[ORAL ARGUMENT NOT YET SCHEDULED]
No. 21-5119

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOSEPH LADEAIROUS,
Appellant,

v.

MERRICK GARLAND, et al,
Appellees.

Appeal from the United States District Court for the District of Columbia

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BRIEF OF APPOINTED AMICUS CURIAE IN SUPPORT OF APPELLANT

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January 14, 2022

CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), amicus curiae Erica Hashimoto, appointed to present arguments in support of Mr. Ladeairous, hereby submits the following certificate as to parties, rulings, and related cases.

I. Parties and Amici

The parties to this proceeding in the district court and in this Court are: Plaintiff/Appellant Joseph Ladeairous; and Defendants/Appellees Merrick Garland, U.S. Attorney General, and Michael Horowitz, U.S. Dept. of Justice Inspector General. This Court appointed Erica Hashimoto, Director of the Appellate Litigation Clinic at Georgetown University Law Center, as amicus in support of Mr. Ladeairous.

II. Rulings Under Review

This appeal challenges the district court's February 24, 2021 Opinion and Judgment dismissing Mr. Ladeairous's complaint.

III. Related Cases

This case was previously before this Court in Case No. 15-5324. Amicus is not aware of any related cases.

TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES ii

TABLE OF AUTHORITIES v

GLOSSARY 1

STATUTES AND REGULATIONS 2

STATEMENT OF JURISDICTION 10

STATEMENT OF THE ISSUES 11

STATEMENT OF THE CASE 12

I. Statement of Facts 12

II. Procedural History 15

SUMMARY OF THE ARGUMENT 19

ARGUMENT 22

I. THIS COURT SHOULD GRANT MR. LADEAIROUS'S TIMELY FILED RULE 4(A)(6) MOTION TO THE DISTRICT COURT WITH INSTRUCTIONS TO GRANT IT. 22

A. Mr. Ladeairous's notice of appeal together with his response to this Court's order to show cause constitute a Fed. R. App. P. (4)(a)(6) motion to reopen. 23

B. Mr. Ladeairous timely filed his Rule 4(a)(6) motion. 26

C. This Court should grant a limited remand directing the district court to grant relief. 31

II. MR. LADEAIROUS STATED A PLAUSIBLE CLAIM FOR MANDAMUS RELIEF. 34

CONCLUSION.. 38

CERTIFICATE OF COMPLIANCE.. 40

CERTIFICATE OF SERVICE 41

TABLE OF AUTHORITIES

CASES

13th Reg'l Corp. v. U.S. Dep't of Interior, 654 F.2d 758 (D.C. Cir. 1980) 36
Am. Hosp. Ass'n v. Burwell, 812 F.3d 183 (D.C. Cir. 2016) 37
Am. Rivers v. FERC, 895 F.3d 32 (D.C. Cir. 2018)................................28
Anyanwutaku v. Moore, 151 F.3d 1053 (D.C. Cir. 1998) 25,26,38
Bateman v. U.S. Postal Serv., 231 F.3d 1220 (9th Cir. 2000) 33
Bowles v. Russell, 551 U.S. 205 (2007) 34
Campos v. LeFevre, 825 F.2d 671 (2d Cir. 1987) 24
Cartier v. Sec'y of State, 506 F.2d 191 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 947 (1975) 38
Casey v. McDonald's Corp., 880 F.3d 564 (D.C. Cir. 2018). 35
Fink v. Union Cent. Life Ins. Co., 65 F.3d 722 (8th Cir. 1995)......... 33, 34
Houston v. Lack, 487 U.S. 266 (1988) 17,18
In re Medicare Reimbursement Litig., 414 F.3d 7 (D.C. Cir. 2005)........36
In re Nelson, 834 F. Appx. 774 (3d Cir. 2021)...................................25,31
In re Pub. Emps. for Env't Responsibility, 957 F.3d 267 (D.C. Cir. 2020) 37
Joyner v. Angelone, 69 F. Appx. 153 (4th Cir. 2003) 31
Larouche's Comm. For a New Bretton Woods v. F.E.C., 439 F.3d 733 (D.C. Cir. 2006)...28
Laurino v. Syringa Gen. Hosp., 279 F.3d 750 (9th Cir. 2002)................33
Lovitzky v. Trump, 949 F.3d 753 (D.C. Cir. 2020)..................................36
Nat'l Wildlife Fed'n v. United States, 626 F.2d 917 (D.C. Cir. 1980).....38
Pettibone v. Cupp, 666 F.2d 333 (9th Cir. 1981)....................................24
Poole v. Fam. Ct. of New Castle Cnty., 368 F.3d 263 (3d Cir. 2004) 24
Power v. Barnhart, 292 F.3d 781 (D.C. Cir. 2002) 36
Sanders v. United States, 113 F.3d 184 (11th Cir. 1997) 25
Scarpa v. Murphy, 782 F.2d 300 (1st Cir. 1986)................................32,33
Sinclair Broadcast Grp., Inc. v. F.C.C., 284 F.3d 148 (D.C. Cir. 2002)… 27-30
Small Bus. in Telecomms. v. F.C.C., 251 F.3d 1015 (D.C. Cir. 2001). ...26
Smith v. Barry, 502 U.S. 244 (1992) 32
Swan v. Clinton, 100 F.3d 973 (D.C. Cir. 1996) 38
United States v. Withers, 638 F.3d 1055 (9th Cir. 2011)...................24,25
Young v. Kenney, 949 F.3d 995 (6th Cir. 2020) 25,32

Zack v. United States, 133 F.3d 451 (6th Cir. 1998) 33

Statutes

18 U.S.C. § 2339(B) 12
18 U.S.C. § 2712. 37
28 U.S.C. § 1291 10
28 U.S.C. § 1331. 10
28 U.S.C. § 1361. 36
28 U.S.C. § 2107(c) 22
28 U.S.C. §§ 2201–2202..15
28 U.S.C. §§ 2283–2284..15
50 U.S.C. § 1810 10
Pub. L. No. 107-56 § 1001, 115 Stat. 272 (2001)..........................34,35

Rules

Fed. R. App. P. 4(a)(1)(A). 10
Fed. R. App. P. 4(a)(1)(B). 27
Fed. R. App. P. 4(a)(5) 24,27,32
Fed. R. App. P. 4(a)(6). 22,24,27
Fed. R. App. P. 12(b)(1) 16
Fed. R. App. P. 15(a)..27,28
Fed. R. App. P. 25(a)(2)(a)(iii) 17
Fed. R. Civ. P. 12(b)(6). 16
Fed. R. Civ. P. 60(b)(1) 33

GLOSSARY

DOJ: Department of Justice

FISA: Foreign Intelligence Surveillance Act, 50 U.S.C. Ch. 36 (2012).

