ORAL ARGUMENT SCHEDULED MAY 13, 2022
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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REPLY BRIEF OF APPOINTED AMICUS CURIAE IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

SUMMARY OF THE ARGUMENT

The government starts by asking this Court to not consider the argument presented by court-appointed amicus that Mr. Ladeairous's filings constitute a timely filed Fed. R. App. P. 4(a)(6) motion to reopen in his brief. But Mr. Ladeairous need not have asserted that argument in his brief because: (1) court-appointed amicus counsel is afforded wide discretion by this Court to present arguments on his behalf, and (2) Mr. Ladeairous joined amicus's brief.

The government's primary argument against construing Mr. Ladeairous's notice of appeal and show-cause response together as a Rule 4(b)(6) motion rests on a mistaken assertion that the only basis for doing so is Fed. R. App. P. 3(c)(7). That is wrong. Independent of the text of Rule 3(c)(7), the Supreme Court and this Court have historically and repeatedly recognized that courts can—and often should—construe contemporaneously-filed documents together when faced with imperfections of form. The principles of those cases apply equally to Rule 4(a)(6) motions. This Court should consider both the response to the order to show cause and the notice of appeal to determine the sufficiency

of Mr. Ladeairous's Rule 4(a)(6) motion. Considered together, they are a timely filed 4(a)(6) motion.

The fact that Mr. Ladeairous did not file his response to this Court's show cause order in the district court does not preclude considering it, along with the notice of appeal, as a Rule 4(a)(6) motion. Mr. Ladeairous's filings satisfy all of the requirements for motions set forth in Fed. R. Civ. P. 7(b)(1). And this Court has historically expressed a willingness to afford pro se prisoners like Mr. Ladeairous broad leniency in reading their filings as motions to avoid procedural dilemmas like this one. The government's last-ditch argument that this Court should not remand with instructions to grant Rule 4(a)(6) relief is that although the government has not yet found an argument that it would be prejudiced by Rule 4(a)(6) relief, it *might* be able to later construct one. Because it has offered no foundation for that argument, this Court should forward the response to the show cause order to the district court with instructions that it grant Mr. Ladeairous Rule 4(a)(6) relief.

Once the district court grants the Rule 4(a)(6) motion and this Court turns to the merits of this appeal, this Court should remand for the district court to consider Mr. Ladeairous's claim for mandamus relief.

The government offers new evidence that the Inspector General has designated an official. But because the government did not offer that evidence below, this Court should decline to consider it.

ARGUMENT

I. AMICUS'S ARGUMENT THAT MR. LADEAIROUS'S FILINGS CONSTITUTE A RULE 4(a)(6) MOTION IS PROPERLY BEFORE THIS COURT.

The government insists that Mr. Ladeairous has disclaimed any argument that his filings constitute a Fed. R. App. P. 4(a)(6) motion and that amicus cannot preserve that argument.[1] Appellee's Br. at 14 ("Mr. Ladeairous has explicitly disclaimed any argument that he filed a Rule 4(a)(5) or Rule 4(a)(6) motion, and this Court should not reinterpret his filings in a way he never intended."). Not so. This assertion both fundamentally misunderstands the role of court-appointed amicus in this Court and ignores that Mr. Ladeairous joined this portion of the amicus brief.

The government's reliance on *MetLife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661 (D.C. Cir. 2017)—a case in which a non-court-appointed amicus attempted to raise an argument that a party had "disavowed" before the district court, *id.* at 666 n.4—is misplaced. *See*

[1] 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).

Appellee's Br. at 22. This Court appointed amicus "to present arguments in favor of appellant's position." And this Court exercises its discretion to appoint amicus curiae "precisely because an untrained pro se party may be unable to identify and articulate the potentially meritorious arguments in his case." *Bowie v. Maddox*, 642 F.3d 1122, 1135 n.6 (D.C. Cir. 2011). It thus "ha[s] no qualms about addressing an argument raised by court-appointed amicus curiae and not by the pro se party." *Id.*; *see also Abdelfattah v. U.S. Dept. of Homeland Sec.*, 787 F.3d 524, 535 n.6 (D.C. Cir. 2015).

