ORAL ARGUMENT SCHEDULED FOR MAY 13, 2022

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-5119
(C.A. No. 15-0954)

JOSEPH MICHAEL LADEAIROUS, Appellant,

v.

MERRICK GARLAND, *et al.*, Appellees.

BRIEF FOR APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for Appellees file this certificate as to parties, rulings, and related cases.

Parties and Amici

Appellant is Joseph Michael Ladeairous, plaintiff in the District Court. Appellees are U.S Attorney General Merrick Garland and U.S. Department of Justice Inspector General Michael Horowitz, defendants in the District Court. Pursuant to the Court's November 8, 2021 Order, Erica Hashimoto was appointed as *amicus curiae* to present argument in support of Appellant's position. Appellant has also submitted a brief of his own.

Rulings Under Review

Ostensibly at issue is the Honorable Amy Berman Jackson's February 24, 2021 Order and Memorandum Opinion granting the Appellees' motion to dismiss.

Related Cases

This case was previously before this Court in Case No. 15-5324. Counsel for Appellees are unaware of any related cases currently pending before this Court or any other court.

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GLOSSARY

Amicus Br.	Brief for *Amicus Curiae*
DOJ OIG Hotline	U.S. Department of Justice's Office of Inspector General Hotline
FISA	Foreign Intelligence Surveillance Act of 1978
USA PATRIOT Act	The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001

STATEMENT OF JURISDICTION

The District Court lacked jurisdiction over the entire complaint. JA 29. The District Court entered a final order dismissing all of plaintiff's claims on February 24, 2021. JA 40. Plaintiff filed an untimely notice of appeal on May 17, 2021. JA 41; *Amicus* Br. at 16. This Court lacks jurisdiction.

STATEMENT OF THE ISSUES

I. Whether the deadline to file a notice of appeal runs from the entry of judgment, as stated in Federal Rule of Appellate Procedure 4(a)(1)(B), or whether it runs from the date that the losing party learns of the entry of judgment.

II. Whether, in the absence of either a timely motion for extension of time for filing a notice of appeal being filed in the District Court pursuant to Federal Rule of Appellate Procedure 4(a)(5) or a timely motion to reopen the time to file an appeal being filed in the District Court pursuant to Federal Rule of Appellate Procedure 4(a)(6), a response to an Order to show cause filed in this Court may be substituted for either motion where the response was not sent or addressed to the District Court, did not state that Appellant was seeking either form of relief, and was submitted to this Court after the deadline for filing those motions had expired.

III. Whether the Court should nevertheless address the merits of Mr. Ladeairous's case.

PERTINENT STATUTES, RULES, AND REGULATIONS

28 U.S.C. § 2107(a)–(c)

(a) Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

(b) In any such action, suit, or proceeding, the time as to all parties shall be 60 days from such entry if one of the parties is—

(1) the United States;

(2) a United States agency;

(3) a United States officer or employee sued in an official capacity; or

(4) 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 behalf of the United States, including all instances in which the United States represents that officer or employee when the judgment, order, or decree is entered or files the appeal for that officer or employee.

(c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds—

(1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and

(2) that no party would be prejudiced,

the district court may, upon motion filed within 180 days after entry of the judgment or order or within 14 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

Fed. R. App. P. 4(a)(1)(B), (a)(5)–(6)

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

. . . .

(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.

. . . .

(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.

COUNTERSTATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Mr. Ladeairous was incarcerated in New York from 1997 to 2005, JA 5, on felony charges, JA 10. He alleges that he chose to "flee from New York State" in 2009 and move to Virginia. JA 10. After moving to Virginia, Mr. Ladeairous was criminally prosecuted, tried, and convicted by a jury of two counts of robbery and two counts of use of a firearm in commission of a felony in the Norfolk County Circuit Court on or about August 6, 2010. *Ladeairous v. Goldsmith*, Civ. A. No. 13-0673, 2015 WL 1787297, at *2 (E.D. Va. Apr. 15, 2015); *see also* JA 20. He is currently serving his sentence in the Augusta Correctional Center in Craigsville, Virginia. JA 48.