IFP: In forma pauperis

IRA: Irish Republican Army

Noraid: Irish Northern Aid Committee

PATRIOT Act: The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001), Pub. L. No. 107–56, 115 Stat. 272 (2001).

STATUTES AND REGULATIONS

18 U.S.C. § 2712:

Civil actions against the United States:

(a) In general.--Any person who is aggrieved by any willful violation of this chapter or of chapter 119 of this title or of sections 106(a), 305(a), or 405(a) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) may commence an action in United States District Court against the United States to recover money damages. In any such action, if a person who is aggrieved successfully establishes such a violation of this chapter or of chapter 119 of this title or of the above specific provisions of title 50, the Court may assess as damages--

(1) actual damages, but not less than $10,000, whichever amount is greater; and

(2) litigation costs, reasonably incurred.

(b) Procedures.--(1) Any action against the United States under this section may be commenced only after a claim is presented to the appropriate department or agency under the procedures of the Federal Tort Claims Act, as set forth in title 28, United States Code.

(2) Any action against the United States under this section shall be forever barred unless it is presented in writing to the appropriate Federal agency within 2 years after such claim accrues or unless action is begun within 6 months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented. The claim shall accrue on the date upon which the claimant first has a reasonable opportunity to discover the violation.

(3) Any action under this section shall be tried to the court without a jury.

(4) Notwithstanding any other provision of law, the procedures set forth in section 106(f), 305(g), or 405(f) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) shall be the exclusive means by which materials governed by those sections may be reviewed.

(5) An amount equal to any award against the United States under this section shall be reimbursed by the department or agency concerned to the fund described in section 1304 of title 31, United States Code, out of any appropriation, fund, or other account (excluding any part of such appropriation, fund, or account that is available for the enforcement of

any Federal law) that is available for the operating expenses of the department or agency concerned.

(c) Administrative discipline.--If a court or appropriate department or agency determines that the United States or any of its departments or agencies has violated any provision of this chapter, and the court or appropriate department or agency finds that the circumstances surrounding the violation raise serious questions about whether or not an officer or employee of the United States acted willfully or intentionally with respect to the violation, the department or agency shall, upon receipt of a true and correct copy of the decision and findings of the court or appropriate department or agency promptly initiate a proceeding to determine whether disciplinary action against the officer or employee is warranted. If the head of the department or agency involved determines that disciplinary action is not warranted, he or she shall notify the Inspector General with jurisdiction over the department or agency concerned and shall provide the Inspector General with the reasons for such determination.

(d) Exclusive remedy.--Any action against the United States under this subsection shall be the exclusive remedy against the United States for any claims within the purview of this section.

(e) Stay of proceedings.--(1) Upon the motion of the United States, the court shall stay any action commenced under this section if the court determines that civil discovery will adversely affect the ability of the Government to conduct a related investigation or the prosecution of a related criminal case. Such a stay shall toll the limitations periods of paragraph (2) of subsection (b).

(2) In this subsection, the terms “related criminal case” and “related investigation” mean an actual prosecution or investigation in progress at the time at which the request for the stay or any subsequent motion to lift the stay is made. In determining whether an investigation or a criminal case is related to an action commenced under this section, the court shall consider the degree of similarity between the parties, witnesses, facts, and circumstances involved in the 2 proceedings, without requiring that any one or more factors be identical.

(3) In requesting a stay under paragraph (1), the Government may, in appropriate cases, submit evidence ex parte in order to avoid disclosing any matter that may adversely affect a related investigation or a related criminal case. If the Government makes such an ex parte

submission, the plaintiff shall be given an opportunity to make a submission to the court, not ex parte, and the court may, in its discretion, request further information from either party.

Fed. R. App. P. 4:
Appeal as of Right--When Taken
(a) Appeal in a Civil Case.
(1) Time for Filing a Notice of Appeal.
(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.
(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:
(i) the United States;
(ii) a United States agency;
(iii) a United States officer or employee sued in an official capacity; or
(iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf--including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.
(C) An appeal from an order granting or denying an application for a writ of error coram nobis is an appeal in a civil case for purposes of Rule 4(a).
(2) Filing Before Entry of Judgment. 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.
(3) Multiple Appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.
(4) Effect of a Motion on a Notice of Appeal.
(A) If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure--and does so within the time allowed by those rules--the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:
(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;
(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;
(iv) to alter or amend the judgment under Rule 59;
(v) for a new trial under Rule 59; or
(vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.
(B)(i) If a party files a notice of appeal after the court announces or enters a judgment--but before it disposes of any motion listed in Rule 4(a)(4)(A)--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.
(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal--in compliance with Rule 3(c)--within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.
(iii) No additional fee is required to file an amended notice.
(5) Motion for Extension of Time.
(A) The district court may extend the time to file a notice of appeal if:
(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and
(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.
(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.
(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.
(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;
(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and
(C) the court finds that no party would be prejudiced.
(7) Entry Defined.
(A) A judgment or order is entered for purposes of this Rule 4(a):
(i) if Federal Rule of Civil Procedure 58(a) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or
(ii) if Federal Rule of Civil Procedure 58(a) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:
・ the judgment or order is set forth on a separate document, or
・ 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).
(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a) does not affect the validity of an appeal from that judgment or order.
(b) Appeal in a Criminal Case.
(1) Time for Filing a Notice of Appeal.
(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days after the later of:
(i) the entry of either the judgment or the order being appealed; or
(ii) the filing of the government's notice of appeal.
(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:
(i) the entry of the judgment or order being appealed; or
(ii) the filing of a notice of appeal by any defendant.
(2) Filing Before Entry of Judgment. 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.
(3) Effect of a Motion on a Notice of Appeal.