Contrary to the government's argument, moreover, Mr. Ladeairous never disclaimed or waived the argument that court-appointed amicus is presenting. Mr. Ladeairous explicitly accepted this Court's invitation to join amicus's brief, thereby adopting amicus's Rule 4(a)(6) arguments. *See* ECF No. 30 at 3 (asking "to join the amicus curiae's appellate brief concerning Federal Rules of Appellate Procedure . . . 4(a)(5) and 4(a)(6) . . ."). This argument therefore is properly before this Court. Amicus Br. at 23–26.

II. MR. LADEAIROUS'S FILINGS TOGETHER QUALIFY AS A TIMELY RULE 4(a)(6) MOTION.

Despite the government's claims to the contrary, Mr. Ladeairous's notice of appeal, combined with his response to the order to show cause, should be construed as a Rule 4(a)(6) motion for three reasons. First, Mr. Ladeairous's contemporaneously filed notice of appeal and response should both be considered in determining the sufficiency of his Rule 4(a)(6) motion. Second, his filing in this Court, along with his notice of appeal, qualify as the functional equivalent of a filing in the district court. Finally, the government offers no grounds for prejudice that would preclude a finding of Rule 4(a)(6) relief for Mr. Ladeairous.

A. Mr. Ladeairous's Contemporaneous Filings Should Be Considered Together in Determining Whether He Filed a Rule 4(a)(6) Motion.

The government does not dispute that, if this Court considers Mr. Ladeairous's response to this Court's show-cause order and his notice of appeal together to be a Rule 4(a)(6) motion, that motion was timely. And it acknowledges that this Court can consider contemporaneously-filed documents together when assessing Rule 3(c) notices of appeal and Rule 15 petitions for review. Appellee's Br. at 27. It instead asserts that this well-established practice "should not expand" to Rule 4 motions. *Id.* But

Rule 4(a)(6) motions fall comfortably within the long-standing and consistent practice of this Court and the Supreme Court of using contemporaneous filings to cure imperfections of form. And Rule 4(a)(6) motions serve the same notice function as the requirements of Rule 3(c) and Rule 15.

The government cannot contest the long history of considering contemporaneous filings to satisfy the requirements of the rules. And those cases demonstrate why Mr. Ladeairous's response to the show cause order should be considered alongside his notice of appeal in determining the sufficiency of his Rule 4(a)(6) motion. *Foman v. Davis*, 371 U.S. 178 (1962), is a prototypical example of the doctrine.[2] In *Foman*, the appellant's notice of appeal from the district court's order entering judgment was deemed premature because the district court had not yet ruled on her motion to vacate that judgment. *Id.* at 180.[3] Her later timely filed notice of appeal specified only the district court's denial of her motion to vacate, not the underlying judgment. *Id.* The Supreme

[2] Because *Foman* was decided before the Federal Rules of Appellate Procedure were promulgated, it was decided under Fed. R. Civ P. 5(e).
[3] At the time, a party was required to file the notice of appeal *after* Rule 59(a) motions had been resolved. The rules have since changed that. Fed. R. App. P. 4(a)(4)(B).

Court held that the First Circuit, which had refused to hear an appeal from the underlying judgment, had erred in "so narrowly reading" the timely filed notice. *Id.* at 181. The Court held that the timely notice of appeal covered the underlying judgment because the two notices and her appeal papers, read together, demonstrated that she sought review of the underlying judgment. *Id*. at 180–82.

As in *Foman*, where the appellant's timely notice of appeal did not specify the order she sought to appeal, Mr. Ladeairous filed his notice of appeal within Rule 4(a)(6)'s time limitations but failed to specify the grounds for relief. *See id.* at 179. And as in *Foman*, where the Court considered an untimely notice that provided the required information, so too this Court should consider the grounds for Rule 4(a)(6) relief that Mr. Ladeairous provided in his response to the show cause order. *See id.* at 181.