II. PROCEDURAL BACKGROUND

Mr. Ladeairous filed his initial Complaint in this action on June 22, 2015. JA 2. He claimed that the Attorney General used Foreign Intelligence Surveillance Act investigations and surveillance "to improperly and unlawfully disseminate information of plaintiff to law enforcement and civilians in defendant[']s attempts to improperly deter plaintiff[']s Irish republican political support with harsh treatment, using bogus common penal violations as a pretext for plaintiff[']s Irish republican political support, and obstruct the justice of exposure of such abuses because of defendant[']s fear of civil liability and fear of the political ramifications

[that] exposing such horrific abuses to Irish republican political supporters in the U.S., by the U.S. government, would have on the Northern Ireland peace process." JA 14. He claimed that the Inspector General violated the First Amendment by "frivolously and erroneously refusing to investigate the conduct of [the] U.S. Attorney General." *Id.* Despite admitting that he had submitted numerous complaints to the Inspector General's Office and despite admitting that the Inspector General acknowledged multiple complaints that he had filed, JA 13, Mr. Ladeairous also alleged that the Inspector General "failed to make accessible public information through the internet, radio, television, and newspaper advertisements and information on the responsibilities and functions of the Inspector General[']s designated official that is to take the complaints of anyone being subjected to the abuses of the F.I.S.A. and its amendments, and how to contact said official," JA 15.

On February 24, 2021, the District Court dismissed the Complaint.[1] JA 40. The District Court held that it lacked jurisdiction over the entire Complaint. JA 29. It found that Mr. Ladeairous's claims were "patently insubstantial" and that dismissal was therefore appropriate under Federal Rule of Civil Procedure 12(b)(1). JA 29–32. In reaching this conclusion, the District Court straightforwardly applied

[1] Previously, the District Court had denied Mr. Ladeairous's application for leave to proceed *in forma pauperis* under the three-strikes rule and dismissed the Complaint without prejudice. JA 19–20. This Court reversed because it found that Mr. Ladeairous had amassed only two strikes. *Ladeairous v. Sessions*, 884 F.3d 1172, 1176 (D.C. Cir. 2018).

Tooley v. Napolitano, 586 F.3d 1006 (D.C. Cir. 2009). JA 30–31; *see also Tooley*, 586 F.3d at 1010 ("Indeed, the allegations appear similar to those in a number of cases that district courts have dismissed for patent insubstantiality: that plaintiff was subjected to a campaign of surveillance and harassment deriving from uncertain origins, . . . [T]he allegations of [appellant's] complaint constitute the sort of patently insubstantial claims dismissed in these and other cases[.]") (citations omitted).

As an independent basis for dismissal of Mr. Ladeairous's FISA claim, the District Court also found that Mr. Ladeairous lacks standing to raise a FISA claim. JA 32–34. In reaching this conclusion, the District Court straightforwardly applied *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013). JA 33; *see also Clapper*, 568 U.S. at 418 ("[Respondents'] subjective fear of surveillance does not give rise to standing."). The District Court noted that, "while it is true that it may be challenging to base a claim on actions that are inherently clandestine, plaintiff bears the burden of pointing to some facts to indicate that his concerns are based on more than mere conjecture, and that he has not done." JA 34. Separately, the District Court noted various additional defects with Mr. Ladeairous's FISA, USA PATRIOT Act, Declaratory Judgment, and *Bivens* claims. JA 34–39.

Mr. Ladeairous's deadline to file a notice of appeal was the sixtieth day after the District Court dismissed the case, which was April 26, 2022. *See* Fed. R. App.

P. 4(a)(B); JA 40. Mr. Ladeairous claims that he did not receive a copy of the Court's Order until May 4, 2021. JA 44. Mr. Ladeairous did not prepare his notice of appeal until May 9, 2021, and he had a notary public date it on May 10, 2021. JA 41. The District Court docketed the notice of appeal on May 17, 2021, and transmitted the notice of appeal to this Court on May 28, 2021. JA 6. The notice of appeal states only: "Notice is hereby given that Joseph Michael Ladeairous, plaintiff in the above said matter, will appeal to the U.S. Court of Appeals for the District of Columbia for the judgment of this Court filed February 24, 2021." JA 41.

On June 2, 2021, this Court entered an Order requiring Mr. Ladeairous to show cause by July 2, 2021, as to why this appeal should not be dismissed as untimely. The Order noted that Mr. Ladeairous "may respond to this order to show cause 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." Order at 1 (June 2, 2021). The Order also attached a copy of those provisions of those Rules to assist Mr. Ladeairous.

Mr. Ladeairous did not move the District Court to extend the time to file a notice of appeal, nor did he move the District Court to reopen the time to file an appeal. JA 6. The only thing Mr. Ladeairous did was timely respond to the show cause Order in this Court without providing that response or anything else to the District Court. JA 44. In his show cause response, he requested that this Court not

dismiss his appeal as untimely, but he did not make any request of the District Court. JA 46.