(A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 14 days after the entry of the order disposing of the last such remaining motion, or within 14 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:
(i) for judgment of acquittal under Rule 29;
(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 14 days after the entry of the judgment; or
(iii) for arrest of judgment under Rule 34.
(B) A notice of appeal filed after the court announces a decision, sentence, or order--but before it disposes of any of the motions referred to in Rule 4(b)(3)(A)--becomes effective upon the later of the following:
(i) the entry of the order disposing of the last such remaining motion; or
(ii) the entry of the judgment of conviction.
(C) A valid notice of appeal is effective--without amendment--to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A).
(4) Motion for Extension of Time. Upon a finding of excusable neglect or good cause, the district court may--before or after the time has expired, with or without motion and notice--extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).
(5) Jurisdiction. The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under Federal Rule of Criminal Procedure 35(a) does not suspend the time for filing a notice of appeal from a judgment of conviction.
(6) Entry Defined. A judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket.
(c) Appeal by an Inmate Confined in an Institution.
(1) If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 4(c)(1). If an inmate files a notice of appeal in either a civil or a criminal

case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:
(A) it is accompanied by:
(i) a declaration in compliance with 28 U.S.C. § 1746--or a notarized statement--setting out the date of deposit and stating that first-class postage is being prepaid; or
(ii) evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid; or
(B) the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 4(c)(1)(A)(i).
(2) If an inmate files the first notice of appeal in a civil case under this Rule 4(c), the 14-day period provided in Rule 4(a)(3) for another party to file a notice of appeal runs from the date when the district court dockets the first notice.
(3) When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later.
(d) Mistaken Filing in the Court of Appeals. If a notice of appeal in either a civil or a criminal case is mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date when it was received and send it to the district clerk. The notice is then considered filed in the district court on the date so noted.

Fed. R. App. P. 15(a):
Petition for Review; Joint Petition
(1) Review of an agency order is commenced by filing, within the time prescribed by law, a petition for review with the clerk of a court of appeals authorized to review the agency order. If their interests make joinder practicable, two or more persons may join in a petition to the same court to review the same order.
(2) The petition must:
(A) name each party seeking review either in the caption or the body of the petition--using such terms as "et al.," "petitioners," or "respondents" does not effectively name the parties;
(B) name the agency as a respondent (even though not named in the petition, the United States is a respondent if required by statute); and

(C) specify the order or part thereof to be reviewed.
(3) Form 3 in the Appendix of Forms is a suggested form of a petition for review.
(4) In this rule “agency” includes an agency, board, commission, or officer; “petition for review” includes a petition to enjoin, suspend, modify, or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute.

Pub. L. No. 107-56 § 1001, 115 Stat. 272 (2001):
Review of the Department of Justice.
The Inspector General of the Department of Justice shall designate one official who shall—
(1) review information and receive complaints alleging abuses of civil rights and civil liberties by employees and officials of the Department of Justice;
(2) make public through the Internet, radio, television, and newspaper advertisements information on the responsibilities and functions of, and how to contact, the official; and
(3) submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate on a semi-annual basis a report on the implementation of this subsection and detailing any abuses described in paragraph (1), including a description of the use of funds appropriations used to carry out this subsection.

STATEMENT OF JURISDICTION

Joseph Michael Ladeairous's complaint alleged that he suffered misconduct and abuses by the federal government in violation of the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. § 1810 and 18 U.S.C. § 2712(a), and that the government also violated his First Amendment rights by depriving him of his freedoms of political association and speech. The district court had subject matter jurisdiction over these federal claims pursuant to 28 U.S.C. § 1331.

This Court has appellate jurisdiction under 28 U.S.C. § 1291. The district court issued a final order on February 24, 2021, granting the government's motion to dismiss. JA40. The timeliness of Mr. Ladeairous's notice of appeal is addressed below. *See infra* Part I; Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUES

I. Whether Mr. Ladeairous's pro se filings constitute a timely filed Fed. R. App. P. 4(a)(6) motion that would entitle him to reopen the time to appeal.

II. Whether Mr. Ladeairous's allegations—that the Inspector General violated the PATRIOT Act's clear terms by failing to designate an official to receive complaints of abuses by Department of Justice officials—set forth a justiciable mandamus claim.

STATEMENT OF THE CASE

I. Statement of Facts

Appellant Joseph Michael Ladeairous filed a complaint alleging the following facts. Since 2000, he has been an active supporter of the movement for a unified Irish Republic. JA8. During that time, he has corresponded from the United States with the Irish Northern Aid Committee (Noraid), purchased books from the Irish People newspaper, and submitted articles about abuses suffered by Irish Catholics in Northern Ireland to various U.S. national newspapers. JA8. The federal government has designated both the Irish People newspaper and Noraid as agents of the Irish Republican Army (IRA), and it has identified the IRA as a foreign power pursuant to the Foreign Agents Registration Act. JA9. Because of these designations, all supporters of the IRA and its agents in the United States, including Mr. Ladeairous, fall under Foreign Intelligence Surveillance Act (FISA) jurisdiction for providing material support to a foreign terrorist organization pursuant to 18 U.S.C. § 2339(B) and are subject to FISA investigations and surveillance. JA9. Any information from FISA surveillance can be disseminated to federal, state, and local law enforcement. JA9.

Mr. Ladeairous was incarcerated in the New York State Department of Corrections between 2000 and 2005.[1] While in prison, he was "called a terrorist sympathizer by prison officers, starved, and placed in solitary confinement for frivolous reasons. JA10. During his time in the New York State Department of Corrections, Mr. Ladeairous also believed that he experienced backlash for his support of the Irish republic movement when Irish republican newspapers were constantly confiscated and he continuously faced disciplinary charges. JA9.

