument, suggesting that the express ripening provisions in Rules 4(a)(2) and 4(a)(4)(B)(i) preclude ripening in all other contexts. Am.Br. 18–19, 26.

No court limits ripening to the circumstances covered by Rules 4(a)(2) and 4(a)(4)(B)(i). Courts uniformly hold that notices of appeal ripen upon Rule 54(b) certification, even though no Rule covers that scenario. *See* Pet.Br. 26–27 (collecting cases).[1] They

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[1] Although some courts treat Rule 54(b) ripening as an "application of Rule 4(a)(2)," Am.Br. 19, most do not. *See, e.g.*, *Clausen v. Sea-3, Inc.*, 21 F.3d 1181, 1185 (1st Cir. 1994) ("In reaching this decision [to allow ripening in Rule 54(b) context], the circuits follow the same relation forward principle as is provided by [Fed. R. App. P.] 4(a)(2), [although they] do not generally refer to that rule." (cleaned up)); *Tilden Fin. Corp. v. Palo Tire Serv., Inc.*, 596 F.2d 604, 607 (3d Cir. 1979) (Rule 54(b) ripening before adoption of Rule 4(a)(2)). For good reason: Notices filed after an order but before 54(b) certification are not filed "before the entry of . . . the order." Fed. R. App. P. 4(a)(2).

also agree that notices filed after the original appeal period expires ripen when the appeal period is extended, even though no Rule covers that scenario, either. *See id.* at 27 (collecting cases).

That consensus aligns with first principles. Common-law rules are not lightly displaced. *See supra* 5; *cf., e.g.*, *Scharfeld v. Richardson*, 133 F.2d 340 (D.C. Cir. 1942) (statute declaring that "[a]ny dog wearing [a] tax tag . . . shall be regarded as personal property" did not eliminate property rights in untagged dogs). Other statutes and rules set a default presumption that courts should ignore technical defects. *See, e.g.*, 28 U.S.C. § 2111 ("court[s] shall give judgment . . . without regard to errors or defects which do not affect the substantial rights of the parties"); Fed. R. Civ. P. 61 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."). And the decision to codify a background principle in one context (notices filed before final judgment) does not imply a decision to override it in a distinct one (notices filed after final judgment). *Cf., e.g.*, Scalia & Garner, *supra*, 107–08 (*expressio unius* canon limited by "the scope of the inclusiveness"); *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 489 (1955) ("[R]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute . . . .").

Although a footnote in *Outlaw v. Airtech Air Conditioning & Heating, Inc.*, 412 F.3d 156 (D.C. Cir. 2005), suggests that Rule 4(a)(2) covers the waterfront for "notices of appeal filed before entry of judgment," *id.* at 160 n.2, the court ultimately applied the ripening principle in a context that does not fit neatly under Rule 4(a)(2): a grant of partial summary

judgment followed by dismissal of the remaining claims, *id.* at 161–62. More importantly, it recognized that Rule 4(a)(2) did not purport to address notices "filed *after* judgment" but before post-judgment motions—ground covered by Rule 4(a)(4)(B)(i). *See id.* at 160 n.2 (emphasis in original). Because neither Rule 4(a)(2) nor Rule 4(a)(4)(B)(i) speaks to notices filed after the original appeal period expires, *Outlaw* is entirely consistent with ripening in that context.

II. THE FOURTH CIRCUIT LACKED DISCRETION TO DISMISS MR. PARRISH'S APPEAL.

Amicus argues in the alternative that the Fourth Circuit appropriately exercised its discretion to dismiss Mr. Parrish's appeal. But courts lack discretion to abdicate jurisdiction. The Fourth Circuit did not purport to exercise discretion. And there is no basis to dismiss this appeal on discretionary grounds.

A. Federal courts have a "virtually unflagging obligation" to exercise their jurisdiction. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976); *see Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996). Amicus tries to turn a jurisdictional question into a discretionary one by leaning on § 2107(c)'s use of the word "may." Am.Br. 43. That word endows *district courts* with discretion in deciding whether to grant a motion to reopen. 28 U.S.C. § 2107(c) ("[T]he district court may . . . reopen the time for appeal . . . ."). It in no way suggests that *appellate courts* have discretion to refuse jurisdiction once a motion to reopen has been properly granted.

With no support for "discretionary jurisdiction" in the statute, Amicus cobbles together a handful of

cases that use "may" or "could" language in discussing premature notices of appeal. *See* Am.Br. 44. But Amicus identifies no case in which a court purported to discretionarily decline jurisdiction under § 2107 on premature-notice grounds. And none of his cases supports the proposition that courts have free-floating discretionary power to do that.[2] To the contrary, this Court has consistently reversed decisions taking an overly rigid approach to notices of appeal, without ever suggesting that courts could reach the same result on discretionary grounds. *See, e.g.*, *Smith*, 502 U.S. at 248–50; *Hoiness v. United States*, 335 U.S. 297, 300–02 (1948); *Foman v. Davis*, 371 U.S. 178, 181–82 (1962). *FirsTier* does not contemplate discretion. *See* 498 U.S. at 277 (holding that "the Court of Appeals *erred* in dismissing [the] appeal").