On November 8, 2021, the Court discharged the show cause Order, appointed *amicus curiae*, and ordered that the question of this Court's jurisdiction be referred to the merits panel. The Court instructed the parties 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)." Order at 2 (Nov. 8, 2021).

SUMMARY OF ARGUMENT

Consistent with his arguments in his response to the show cause Order, Mr. Ladeairous argues on appeal that this Court should not dismiss his appeal without resorting to Federal Rule of Appellate Procedure 4(a)(5) or 4(a)(6). Mr. Ladeairous asks this Court to hold that the deadline for a notice of appeal does not run until the losing party learns of the entry of judgment. That position is foreclosed by statute, 28 U.S.C. § 2107(b), by Rule, Fed. R. App. P. 4(a)(1)(B), and by Supreme Court precedent, *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 19 (2017).

Amicus advances a different argument and instead attempts to combine Mr. Ladeairous's bare notice of appeal and his response to this Court's show cause Order

into a motion pursuant to Rule 4(a)(5) or Rule 4(a)(6). This argument also fails. Rule 4(a)(5) would have granted the District Court discretion to extend the time to file a notice of appeal had Mr. Ladeairous filed an appropriate motion in the District Court requesting that relief no later than May 26, 2021, and had he demonstrated excusable neglect or good cause. Fed. R. App. P. 4(a)(5)(A). Rule 4(a)(6) would have granted the District Court discretion to reopen the time to file an appeal had Mr. Ladeairous filed a motion in the District Court no later than May 18, 2021, and demonstrated that no party would be prejudiced. Fed. R. App. P. 4(a)(6). Mr. Ladeairous did not file either motion, so the District Court did not grant Mr. Ladeairous relief.

The District Court's failure to rule on an issue not presented to it does not constitute an abuse of discretion, and this Court's role is not to fill in the gaps by assuming a timely and properly presented motion and how the District Court might have exercised its discretion or not. The Court should not disrupt the District Court's orderly administration of its heavy dockets by belatedly referring a response to an Order to show cause for consideration as a substitute for a proper motion under Rule 4(a)(5) or Rule 4(a)(6). Conjecture about what might have been is outside this Court's province.

As *amicus* counsel correctly recognizes, "this Court does not have jurisdiction to decide the merits of this appeal until the district court grants the Rule 4(a)(6)

motion" or a Rule 4(a)(5) motion. *Amicus* Br. at 34; *see also id.* at 19 n.6. The Supreme Court "make[s] clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement," and "this Court has no authority to create equitable exceptions to jurisdictional requirements." *Bowles v. Russell*, 551 U.S. 205, 214 (2007). Accordingly, this appeal should be dismissed for lack of jurisdiction, and it is improper to consider the merits of Mr. Ladeairous's appeal of the District Court's dismissal of the case.

STANDARD OF REVIEW

Rule 4(a)(5) and "Rule 4(a)(6) relief rests within the district court's discretion," and this Court reviews for abuse of discretion. *Amicus* Br. at 32–33; *see also Benavides v. Bureau of Prisons*, 79 F.3d 1211, 1214 (D.C. Cir. 1996) ("[T]he district court may, in its discretion, deny relief under Rule 4(a)(6)."); *McIntyre v. Wash. Metro. Area Transit Auth.*, No. 19-7061, 2020 WL 7351291, at *1 (D.C. Cir. Mar. 6, 2020) (per curiam) ("[A]ppellant has not shown any error or abuse of discretion in the district court's determination that she did not show excusable neglect or good cause for extending the time to file her notice of appeal."); *Coles v. Cropp*, No. 02-7038, 2002 WL 31112184, at *1 (D.C. Cir. Sept. 23, 2002) (per curiam) ("The district court did not abuse its discretion in denying appellant's Rule 4(a)(5) motion for extension of time to file her appeal from the district court's order entered March 7, 2002."); *Blum, Frank & Kamins Cos., Inc. v. Di Marva Constr.*

Co., No. 96-7263, 1997 WL 634554, at *1 (D.C. Cir. Sept. 5, 1997) (per curiam) ("[T]he district court did not abuse its discretion, in denying the motion to reopen the time for filing a notice of appeal.") (citation omitted). "Abuse of discretion is a particularly high bar 'where the court is simply exercising its judgment about whether to relieve a party from an unexcused (*i.e.*, no good cause) failure to comply with the [R]ules.'" *Morrissey v. Mayorkas*, 17 F.4th 1150, 1157 (D.C. Cir. 2021), *pending pet. for reh'g*, No. 20-5024 (D.C. Cir.) (alteration in original) (quoting *Troxell v. Fedders of N. Am., Inc*., 160 F.3d 381, 383 (7th Cir. 1998)).