From 2005, when he was released from incarceration in New York, until 2008, Mr. Ladeairous alleged he was the target of aggressive surveillance, and that he "experienced a barrage of injustices as a pretext for [his] Irish republican support." JA10. Such injustices included unjustified arrests and assault charges "that were accompanied with horrible beatings by police warranting medical attention." JA10. Further, Mr. Ladeairous felt that such abuses had drastic effects on his marriage and family relationships. JA10.

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[1] The complaint does not specify the charges on which he was imprisoned.

Following his arrest on a robbery charge in Norfolk, Virginia in 2008, Mr. Ladeairous was interrogated by an official who had been "in contact with New York" and who accused him of being an IRA member. JA10. Mr. Ladeairous was later convicted and incarcerated in the Virginia Department of Corrections. JA10–11. On April 1, 2011, Mr. Ladeairous was asked to sign a statement denouncing Irish republican political support, which he refused to do. JA11. He alleged he continued to suffer abuse due to his support for organizations seeking an Irish republic. JA10.

While incarcerated in Virginia, Mr. Ladeairous sent numerous grievances to the U.S. Department of Justice (DOJ) and to its Office of the Inspector General detailing these abuses and acts of misconduct.[2] JA11. In these grievances, Mr. Ladeairous explained that he was the target of interrogations by government officials, and that prison officials deprived him of access to his mail. JA11.

[2] Mr. Ladeairous stated that he submitted grievances detailing his unlawful surveillance to the DOJ on seventeen separate occasions from December 2010 to August 2014. JA11.

II. Procedural History

Mr. Ladeairous filed a pro se complaint against the U.S. Attorney General and the DOJ Inspector General. He alleged the Inspector General violated his First Amendment rights when the Inspector General refused to investigate the unlawful FISA investigations and surveillance. JA13–15. He also alleged that the Inspector General failed to make information publicly available about how to contact "any official designated by the U.S. Inspector General" to receive complaints from individuals alleging abuses of the FISA. JA13. Finally, Mr. Ladeairous alleged that the Inspector General had neither provided nor publicly disclosed information that the PATRIOT Act required. JA14–15. Mr. Ladeairous sought declaratory relief pursuant to 28 U.S.C. §§ 2201–2202, and injunctive relief pursuant to 28 U.S.C. §§ 2283–2284. JA15–17.

The district court, concluding that Mr. Ladeairous had three strikes under the Prison Litigation Reform Act, initially denied Mr. Ladeairous's application for leave to proceed *in forma pauperis* (IFP) and dismissed his complaint without prejudice. JA19–20. On appeal, this Court held that Mr. Ladeairous did not have three strikes, granted his petition to

proceed IFP before this Court, and remanded to the district court for it to grant his IFP motion to proceed before it. JA20.[3]

The government filed a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) and for failure to state a claim under Fed. R. Civ. P. 12(b)(6). JA20, 26. After briefing, the district court issued an opinion and order on February 24, 2021, dismissing Mr. Ladeairous's FISA and First Amendment claims for three reasons: (1) lack of subject matter jurisdiction; (2) lack of standing because Mr. Ladeairous failed to establish that defendants had caused him injury; and (3) failure to state a claim upon which relief can be granted. JA26–36. The district court also dismissed the PATRIOT Act claims, concluding that the statute did not include a private right of action. JA36–37.

Mr. Ladeairous filed a notice of appeal on May 17, 2021.[4] JA41. The appeal was transmitted to this Court on May 28, 2021, and this

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[3] For reasons that are not clear from the record, almost two years passed (from March 2018 until January 2020) before the district court granted the IFP application.

[4] The district court did not include in the record the envelope demonstrating when the prison authorities received the mailing and when the mailing was postmarked.

Court then issued an order on June 2, 2021 directing Mr. Ladeairous to show cause why his appeal should not be dismissed as untimely, given that "the notice of appeal was filed on May 17, 2021, which [was] beyond the 60-day period provided by Fed. R. App. P. 4(a)." *See* June 2, 2021 Order, at 1. The order instructed him to file a response by July 2, 2021, and it noted that Mr. Ladeairous could respond by filing in this Court a copy of a "motion pursuant to either Fed. R. App. P. 4(a)(5) or 4(a)(6) that has been submitted to the District Court." *See id.*

Mr. Ladeairous's response, filed in this Court on June 25, 2021,[5] stated that he had not received the district court's February 24, 2021 decision until May 4, 2021. JA44. He attached a scanned image of the envelope from the clerk of the district court addressed to him at the Augusta Correctional Center, which was postmarked February 25, 2021, and stamped "received" by the prison mailroom on May 4, 2021. JA47. Mr. Ladeairous asserted that he could only "guess whether the prison authorities, the Postal Service, or the court clerk [was] to blame" for the

[5] Mr. Ladeairous delivered his response to the show cause order to prison authorities at Augusta Correctional Center for the purpose of mailing it to the court clerk on June 25, 2021. *See* Fed. R. App. P. 25(a)(2)(A)(iii); JA50.

delay in his receipt of the district court's decision. JA5 (quoting *Houston v. Lack*, 487 U.S. 266, 267–68 (1988)). He also said that he had not received this Court's June 2, 2021 show cause order until June 22, 2021. JA45. He attached a scanned image of the Prisoner Acknowledgement of Receipt Letter for this Court's order, which he had signed and dated on June 22, 2021. JA48.

This Court appointed undersigned counsel as amicus curiae to present arguments in favor of Mr. Ladeairous's position. It further directed the parties and amicus to address: "(1) whether Rule 4(a)(5) and Rule 4(a)(6) require a litigant seeking relief to file a formal motion in district court; and (2) whether, if a formal motion is not required, a litigant must nonetheless apprise the district court of the grounds for granting such relief within the respective time limits of Rule 4(a)(5) and Rule 4(a)(6)." *See* November 8, 2021 Order.

SUMMARY OF THE ARGUMENT

This Court's two questions have relatively straightforward responses. Rule 4(a)(6) does not require a formal motion; instead, any filing that identifies the grounds for Rule 4(a)(6) relief suffices.[6] And a timely filed Rule 4(a)(6) motion can adequately apprise the district court of the grounds for relief even if part of it is filed in the circuit court.