This conclusion is consistent with this Court's practice of considering contemporaneous documents when deciding the adequacy of notices of appeal and petitions for review. *See*, *e.g.*, *Brookens v. White*, 795 F.2d 178, 180 (D.C. Cir. 1986) (examining documents other than the notice of appeal in determining the sufficiency of notice of appeal). In the

context of Rule 15 petitions for review, this Court has considered a broad range of contemporaneously filed documents to provide the information required by Rule 15. *See*, *e.g.*, *Sinclair Broadcast Grp., Inc. v. F.C.C.*, 284 F.3d 148, 157–58 (D.C. Cir. 2002) (allowing an ambiguous statement of the issues filed thirty-four days after the petition for review to clarify the order as to which petitioner sought review); *Martin v. FERC*, 199 F.3d 1370, 1373 (D.C. Cir. 2000) (using a motion for a stay to clarify the petition for review). So too here. This Court can consider Mr. Ladeairous's response to the order to show cause—filed thirty-nine days after the notice of appeal—to clarify his intent to reopen the time for filing a notice of appeal. *See* Amicus's Br. at 29–30.

To be sure, as the government points out, *Sinclair* cited to Rule 3(c)(7)'s text, which says that "[a]n appeal must not be dismissed for informality of form or title of the notice of appeal." Fed. R. App. P. 3(c)(7); *see* Appellee's Br. at 27–28 (arguing that the contemporaneous filings doctrine is rooted in Rule 3(c)(7)). But this Court has looked at contemporaneous filings in the context of Rule 15 petitions for review *even though* the text of Rule 15 does not have a provision analogous to

Rule 3(c)(7).[4] *See, e.g.*, *Southwestern Bell Tel. Co. v. F.C.C.*, 180 F.3d 307, 313 (D.C. Cir. 1999) (allowing contemporaneous filing to assist Court's determination of whether appellant satisfied Rule 15's requirements); *Martin*, 199 F.3d at 1372 (same); *City of Oconto Falls v. FERC*, 204 F.3d 1154, 1159–60 (D.C. Cir. 2000) (same). Rule 3(c)(7) thus has not been a key determinant in this Court's application of the doctrine of contemporaneous filings to Rule 15 petitions for review.

Nor has Rule 3(c)(7)'s text been dispositive when this Court has considered contemporaneous filings to interpret Rule 4 notices of appeal. After all, this Court excused imperfections of form in notices of appeal long before the rules were amended to include the text of Rule 3(c)(7). *Nichols v. Bd. of Tr. of Asbestos Workers Local 24 Pension Plan*, 835 F.2d 881, 888 & n.68 (D.C. Cir. 1987). Before the 1979 amendments, Rule 3(c) only listed the requirements for the contents of a notice of appeal.[5] It

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[4] This Court's practice of using contemporaneously-filed documents to provide the necessary Rule 3(c) and Rule 15 specificity has not created an equitable exception to jurisdictional requirements in violation of the separation of powers. So, contrary to the government's assertion, Appellee's Br. at 24–26, no such equitable exception is needed here either.

[5] Before the 1979 amendments, Rule 3(c) read: "The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court

provided no guidance about what courts should do if the notice of appeal was not properly captioned or failed to provide the required information. But this Court (along with many others) did not dismiss appeals for imperfections when the would-be appellant's documents satisfied the purpose of a notice of appeal. *See Pasternack v. Comm'r*, 478 F.2d 588, 593–94 (D.C. Cir. 1973) (treating letter sent to Tax Court as notice of appeal); *see also Nichols,* 835 F.2d at 888 & n.68 (collecting pre-1979 cases). In 1979, the Advisory Committee "expressly endorsed" the principle that an appeal should not be dismissed for informality of form, *Nichols,* 835 F.2d at 888 & n.68, and added the language that is now in Rule 3(c)(7) to "give recognition to this practice." Fed. R. App. P. 4(a)(6) advisory committee's note to 1979 amendment. But Rule 3(c)(7)'s language was never—and still is not—necessary for this Court's acceptance of an appeal with imperfections of form.