ARGUMENT

I. THE DEADLINE TO FILE A NOTICE OF APPEAL RUNS FROM THE ENTRY OF THE JUDGMENT OR ORDER, NOT FROM WHEN THE LOSING PARTY LEARNS OF THE JUDGMENT.

The deadline to notice an appeal runs from date of "entry of the judgment or order," not the date that the judgment or order is received by the losing party. Fed. R. App. P. 4(a)(1)(A)–(B); *see also* 28 U.S.C. § 2107(a)–(b) (calculating the notice of appeal deadline from the "entry of such judgment, order or decree"). While Congress recognized that there should be some grace period for "appellants who lacked notice of the entry of judgment," it did so through the mechanisms afforded by Rule 4(a)(5) and Rule 4(a)(6). *Hamer*, 138 S. Ct. at 19; *see also* 28 U.S.C. § 2107(c). Congress did not choose to tie the deadline to the date of receipt by the losing party, which would have caused serious administrative difficulties. *See*

28 U.S.C. § 2107(a)–(b). Mr. Ladeairous concedes that he did not file a motion under Rule 4(a)(5) or Rule 4(a)(6), and he does not attempt to argue that either provision applies. Appellant's Br. at 17–18; *see also MetLife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 666 n.4 (D.C. Cir. 2017) ("Nor may amici expand an appeal's scope to sweep in issues that a party has waived.").

Instead, Mr. Ladeairous endeavors to change the date from which his deadline to notice an appeal began to run. He argues implicitly that 28 U.S.C. § 2107(a)–(b) and Federal Rule of Appellate Procedure 4(a)(1)(A)–(B) should be rewritten to refer to the "date of service" of the entry or judgment, which they do not. Then he attempts to change the date of service that would be calculated by Federal Rule of Civil Procedure 5(b)(2). Appellant's Br. at 17–18. Rule 5(b)(2)(C) provides that, for service by mail, "service is complete upon mailing," whereas Rule 5(b)(2)(E) provides that, when sending a paper by electronic means, "service is complete upon filing or sending, but is not effective if the filer or sender learns that it did not reach the person to be served." Fed. R. Civ. P. 5(b)(2)(C), (E). He argues that the provision for service by mail should be rewritten to include the same caveat about service not being "effective if the filer or sender learns that it did not reach the person to be served." Fed. R. Civ. P. 5(b)(2)(E).

Even were the Court inclined to disregard or broadly construe the plain language of Federal Rule of Appellate Procedure 4(a)(1)(B), which focuses solely

on the date of entry of judgment, and attempt to calculate a new service date for the District Court's order, Federal Rule of Civil Procedure 5(b)(2)(E) is inapplicable because Mr. Ladeairous, a prisoner proceeding *pro se*, was not a registered CM/ECF user and did not receive the District Court's order by electronic means. For service by mailing, the rule is that service is made by "mailing it to the person's last known address—in which event service is complete upon mailing." Fed. R. Civ. P. 5(b)(2)(C).

The Court must not accept Mr. Ladeairous's request for it to rewrite Federal Rule of Civil Procedure 5(b)(2)(C) or Federal Rule of Appellate Procedure 4(a)(1)(A)–(B). *See Varhol v. Nat'l R.R. Passenger Corp.*, 909 F.2d 1557, 1574 (7th Cir. 1990) (Manion, J., concurring) ("[T]he Supreme Court has recently and emphatically spoken: in applying the federal rules, our task is to apply the rules' text as we find it, not to change it or attempt to improve it.") (citing *Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120, 126 (1989); *see also Pavelic*, 493 U.S. at 126 ("Even if it were entirely certain that liability on the part of the firm would more effectively achieve the purposes of the Rule [*i.e.,* Fed. R. Civ. P. 11], we would not feel free to pursue that objective at the expense of a textual interpretation as unnatural as we have described. Our task is to apply the text, not to improve upon it."). And it is beyond dispute that this Court may not rewrite what Congress said at 28 U.S.C. § 2107(a)–(b). *See Blount v. Rizzi*, 400 U.S. 410, 419 (1971) ("[I]t is for

Congress, not this Court, to rewrite the statute."). Because Congress stated that the deadline to file a notice of appeal runs from the date of the "entry of such judgment, order or decree," Mr. Ladeairous's argument fails. 28 U.S.C. § 2107(a)–(b).