In the context of the facts presented in this case, these two questions encompass three distinct issues that require further explanation. First, no formal motion was required. Because Mr. Ladeairous's notice of appeal—together with his response to this Court's order to show cause—set forth his grounds for reopening under Rule 4(a)(6), they should be construed as a Rule 4(a)(6) motion. Read in conjunction, those two documents provided an unambiguous explanation for the delay: he had not received the district court's order for more than two months. JA44–45.

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[6] For the sake of clarity and to avoid redundancy, this brief primarily addresses Rule 4(a)(6) rather than Rule 4(a)(5). But because many of the procedural requirements of the two rules are the same (with a few exceptions noted throughout the argument), the Rule 4(a)(6) arguments apply equally to Rule 4(a)(5).

Second, Mr. Ladeairous's Rule 4(a)(6) motion was timely filed. Although Rule 4(a)(6)'s time limitation is jurisdictional, this Court's precedent demonstrates that Mr. Ladeairous's notice of appeal, which was filed within Rule 4(a)(6)'s time limitation, can be supplemented by the reasons for Rule 4(a)(6) relief stated in his response to the show cause order. This Court permits parties to use later filings to correct jurisdictional defects in petitions for review of agency orders in the context of Fed. R. App. P. 15 where an opposing party is not prejudiced. It should apply similar principles to Mr. Ladeairous's filings.

Third, although Mr. Ladeairous filed his response to the show cause order—a critical part of his Rule 4(a)(6) motion—in this Court, a limited remand of that motion to the district court is appropriate. Because he has also established strong grounds for Rule 4(a)(6) relief, it would be an abuse of discretion for the district court to deny his motion. This Court should thus remand to the district court with instructions to grant Rule 4(a)(6) relief and hold the merits of this appeal in abeyance during that limited remand.

One point about the merits of Mr. Ladeairous's appeal deserves mention. This Court does not have jurisdiction over the merits until the

district court grants Rule 4(a)(6) relief. But because amicus believes that Mr. Ladeairous has a substantial claim for mandamus relief that the district court did not address, amicus has briefly addressed that issue.

ARGUMENT

I. THIS COURT SHOULD GRANT MR. LADEAIROUS'S TIMELY FILED RULE 4(A)(6) MOTION TO THE DISTRICT COURT WITH INSTRUCTIONS TO GRANT IT.

Through no fault of his own, Mr. Ladeairous did not receive notification of the district court's order and judgment until after his time to file a notice of appeal had expired. The facts therefore set forth a prototypical Rule 4(a)(6) case.

Rule 4(a)(6) provides that a "district court may reopen the time to file an appeal" if each of the following conditions is satisfied:

> (A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;
> (B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and
> (C) the court finds that no party would be prejudiced.

Fed. R. App. P. 4(a)(6).; *see also* 28 U.S.C. § 2107(c) (allowing the district court to "extend the time for appeal upon a showing of excusable neglect or good cause . . . [and to] . . . reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal").

Mr. Ladeairous filings satisfy the requirements for a Rule 4(a)(6) motion. First, courts of appeals agree that a Rule 4(a)(6) motion need not be formal, and Mr. Ladeairous's notice of appeal and response to this Court's order to show cause should be construed as a Rule (4)(a)(6) motion to reopen. Second, his notice of appeal—albeit incomplete on its own as a Rule 4(a)(6) motion—was filed within fourteen days of Mr. Ladeairous's receipt of the order and supplemented shortly thereafter with the reasons justifying Rule 4(a)(6) relief. Finally, because Mr. Ladeairous filed his response to the order to show cause in this Court (rather than the district court), this Court should grant a limited remand, forward the motion to the district court with instructions to grant Mr. Ladeairous Rule 4(a)(6) relief, and hold the merits of the appeal in abeyance during the limited remand.

A. Mr. Ladeairous's notice of appeal together with his response to this Court's order to show cause constitute a Fed. R. App. P. (4)(a)(6) motion to reopen.

Mr. Ladeairous's May 17, 2021 notice of appeal and his June 25, 2021 response to this Court's show cause order together explained the basis for his Fed. R. App. P. 4(a)(6) motion: he did not receive the district court's opinion and judgment until May 4, 2021, more than twenty-one

days after they were entered. *See* JA44. As such, the notice of appeal and response to this Court's order are appropriately construed as a Rule 4(a)(6) motion. *See*, *e.g.*, *United States v. Withers*, 638 F.3d 1055, 1061 (9th Cir. 2011) (treating pro se litigant's notice of appeal as Rule 4(a)(6) motion to reopen when appellant alleged he "did not receive timely notice of the entry of the order or judgment from which he [sought] to appeal").

To be sure, Rule 4(a)(6) requires a motion setting forth the reasons for reopening and thus a bare notice of appeal, without more, is not sufficient to constitute a Rule 4(a)(6) motion. *See*, *e.g.*, *Poole v. Fam. Ct. of New Castle Cnty.*, 368 F.3d 263, 268 (3d Cir. 2004) (noting that although "no particular form of words is necessary to render a filing a motion," something more than a "simple notice of appeal" is required) (citing *Campos v. LeFevre*, 825 F.2d 671, 676 (2d Cir. 1987)).[7] But circuit

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[7] Prior to amendments to Fed. R. App. P. 4 in 1979, some courts had held that the filing of a late notice of appeal (without more) was sufficient to constitute a request for extension under Fed. R. App. P. 4(a)(5). *See, e.g.*, *Pettibone v. Cupp*, 666 F.2d 333, 335 (9th Cir. 1981). The amendments to Fed. R. App. P. 4 made clear that a motion is required for Rule 4(a)(5) relief. When promulgated, Fed. R. App. P. 4(a)(6) used the same language as Fed. R. App. P. 4(a)(5). As a result, late notices of appeal alone are now insufficient to constitute requests for extension and/or to reopen the time to appeal under Rules 4(a)(5) and/or 4(a)(6); some statement of the reason for seeking relief is required.