It also makes sense to treat imperfections of form in Rule 4(a)(6) motions like those in petitions for review and notices of appeal because Rule 4(a)(6) motions serve a notice function similar to the specificity

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to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal." Fed. R. App. P. 3(c) (1976).

requirements of Rule 3(c) and Rule 15. Rule 4(a)(6) motions ensure that the court and the opposing party are advised of the reason for delay and the grounds for relief. *See* Amicus Br. at 24–25 (collecting cases that treat notices of appeal as Rule 4(a)(6) motions when grounds for relief are set forth). Likewise, Rule 3(c)'s specificity requirements for notices of appeal and Rule 15's requirements for petitions for review also ensure notice to the opposing party and the court. *See*, *e.g.*, *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 318 (1988) (clarifying that Rule 3(c)'s specificity requirement "provide[s] notice both to the opposition and to the court"). Imperfections of form under these rules should thus be treated the same. *Cf. Sinclair*, 284 F.3d at 157 (recognizing the similarities between Rule 3(c) notices of appeal and Rule 15 petitions for review as relevant factor in court's use of contemporaneous filings).

Considering both Mr. Ladeairous's response to the order to show cause and the notice of appeal also aligns with the Supreme Court's emphasis on the substance of an appeal over its form. *See Torres*, 487 U.S. at 316 (emphasizing that "'mere technicalities' should not stand in the way of consideration of a case on its merits" (quoting *Foman*, 371 U.S. at 181)); *see also Smith v. Barry*, 502 U.S. 244, 248–49 (1992). Mr.

Ladeairous's pro se notice of appeal did not inform the district court that he had not received the district court's order within twenty-one days of its entry. But he corrected that mistake of form by contemporaneously filing his response to the show cause order. This Court should thus consider that document together with his notice of appeal to conclude that he timely set forth his grounds for Rule 4(a)(6) relief.

B. Mr. Ladeairous's Filings Constitute a Rule 4(a)(6) Motion that this Court Should Forward to the District Court.

Although Mr. Ladeairous's response was filed in this Court, it can still be considered as part of his motion that meets the Fed. R. Civ. P. 7(b)(1) standard. The government is wrong to assert that amicus provided no support for its argument that this Court can forward his response to the district court. Appellee's Br. at 29. Amicus cited two cases in which a filing sent to the wrong court was construed as the functional equivalent of a filing in the correct court. Amicus Br. at 31–32 (citing and discussing *In re Nelson*, 834 F. App'x 774, 774 (3d Cir. 2021) and *Joyner v. Angelone*, 69 F. App'x. 153, 153 (4th Cir. 2003)).

The government never addresses *Joyner*. And it erroneously asserts that the petitioner in *Nelson*, unlike Mr. Ladeairous, told the district court "why [he was] submitting an untimely notice of appeal."

Appellee Br. at 23. But the *Nelson* petitioner did not file a notice of appeal at all; he filed a mandamus petition in the Third Circuit. 834 F. App'x at 774. The Third Circuit reasoned that because that filing "might be considered to be" a timely Rule 4(a)(5) or 4(a)(6) motion, it should be forwarded to the district court. *Id.* As in *Nelson* and *Joyner*, this Court should forward the response to the show cause order to the district court. *See id.*; *Joyner*, 69 F. App'x. at 153. That is particularly so because Mr. Ladeairous is a pro se litigant. *See Davis v. U.S. Sent'g Comm'n*, 716 F.3d 660, 667 (D.C. Cir. 2013) (liberally construing pro se pleadings); *Anderson v. Carter*, 802 F.3d 4, 8 (D.C. Cir. 2015) (same).

The government insists that "a request for a court order must be made by *motion*" and that Mr. Ladeairous's filings were not a motion. Appellee's Br. at 19 (quoting Fed. R. Civ. P. 7(b)(1)) (emphasis added). Once again, the government inappropriately seeks to elevate technical form over practical function: Mr. Ladeairous's filings satisfy each of the three elements of Fed. R. Civ. P. 7(b)(1). First, they were submitted in writing. JA41–46. Second, the response specified in detail the grounds for Rule 4(a)(6)relief—namely, that he did not receive the district court's order until after the time to appeal had passed. JA46; *see Elustra v.*

Mineo, 595 F.3d 699, 707– 08 (7th Cir. 2010) (holding that pro se litigant's filing that stated "I never aggred [*sic*] to settlement vacate order Dec 11–08 and reinstate case" stated grounds for relief under Fed. R. Civ. P 7(b)(1)). Finally, Mr. Ladeairous's response stated the relief that he sought: to not have his appeal dismissed as untimely. JA44, 46; Fed. R. Civ. P. 7(b)(1). The filings therefore constitute a Fed. R. Civ. P 7(b)(1) motion.