II. MR. LADEAIROUS'S SUBMISSION IN THIS COURT IS NOT A SUBSTITUTE FOR A RULE 4(a)(5) OR RULE 4(a)(6) MOTION, AND THE DISTRICT COURT'S FAILURE TO RULE ON A MOTION THAT WAS NEVER PRESENTED TO IT IS NOT AN ABUSE OF DISCRETION

Mr. Ladeairous did not file a Rule 4(a)(5) motion for extension of time to file a notice of appeal or a Rule 4(a)(6) motion to reopen the time to file an appeal, and the District Court's failure to address a motion that was not filed is not an abuse of discretion. 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. *See, e.g.*, Appellant's Br. at 17 ("The time limits for both rules had been passed. The appellant could not possibly have filed a motion for a time extension for a time limit appellant had not known appellant had exceeded."); *id.* at 18 ("[A]ppellant does not believe this matter fits the specifics of F.R.A.P. Rule 4(a)(5) or 4(a)(6).").

Rule 4(a)(5)(A) provides that the District Court may extend the time to file a notice of appeal only if the following two requirements are both met: (1) "a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires"; and (2) "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." Fed. R. App. P. 4(a)(5)(A); *see also* 28 U.S.C. § 2107(c) ("The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause.").[2] Thus, to invoke Rule 4(a)(5), Mr. Ladeairous was required to file a motion for extension of time to file a notice of appeal in the District Court no later than May 26, 2021, and he was required to demonstrate excusable neglect or good cause. *See* Fed. R. App. P. 4(a)(5)(A). As he admits, he did not do so. Appellant's Br. at 17–18.

Rule 4(a)(6) provides that the District Court may reopen the time to file an appeal "only if all the following conditions are satisfied": (1) the District Court "finds that the moving party did not receive notice . . . of the entry of judgment or order sought to be appealed within 21 days after entry"; (2) "the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice . . . of the entry, whichever is earlier"; and (3) the District Court "finds that no party would be prejudiced." Fed. R. App. P. 4(a)(6);

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[2] In *Youkelsone v. FDIC*, 660 F.3d 473 (D.C. Cir. 2011), the Court held that a separate provision, Rule 4(a)(5)(C), "is a claim-processing rule, not a jurisdictional bar," because Rule 4(a)(5)(C) does not contain a statutory analogue. *Id.* at 475–76; *accord Hamer*, 138 S. Ct. at 21–22. Rule 4(a)(5)(A), in contrast, does have a statutory analogue at 28 U.S.C. § 2107(c) and is a jurisdictional bar. *Compare Youkelsone*, 660 F.3d at 475–76, *with* 28 U.S.C. § 2107(c).

see also 28 U.S.C. § 2107(c) ("[I]f the district court finds—(1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and (2) that no party would be prejudiced, the district court may, upon motion filed within 180 days after entry of the judgment or order or within 14 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal."). To avail himself of Rule 4(a)(6), Mr. Ladeairous was required to file a motion to reopen the time to file an appeal in the District Court by May 18, 2021 (*i.e.,* 14 days after receipt), and to demonstrate that no party would be prejudiced by the delay of initiation of the appeal. As he admits, he did not do so. Appellant's Br. at 17–18.

The time limits for appeals are "mandatory and jurisdictional." *Kidd v. District of Columbia*, 206 F.3d 35, 38 (D.C. Cir. 2000) (quoting *Moore v. S.C. Labor Bd.*, 100 F.3d 162, 163 (D.C. Cir. 1996)); *In re Sealed Case (Bowles)*, 624 F.3d 482, 486 (D.C. Cir. 2010) (emphasizing that the Supreme Court has stated that the Rule 4(a)(6) jurisdictional deadline "applie[s] even where life itself was at stake") (citing *Bowles*, 551 U.S. at 212 n.4). In *Kidd*, the appellant presented "compelling" and "not disputed" evidence that she did not receive a copy of the District Court's order until after her time to appeal had passed. 206 F.3d at 38. Nevertheless, because "Rule 4(a)(5) requires appellants to file a motion requesting an extension of time

with the district court," and because the appellant "filed no such motion," the Court held that "therefore Rule 4(a)(5) is inapplicable." *Id.*; *see also* Fed. R. App. P. 4(a)(5) advisory committee's note to 1979 amendment ("The amendment would require that the application must be made by motion, though the motion may be made ex parte."). Likewise, because Rule 4(a)(6) "also requires a motion asking the district court to reopen the time for appeal," Rule 4(a)(6) provided appellant with no relief. *Kidd*, 206 F.3d at 38.