courts substantially agree that although *some* explanation of the basis for Rule 4(a)(6) relief is required, providing the Rule 4(a)(6) grounds for relief in another filing is sufficient to constitute a motion. *See Young v. Kenney*, 949 F.3d 995, 997 (6th Cir. 2020) (holding that because appellant's notice of appeal "effectively reads as a [Rule 4(a)(5)] motion for an extension of time to file an appeal," it should be treated as such); *Sanders v. United States,* 113 F.3d 184, 187 (11th Cir. 1997) (treating litigant's notice of appeal that explained that he had not received the court's order as a Rule 4(a)(6) motion); *Withers*, 638 F.3d at 1061 (same); *In re Nelson*, 834 F. App'x. 774, 774–75 (3d Cir. 2021) (holding that pro se appellant's petition for mandamus should be read as Rule 4(a)(5) motion to extend or Rule 4(a)(6) motion to re-open because it suggested that he had not received notice of the district court's rulings on his motions).

Mr. Ladeairous's filings—his notice of appeal and response to the show cause order—explained in detail (and provided evidence) that he did not receive the district court's February 24, 2021 order until May 4, 2021. *See* JA44. Particularly in light of his status as an incarcerated pro se appellant, these pleadings constitute a Rule 4(a)(6) motion. *See*

Anyanwutaku v. Moore, 151 F.3d 1053, 1058 (D.C. Cir. 1998) (holding that pro se prisoners' pleadings should be "held to less stringent standards than formal pleadings drafted by lawyers") (internal quotation marks omitted).

B. Mr. Ladeairous timely filed his Rule 4(a)(6) motion.

Mr. Ladeairous's notice of appeal was timely filed under Rule 4(a)(6), and his response to the order to show cause should be treated as a contemporaneous filing that cured the defects of the notice of appeal as a Rule 4(a)(6) motion. Mr. Ladeairous's notice of appeal was filed before Rule 4(a)(6)'s deadline. Although the response to the order to show cause was filed after that deadline, it should serve to supplement the notice of appeal because it was filed shortly after—and "contemporaneously" with[8]—his notice of appeal and explicitly expressed his reasons for reopening. Indeed, this Court has permitted filings almost identical to Mr. Ladeairous's response to the show cause order to correct jurisdictional defects in the analogous context of accepting Rule 15

[8] This Court has defined "'contemporaneous filings' to include documents filed at or near the same time as the petition for review." *Small Bus. in Telecomms. v. F.C.C.*, 251 F.3d 1015, 1022 (D.C. Cir. 2001).

petitions for review. *See Sinclair Broadcast Grp., Inc. v. F.C.C.*, 284 F.3d 148, 158 (D.C. Cir. 2002).

Mr. Ladeairous's Rule 4(a)(6) motion was due by May 18, 2021.[9] The district court entered its final order on February 24, 2021, JA40, and the period for Mr. Ladeairous to file a notice of appeal expired on April 25, 2021. *See* Fed. R. App. P. 4(a)(1)(B). But Mr. Ladeairous did not receive notice of the district court's order until May 4, 2021. JA44–45. The deadline to file a motion to reopen was therefore fourteen days later, on May 18, 2021. Fed. R. App. P. 4(a)(6). Mr. Ladeairous's notice of appeal, filed on May 17, 2021, JA41, was timely under Rule 4(a)(6) but incomplete as a Rule 4(a)(6) motion. Although Mr. Ladeairous complied with the deadline set by this Court's June 2, 2021 order to show cause, his June 25, 2021 response was filed after Rule 4(a)(6)'s deadline. *See* JA50.

Although jurisdictional, Rule 4(a)(6)'s requirement that the motion state that the judgment was received more than 21 days after its entry can be satisfied by a later filing. In the analogous context of Rule 15's

[9] Mr. Ladeairous's 30-day deadline to move to extend the time to file his appeal under Rule 4(a)(5) was May 25, 2021. *See* Fed. R. App. P. 4(a)(5).

jurisdictional analysis for petitions for review, this Court has relied on later filings to meet Rule 15(a)'s requirements. *See Sinclair*, 284 F.3d at 156–58. Rule 15(a) jurisdiction requires petitioners to name "each party seeking review"; "name the agency as a respondent"; and "specify the order or part thereof to be reviewed." Fed. R. App. P. 15(a)(2); *see Larouche's Comm. For a New Bretton Woods v. F.E.C.*, 439 F.3d 733, 739 (D.C. Cir. 2006) (holding Rule 15(a)'s requirement that a party specify the order being challenged is jurisdictional). When a petition for review complies with some—but not all—of those requirements, this Court may consider information contained in contemporaneously filed documents to provide the information Rule 15(a) requires. *See Sinclair*, 284 F.3d at 156–58; *see also, e.g.*, *Am. Rivers v. FERC*, 895 F.3d 32, 43–44 (D.C. Cir. 2018) (allowing this Court to infer petitioner's intent from contemporaneously filed documents).

Sinclair is important here. In that case, the petitioner requested review of an FCC order denying reconsideration of an underlying order, and it attached a copy of the reconsideration order to its petition for review. *Sinclair*, 284 F.3d at 156. But petitioner intended to seek review of the *underlying* order as well as the order denying reconsideration. *Id.*

at 155–56. Over a month after filing its petition for review, petitioner filed a statement of the issues with its docketing statement indicating an intent to seek review of the underlying order in addition to the reconsideration order.[10] *Id.* at 158. This Court held that the statement of the issues was a "contemporaneous filing" that satisfied Rule 15(a)'s requirement and provided adequate notice that petitioner intended to seek review of both orders. *Id.*

Mr. Ladeairous's response to the order to show cause should be treated the same as the statement of the issues in *Sinclair* because it was likewise filed contemporaneously with the original filing. The thirty-four days between the petition for review and the statement of the issues in *Sinclair* is virtually indistinguishable from the thirty-nine days between Mr. Ladeairous's filing of his notice of appeal and the day his response to the show cause order was deemed filed. *See Sinclair*, 284 F.3d at 158; JA41, 50. And Mr. Ladeairous—like the *Sinclair* petitioner—timely filed his response to the order to show cause in a way that was "in accordance

[10] The petitioner's statement of the issues still failed to name the underlying order. *Id.* at 157–58. But concluding that one of the issue statements could only be referring to the earlier order, this Court used that statement to cure the defect in the petition for review. *Id.* at 158.

with the order of the clerk of this court." *See Sinclair*, 284 F.3d at 158. Because this Court deemed contemporaneous the statement filed thirty-four days later in *Sinclair*, it should also treat Mr. Ladeairous's response to the order to show cause—filed thirty-nine days after his notice of appeal—as contemporaneous.