Nor does the fact that Mr. Ladeairous's response was not styled as a "motion" preclude its consideration as such. *See*, *e.g.*, *Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 582–83 (D.C. Cir. 2002) (construing a motion styled as a Rule 4 motion for enlargement of time as a Fed. R. Civ. P. 60 motion for relief from judgment). Indeed, courts have recognized that a party may move to amend a complaint by including such a request in an opposition to a motion to dismiss, provided that the request indicates the particular grounds on which relief is sought. *See*, *e.g.*, *U.S. ex. rel. Willard v. Humana Health Plan of Texas, Inc.*, 336 F.3d 375, 387 (5th Cir. 2003). Mr. Ladeairous's response explained that he did not receive the district court's order, notified the court that he wished to

appeal, and explained precisely why he needed more time. That was all that was required.

C. This Court Should Forward the Motion to the District Court with Instructions to Grant Relief.

The government has little to say about whether Mr. Ladeairous's motion sets forth sufficient grounds for relief under Fed. R. App. P. 4(a)(6). It does not dispute the central fact that Mr. Ladeairous did not receive notice of the district court's ruling within twenty-one days. It argues only that Mr. Ladeairous failed to assert that the government would not be prejudiced by the delay in initiating his appeal. Appellee's Br. at 20–21.

But the government fails to offer any grounds for prejudice. The Advisory Committee Notes explain that prejudice means "some adverse consequence other than the cost of having to oppose the appeal and encounter the risk of reversal, consequences that are present in every appeal." Fed. R. App. P. 4(a)(6) advisory committee's note to 1991 amendment. Prejudice might have arisen, for example, if the government "had taken some action in reliance on the expiration of the normal time period for filing a notice of appeal." *Id.* But it is difficult to imagine any prejudice the government might suffer from permitting an

appeal here, particularly absent even a hint of such an argument in its brief. This Court should forward the response to the show cause order to the district court with instructions that it treat that response, along with the notice of appeal, as a Rule 4(a)(6) motion and grant Mr. Ladeairous relief.

III. MR. LADEAIROUS'S CLAIM FOR MANDAMUS RELIEF SHOULD BE REMANDED.

Once the district court grants the Rule 4(a)(6) motion and this Court turns to the merits of this appeal, it should remand because the district court did not consider the government's newly-found evidence that it says establishes that the Inspector General designated an official. It is settled practice that "evidence not presented to the district court is not ordinarily considered on appeal." *U.S. ex rel. Settlemire v. D.C.*, 198 F.3d 913, 920 (D.C. Cir. 1999). The government failed to provide the district court with anything demonstrating that the Inspector General designated an official. It now asserts that 2021 and 2014 reports to Congress highlight that an official was designated so Mr. Ladeairous's claim was properly dismissed. *See* Appellee's Br. at 31. But it pointed to neither report in its motion to dismiss. The only report the government cited in its motion to dismiss was a 2009 report which did *not* specify that

an official was designated. *See* JA4 (Def.'s Mot. to Dismiss, Mem. in Supp. at 10, May 15, 2020) (citing Office of the Inspector General Semi-Annual Report to Congress October 1, 2008–March 31, 2009, 57 (available at https://oig.justice.gov/semiannual/0905/final.pdf)). Indeed the 2021 report had not even been submitted when the district court granted the government's motion to dismiss. This Court has "no fact-finding function" and therefore cannot consider the government's newly-proffered evidence. *Goland v. CIA*, 607 F.2d 339, 371 (D.C. Cir. 1978). On remand, the issue for the district court to determine is whether the Inspector General failed to meet his statutory obligations.

CONCLUSION

For the foregoing reasons, this Court should forward Mr. Ladeairous's response to the show cause order to the district court with instructions to grant relief under Rule 4(a)(6).

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 3,590 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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April 15, 2022

CERTIFICATE OF SERVICE

I, Erica Hashimoto, certify that on April 15, 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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