Here, it is undisputed that Mr. Ladeairous did not file a Rule 4(a)(5) or Rule 4(a)(6) motion in the District Court (or anything else in the District Court after the untimely-filed notice of appeal besides a form motion for leave to appeal *in forma pauperis*, which does not address the untimeliness of the notice of appeal). JA 6; *see also* Appellant's Br. at 17 (recognizing that the time limits to submit a Rule 4(a)(5) or Rule 4(a)(6) motion had passed before Mr. Ladeairous received the show cause Order and noting that "appellant could not possibly have filed a motion for a time extension for a time limit appellant had not known appellant had exceeded"). Mr. Ladeairous does not claim that his filings constitute a Rule 4(a)(5) or Rule 4(a)(6) motion and instead urges that he "does not believe this matter fits the specifics of F.R.A.P. Rule 4(a)(5) or 4(a)(6)." Appellant's Br. at 18. He claims that he should not "suffer any ramifications for not fulfilling any of the rules[']criteria." *Id.* This argument must fail because Mr. Ladeairous and all other "*pro se* litigants

do not have a 'license' to 'ignore' the Federal Rules." *Oviedo v. Wash. Metro. Area Transit Auth.*, 948 F.3d 386, 397 (D.C. Cir. 2020) (quoting *Moore v. Agency for Int'l Dev.*, 994 F.2d 874, 876 (D.C. Cir. 1993)).

Mr. Ladeairous does not attempt to argue that his bare notice of appeal should be treated as a Rule 4(a)(5) or Rule 4(a)(6) motion.[3] *See* Appellant's Br. at 17–18. Such an argument would likewise fail. *See Kidd*, 206 F.3d at 38 ("Rule 4(a)(5) requires appellants to file a motion requesting an extension of time with the district court. . . . Rule 4(a)(6) . . . also requires a motion[.]"); *Sanders v. United States*, 113 F.3d 184, 187 (11th Cir. 1997) (per curiam) ("[P]recedent makes clear that we may not treat an untimely filed notice of appeal in a civil case as a motion for an extension of time under Rule 4(a)(5)[.]"); 28 U.S.C. § 2107(c) (permitting the District Court to act "upon motion filed"); Fed. R. App. P. 4(a)(5)(A) (permitting the District Court to act if "a party so moves"); Fed. R. App. P. 4(a)(6)(B) (permitting the District Court to act if a "motion is filed"); Fed. R. App. P. 4(a)(5) advisory committee's note to 1979 amendment ("The amendment would require that the application must be made by motion[.]"); Fed. R. App. P. 4(a)(6) advisory committee's note to 1991 amendment ("Reopening may be ordered only upon a motion filed within 180 days

[3] A bare notice of appeal is all that Mr. Ladeairous filed in the District Court. *See* JA 41 ("Notice is hereby given that Joseph Michael Ladeairous, plaintiff in the above said matter, will appeal to the U.S. Court of Appeals for the District of Columbia for the judgement of this court filed February 24, 2021.").

of the entry of a judgment or order or within 7 [later, 14] days of receipt of notice of such entry, whichever is earlier.").

Amicus agrees that Mr. Ladeairous's notice of appeal alone was insufficient, *see Amicus* Br. at 24 ("a bare notice of appeal, without more, is not sufficient to constitute a [Rule 4(a)(5) or] Rule 4(a)(6) motion"), and argues instead that when combined with his response to this Court's show cause Order, the duo should constructively be treated as a Rule 4(a)(5) and/or Rule 4(a)(6) motion, even though Mr. Ladeairous does not advance this argument, even though he did not send or address his show cause response to the District Court, and even though his show cause response was submitted after his deadline to file either motion. *Amicus* Br. at 24–25. *Amicus*' position is wrong for four reasons.

First, a response is not a motion. As the Supreme Court has explained, "the term 'motion' generally means '[a]n application made to a court or judge for purpose of obtaining a rule or order directing some act to be done in favor of the applicant.'" *Melendez v. United States*, 518 U.S. 120, 126 (1996) (quoting Black's Law Dictionary 1013 (6th ed. 1990)). In this Court, "[w]hen a party opposing a motion also seeks affirmative relief, that party must submit with the response a motion so stating." D.C. Cir. R. 27(c). The same is true in the District Court, and a response to an order is not a motion. *See* Fed. R. Civ. P. 7(b)(1) ("A request for a court order must be made by motion."). It is undisputed that there was no motion accompanying

Mr. Ladeairous's response to the show cause Order. JA 42–46; *see also* Appellant's Br. at 17 (conceding that he "could not possibly have filed a motion for a time extension").