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[2] *Richerson v. Jones*, 551 F.2d 918 (3d Cir. 1977), acknowledges that courts "*should* proceed to . . . the merits" "[s]o long as the order is an appealable one and the non-appealing party is not prejudiced." *Id.* at 923 n.6a (quoting *Hodge v. Hodge*, 507 F.2d 87, 89 (3d Cir. 1975)) (emphasis added). *Eason v. Dickson*, 390 F.2d 585 (9th Cir. 1968), used the word "may" only in construing a pro se litigant's filing. *Id.* at 588 (filing that included "a brief . . ., a praecipe for a transcript and a petition for leave to proceed in forma pauperis . . . may fairly be regarded as a manifestation . . . of [the appellant's] intention to appeal"). *Morris v. Uhl & Lopez Eng'rs., Inc.*, 442 F.2d 1247 (10th Cir. 1971), spoke of "could" only in blessing a prior panel's decision to "retain[ ] 'jurisdiction'" while authorizing the district court to entertain a Rule 54(b) motion. *Id.* at 1250. And *Duma v. Commissioner*, 534 F. App'x 4 (D.C. Cir. 2013), was a tax appeal to which § 2107 did not apply. *Id.* at 5–6 (citing 26 U.S.C. § 7483, which governs notices of appeals in tax cases). Moreover, the notice in that case was otherwise inadequate because it was "filed before the court had determined how much [the appellant] actually owed." *Id.*; *cf. Manrique*, 581 U.S. at 124.

Courts of appeals generally treat ripening as mandatory, too. *See, e.g.*, *Holden v. Att'y Gen. New Jersey*, 2023 WL 8798084, at *1 n.4 (3d Cir. Dec. 20, 2023) (because the "District Court granted [the] request to reopen . . . [the] appeal is timely, and we have jurisdiction"); *Farrow v. Tulupia*, 2022 WL 274489, at *1 n.1 (10th Cir. Jan. 31, 2022) (notice of appeal "became effective, conferring [appellate] jurisdiction" when appeal period reopened).

B. Even if courts did have discretion to decline jurisdiction, the Fourth Circuit did not purport to exercise such discretion here. The court construed § 2107 to impose a jurisdictional second-notice requirement. *See* Pet.App.2a. And because Mr. Parrish did not file a second notice, the court "dismiss[ed] his appeal for lack of jurisdiction." *Id.*; *see also id.* at 6a ("[W]e must satisfy ourselves that, under § 2107(c), we have jurisdiction."); *id.* at 10a ("[T]he text of § 2107(c) require[s] that Parrish file his notice of appeal during the reopened period[.]").

Amicus is thus wrong to suggest that this Court can affirm on discretionary grounds. Am.Br. 42. At most, he makes an argument for remand. *See, e.g.*, *Boag v. MacDougall*, 454 U.S. 364, 365 & n.* (1982) (no "ground for affirming" where lower courts "relied solely upon erroneous legal grounds" and did not "exercise[ ]" "discretion"); *cf. Arroyo v. Rosas*, 19 F.4th 1202, 1210 n.4 (9th Cir. 2021) ("[W]e cannot uphold the district court's decision based on discretionary grounds it did not invoke.").

C. But there is no conceivable reason to remand here. For starters, the United States has repeatedly conceded that Mr. Parrish's notice of appeal was

sufficient. Ct.App. Dkt. No. 39 at 11; U.S. Br. 3. It would be an abuse of discretion to override that intentional waiver of a non-jurisdictional argument. *Cf. Hamer*, 583 U.S. at 20 (non-jurisdictional rules "may be waived"); *Wood v. Milyard*, 566 U.S. 463, 466 (2012) ("A court is not at liberty . . . to bypass, override, or excuse a State's deliberate waiver of a limitations defense."); *Eberhart v. United States*, 546 U.S. 12, 19 (2005) ("Court of Appeals should . . . have proceeded to the merits" "where the Government failed to raise a defense of untimeliness").

Even absent the waiver, there is no plausible basis to exercise discretion against Mr. Parrish. He was acting pro se and within the constraints of the prison system. *See* MacArthur Br. 4–12 (discussing systemic barriers faced by incarcerated people litigating pro se); CRC Br. 6–22 (same). Nevertheless, he was diligent in attempting to notify the District Court of his change of address. *See* Pet.Br. 13–14. The District Court found that "no party [would] be prejudiced" by allowing his appeal to proceed. Pet.App.61a. And at the time Mr. Parrish filed his notice of appeal, even the Fourth Circuit recognized ripening in the reopening context. *See id.* at 17a–18a (Gregory, J., dissenting) (discussing *Grant v. City of Roanoke*, 810 F. App'x 236 (4th Cir. 2020)).

Amicus's contrary arguments are meritless. That Mr. Parrish benefited from prior acts of judicial discretion (Am.Br. 42–43) is no reason *not* to afford him discretion now. Indeed, the justifications for construing Mr. Parrish's notice of appeal as a motion to reopen and then granting that motion—his pro se status, his diligence, and the absence of prejudice, *see* Pet.App.61a–62a—apply equally to the ripening

question. And refusing to credit his notice of appeal would render those prior exercises of discretion pointless. The District Court's order (Am.Br. 45) is no basis for refusing ripening, either. The court found that "no party [would] be prejudiced" and then directed the clerk to transmit the record to the Fourth Circuit. Pet.App.61a–62a. Finally, that Mr. Parrish did not offer an explanation for failing to file a second notice of appeal (Am.Br. 45) does not justify requiring him to file one. Mr. Parrish had no reason to believe that a second notice (or any explanation) was necessary.

CONCLUSION

The Court should reverse the decision below and remand for adjudication of the merits.

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Respectfully submitted,

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