This is an even easier case than *Sinclair*. The *Sinclair* petitioner was "a large, sophisticated company represented by experienced counsel who could be expected to name in the petition for review the order or orders Sinclair s[ought] to appeal," *id.* at 157–58, but its lawyers still failed to identify the order it wanted the Court to review in its petition, *id.* at 156. The Court nonetheless determined that a subsequent filing was sufficient to cure the ambiguity of its prior submissions. *Id.* at 157–58. Here there is no ambiguity that Mr. Ladeairous was trying to resuscitate an appeal that had become untimely through no fault of his own. And he had to do so as a pro se incarcerated litigant who had to contend with prison mail delays. Mr. Ladeairous's notice of appeal and response to this Court's order to show cause made clear his intent to seek Rule 4(a)(6) relief when he filed the notice of appeal.

C. This Court should grant a limited remand directing the district court to grant relief.

Although part of Mr. Ladeairous's Rule 4(a)(6) motion—his response to this Court's show order—was filed in this Court, this Court should forward that filing to the district court for consideration. And because Mr. Ladeairous's filings establish that he is entitled to relief under Rule 4(a)(6), this Court should remand to the district court for the limited purpose of granting Mr. Ladeairous relief.

The fact that Mr. Ladeairous filed his response to the show cause order in this Court rather than the district court is not fatal to Mr. Ladeairous's Rule 4(a)(6) motion. When a circuit court receives a filing that is construed as a Rule 4(a)(6) motion to reopen, it is appropriate for that court to forward the motion to the district court. *See Nelson*, 834 F. App'x. at 774–75 (directing the clerk to forward to the district court a mandamus petition filed in the circuit that arguably set forth grounds for Rule 4(a)(5) or Rule 4(a)(6) relief); *see also Joyner v. Angelone*, 69 F. App'x. 153, 153 (4th Cir. 2003) (forwarding appellant's Rule 4(a)(5) motion to extend that was filed in the circuit court to the district court and remanding for the limited purpose of permitting that court to determine whether appellant had shown excusable neglect warranting

an extension of the appeal period). Such relief is particularly appropriate here because Mr. Ladeairous's response to the order to show cause provides an explanation for his motion to reopen, and this Court should construe the filing in this Court as it was intended. *See Smith v. Barry*, 502 U.S. 244, 248–50 (1992) (holding that Fourth Circuit erred in not treating appellant's brief filed in court of appeals as a notice of appeal). This Court should thus remand to the district court for the limited purpose of having it consider the Rule 4(a)(6) motion. *See Young*, 949 F.3d at 997 (remanding to the district court for the limited purpose of ruling on a Rule 4(a)(5) motion and holding the appeal in abeyance during that limited remand).

Because Mr. Ladeairous has established strong grounds for relief, it would be an abuse of discretion for the district court to deny him the opportunity to reopen the time to file an appeal. This Court should thus remand with instructions to grant his motion.[11] To be sure, Rule 4(a)(6)

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[11] Mr. Ladeairous has also met the good cause standard for relief under Fed. R. App. P. 4(a)(5), because he has put forth evidence demonstrating that the two-month long delay in his receipt of the mail was responsible for his untimely filing. *See* JA47 (showing that district court's February 24, 2021 order and decision were not received by the Augusta Mail Room until May 4, 2021); *Scarpa v. Murphy*, 782 F.2d 300, 301 (1st Cir. 1986)

relief rests within the district court's discretion. But here, the equities lie squarely in Mr. Ladeairous's favor—he did not receive the district court's order until after his time to file the notice of appeal had expired, and he filed his motion shortly thereafter. *See* JA44–45. Absent a showing of unfair prejudice to the government, relief is warranted. In the analogous context of equitable relief for excusable neglect under Fed. R. Civ. P. 60(b)(1), federal courts of appeals have remanded cases to district courts with instructions to grant the motions for relief. *See Bateman v. U.S. Postal Serv.,* 231 F.3d 1220, 1225 (9th Cir. 2000) (remanding to district court with instructions to grant Fed. R. Civ. P. 60(b)(1) relief); *Laurino v. Syringa Gen. Hosp.*, 279 F.3d 750, 754 (9th Cir. 2002) (same).

In the alternative, this Court should forward the motion to the district court and remand for the district court to consider it in the first instance. *See Zack v. United States*, 133 F.3d 451, 453 (6th Cir. 1998) (holding that district court's failure to consider possibility of relief under Rule 4(a)(5) warranted remand); *Fink v. Union Cent. Life Ins. Co.*, 65 F.3d

(reversing district court's finding as there was good cause shown where appellant deposited notice of appeal at the post office and it was not delivered to the district court until seven days later).

722, 724 (8th Cir. 1995) (remanding to district court to determine whether there was excusable neglect under Rule 4(a)(5)).

II. MR. LADEAIROUS STATED A PLAUSIBLE CLAIM FOR MANDAMUS RELIEF.

Mr. Ladeairous has briefed the merits of this appeal. Although this Court does not have jurisdiction to decide the merits of this appeal until the district court grants the Rule 4(a)(6) motion, *see Bowles v. Russell*, 551 U.S. 205, 214 (2007) (holding that "the timely filing of a notice of appeal in a civil case is a jurisdictional requirement"), amicus has requested that this Court hold the merits in abeyance pending the district court's ruling. Amicus thus deemed it appropriate to apprise this Court that Mr. Ladeairous's complaint raises a substantial issue—a cognizable claim for mandamus review of his PATRIOT Act claim—that the district court did not address. That issue is set forth briefly below.