Second, even if Mr. Ladeairous's response to the show cause Order could be considered a motion—which it cannot, *see* JA 42—it is undisputed that he did not submit that response to the District Court, so it cannot be treated as a motion to the District Court. JA 42–43. Mr. Ladeairous's response was not in any sense directed to the District Court. JA 42–46. He intentionally addressed his response to "Clerk of Court Mark J. Langer[,] U.S. Court of Appeals for the District of Columbia." JA 42; *accord* JA 43. His caption reflected that he intended to file it in this Court. JA 44. He concluded his response with a request that "appellant prays this court does not dismiss appellant[']s appeal for being untimely," not that the District Court grant a motion to extend his time to appeal or a motion to reopen the time to file an appeal. JA 46. Accordingly, Mr. Ladeairous's response to the show cause Order was not a motion to the District Court.

Third, Mr. Ladeairous's response to the show cause Order did not address the other requirements for obtaining relief under Rule 4(a)(5) or Rule 4(a)(6)—namely, the response does not state that there is good cause to extend his time to file a notice of appeal or that he has demonstrated excusable neglect (as is required for a Rule 4(a)(5) motion), nor does it include any language that even arguably speaks to

whether any party would be prejudiced by the delay of initiation of the appeal (as is required for a Rule 4(a)(6) motion). JA 42–46.[4]

Fourth, even if the Court were inclined to construe Mr. Ladeairous's response as a motion and overlook the fact that it was neither sent nor addressed to the District Court, it would have been untimely. Mr. Ladeairous recognizes that the time limits for both Rule 4(a)(5) and Rule 4(a)(6) had passed before he sent his response to this Court's show cause Order. Appellant's Br. at 17. Mr. Ladeairous would have needed to file a Rule 4(a)(6) motion within 14 days of receipt of the District Court's order—*i.e.,* by May 18, 2021. Fed. R. App. P. 4(a)(6)(B); *see also* JA 47 (showing receipt on May 4, 2021). Likewise, he would have needed to file a Rule 4(a)(5) motion no later than 30 days after the time to notice an appeal—*i.e.,* by May 26, 2021. Fed. R. App. P. 4(a)(5)(A)(i); *see also* Appellant's Br. at 17 ("Then, the additional 30 days allotted to submitt [*sic*] a motion for a time extension under Rule 4(a)(5) being May 25th [*sic*] 2021."). Mr. Ladeairous did not date his response to the show cause Order until June 23, 2021. JA 43; JA 46. This is well after his deadline to submit either motion, so even if his response could be construed as a motion to

[4] Because Mr. Ladeairous did not file a motion under Rule 4(a)(5) or Rule 4(a)(6) and did not urge that he has demonstrated good cause or excusable neglect (under Rule 4(a)(5)) or a lack of prejudice (under Rule 4(a)(6)), Appellees have not previously argued either issue. While the time for Mr. Ladeairous to make such arguments is long past, Appellees reserve the right to argue either issue if this Court were nevertheless to remand to the District Court.

the District Court, he would not be entitled to relief because it was untimely. Fed. R. App. P. 4(a)(5)(A)(i); Fed. R. App. P. 4(a)(6)(B); 28 U.S.C. § 2107(c). Mr. Ladeairous recognizes this fact. *See* Appellant's Br. at 17 ("Upon rec[ei]ving the court['s] June 2nd 2021 show cause order a[l]erting appellant of a problem with appellant[']s notice of appeal[,] [t]he time limits for both rules had been passed."). This time limit is jurisdictional, and failure to abide by it forecloses an appellant from obtaining relief "even where life itself was at stake." *Sealed Case*, 624 F.3d at 486. If the Court cannot make an exception where life itself is at stake, it certainly cannot make an exception here. *Id.*

Given these fatal flaws, any attempts to rewrite Mr. Ladeairous's response as a motion to the District Court based on the notion that "district courts must liberally construe a document" filed by a *pro se* litigant, *Young v. Kenney*, 949 F.3d 995, 997 (6th Cir. 2020), would do violence to the text of Rule 4(a)(5), Rule 4(a)(6), and 28 U.S.C. § 2107(c), as well as the text of Mr. Ladeairous's response. It is also not what Mr. Ladeairous is arguing before this Court, and thus this argument has been waived. Appellant's Br. at 17–18; *MetLife*, 865 F.3d at 666 n.4 (confirming that *amicus* cannot resurrect issues waived by the appellant). Again, in this Court, "[w]hile we liberally construe *pro se* pleadings, *pro se* litigants do not have a 'license' to 'ignore the Federal Rules.'" *Oviedo*, 948 F.3d at 397 (quoting *Moore*, 994 F.2d at 876).