Mr. Ladeairous's complaint requested relief compelling DOJ's Inspector General to follow the requirements of Section 1001 of the PATRIOT Act.[12] Section 1001 of the PATRIOT Act provides as follows:

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[12] Although Section 1001 of the PATRIOT Act is not codified, it is a note to the statute setting forth the Inspector General's responsibilities at the Department of Justice. *See* Pub. L. No. 107-56 § 1001, 115 Stat. 272 (2001).

> The Inspector General of the Department of Justice shall designate one official who shall—
> (1) review information and receive complaints alleging abuses of civil rights and civil liberties by employees and officials of the Department of Justice;
> (2) make public through the Internet, radio, television, and newspaper advertisements information on the responsibilities and functions of, and how to contact, the official; and
> (3) submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate on a semi-annual basis a report on the implementation of this subsection and detailing any abuses described in paragraph (1), including a description of the use of funds appropriations used to carry out this subsection.

Pub. L. No. 107-56 § 1001, 115 Stat. 272 (2001). Mr. Ladeairous claimed that despite Section 1001's mandates, he was never notified whether there was a designated official to receive "complaints of being the target of abuses of investigations and surveillances," and how to contact that designee. *See* JA13.[13]

In dismissing this claim, the district court concluded that Section 1001 of the PATRIOT Act did not create a private cause of action for Mr. Ladeairous to sue the Inspector General in his official capacity. JA36–

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[13] At the motion to dismiss stage, the district court "must assume that the allegations of [Mr. Ladeairous's] complaint are true." *Casey v. McDonald's Corp.*, 880 F.3d 564, 567 (D.C. Cir. 2018). And the government has never asserted that the Inspector General designated an official.

38. But the district court failed to recognize that Mr. Ladeairous plausibly alleged a mandamus claim for the Inspector General's failure to meet his clearly defined obligations under the PATRIOT Act.

Mr. Ladeairous satisfies the threshold requirements for a mandamus claim because (1) he has a "clear right to relief[;]" (2) the Inspector General has a "clear [and non-discretionary] duty to act" under Section 1001 of the PATRIOT Act; and (3) he had "no other adequate remedy." *See In re Medicare Reimbursement Litig.*, 414 F.3d 7, 10 (D.C. Cir. 2005) (quoting *Power v. Barnhart*, 292 F.3d 781, 784 (D.C. Cir. 2002) (quotation marks omitted); *see also* 28 U.S.C. § 1361.

The Inspector General's non-discretionary duty to act and the right to relief and should be considered together. *See, e.g.*, *Lovitzky v. Trump*, 949 F.3d 753, 759–60 (D.C. Cir. 2020). Section 1001 creates a "peremptory obligation" for the Inspector General to designate an official, and Mr. Ladeairous alleged a clear right to relief for the Inspector General's failure to fulfill that obligation. *See id.* at 760 (quoting *13th Reg'l Corp. v. U.S. Dep't of Interior*, 654 F.2d 758, 760 (D.C. Cir. 1980)). The text of Section 1001 plainly states that the Inspector General "shall designate one official," and the designated official "shall . . . make public

. . . information on the responsibilities and functions of, and how to contact, the official." Pub. L. No. 107-56 § 1001. The use of the word "shall" provides a clear duty to act. *See In re Pub. Emps. for Env't Responsibility*, 957 F.3d 267, 273 (D.C. Cir. 2020) (emphasizing the use of the word "shall" in the statute in determining that the agency had a duty to act). *Cf. Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 190 (D.C. Cir. 2016) (noting that the term "shall" is "typically mandatory").

Mr. Ladeairous has a clear right to relief because as someone who alleges civil rights abuses by DOJ officials, he was an intended beneficiary of the statute's mandate for the Inspector General to designate an official. *See In re Pub. Emps. for Env't Responsibility*, 957 F.3d at 274 (considering, in the context of mandamus for agency delay, how mandamus relief "will aid" an act's "intended beneficiaries" and "the ones most harmed by the agency's [delay]" in carrying out a duty). Finally, Mr. Ladeairous does not have any other adequate remedy for his mandamus claim. The PATRIOT Act only grants a remedy for unauthorized disclosures under FISA. *See* 18 U.S.C. § 2712; JA36–37 (holding that Mr. Ladeairous had no private cause of action to redress his claim).

Mandamus is an "extraordinary remedy." *Cartier v. Sec'y of State*, 506 F.2d 191, 199 (D.C. Cir. 1974). But Mr. Ladeairous stated a plausible claim that the district court should have considered. To be sure, Mr. Ladeairous requested only declaratory and injunctive relief. JA16–17. But because his request for an injunction "sought to compel federal officials to perform a statutorily required ministerial duty" and was "based on the general federal question statute," it is "essentially a request for a writ of mandamus." *Swan v. Clinton*, 100 F.3d 973, 977 n.1 (D.C. Cir. 1996) (citing *Nat'l Wildlife Fed'n v. United States*, 626 F.2d 917, 918 n.1 (D.C. Cir. 1980); Paul Bator et al., Hart & Wechsler's The Federal Courts and the Federal System 998–99 (4th ed. 1996)). This is particularly true because Mr. Ladeairous is a pro se litigant, and the district court had a duty to liberally construe his filings. *See, e.g.*, *Anyanwutaku v. Moore*, 151 F.3d 1053, 1058 (D.C. Cir. 1998).

CONCLUSION

For the foregoing reasons, this Court should conclude that the notice of appeal, together with the response to the order to show cause, constitutes a timely filed Fed. R. App. P. 4(a)(6) motion. This Court should grant a limited remand to the district court for it to grant relief

under Fed. R. App. P. 4(a)(6) and hold the merits of the appeal in abeyance pending the district court's action.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5882 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

Respectfully Submitted,

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January 14, 2022

CERTIFICATE OF SERVICE

I, Erica Hashimoto, certify that on January 14, 2022, a copy of Amicus Curiae's Brief was served on appellee via the Court's ECF system and on appellant Joseph Ladeairous by first class mail at:

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