Any attempts to argue around the Court's holding in *Kidd* by relying on out-of-Circuit case law, *see Amicus* Br. at 24–25, must fail. For starters, *amicus*'s cases are distinguishable because the litigants in those cases told the respective district courts why they were submitting an untimely notice of appeal. *See, e.g.*, *In re Nelson*, 834 F. App'x 774, 774 n.1 (3d Cir. 2021) (per curiam); *United States v. Withers*, 638 F.3d 1055, 1062 (9th Cir. 2011); *Sanders*, 113 F.3d at 187. Here, Mr. Ladeairous filed a bare notice of appeal (JA 41), which undisputedly cannot be treated as a motion to reopen under Rule 4(a)(5) or Rule 4(a)(6). *See Amicus* Br. at 24 n.7 ("[L]ate 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.").

Amicus's argument that Mr. Ladeairous's response should be construed as an affirmative motion to the District Court (notwithstanding that this is not his argument, notwithstanding that he did not style his response as a motion, notwithstanding that he did not send or address his response to the District Court, and notwithstanding that the response was sent after the deadline to file such a motion had passed) would, if accepted, stretch the jurisdictional requirements established by Congress beyond their bounds. In no uncertain terms, Congress provided that "[e]xcept as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before

a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree." 28 U.S.C. § 2107(a). The limited exceptions that Congress allows are when there is a timely motion under Rule 4(a)(5) or Rule 4(a)(6). *Id.* § 2107(c) ("The district court may, upon motion filed . . . , extend the time for appeal . . . . [T]he district court may, upon motion filed . . . . reopen the time for appeal[.]").

When adding Section 2107(c), Congress did not state "upon motion or any other filing that could be conceived as the equivalent of a motion, regardless as to which court receives the filing," which is effectively how this Court is being asked to read Congress's narrow exception. *See Campbell v. White*, 721 F.2d 644, 645–46 (8th Cir. 1983) ("We think it clear that the 1979 amendment requires the filing of a motion and that the notice of appeal received after the date for filing notices may not be considered a motion for extension."). Nor did Congress permit this Court to entertain any judicially created exceptions to this language when presented with particular fact patterns. *See Bowles*, 551 U.S. at 214 ("[T]his Court has no authority to create equitable exceptions to jurisdictional requirements[.]"). Because Mr. Ladeairous did not file a motion for extension of time to file a notice of appeal or a motion to reopen the time to file an appeal in the District Court (notwithstanding the Court's providing him a copy of the relevant Rules), he cannot avail himself of Rule 4(a)(5) or Rule 4(a)(6). *See Schmidt v. United States*, 749 F.3d 1064, 1069–70

(D.C. Cir. 2016) (holding no abuse of discretion where district court did not construe a "motion to be heard" as a motion for leave to amend the complaint because it was insufficient under procedural rule requiring proposed amended complaint).

Appellees recognize that other courts have at times indicated a greater willingness to read equitable exceptions into jurisdictional bars when presented with sympathetic appellants. *See Sanders*, 113 F.3d at 187 ("[W]hen through no fault of his own, a *pro se* litigant does not receive notice of the order from which he seeks to appeal, it would be unjust to deprive him of the opportunity to present his claim to this court."). Reading an equitable exception into the law or stretching Congress's words so as to create an exception that does not exist would, however, create serious separation of powers concerns because it is Congress, not this Court, that sets jurisdiction. *See* 28 U.S.C. § 2107(a); *see also Sealed Case*, 624 F.3d at 486, 488 (dismissing an appeal of a sealed case for lack of jurisdiction because Rule 4(a)(6) is a "jurisdictional limitation" imposed by Congress, even while recognizing that there was no "easy way for the parties to learn the status of their case").

As the Supreme Court has explained:

> Today we make clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement. Because this Court has no authority to create equitable exceptions to jurisdictional requirements, use of [such exceptions] is illegitimate. . . . If rigorous rules like the one applied today are thought to be inequitable, Congress may authorize courts to promulgate rules that excuse compliance with the statutory time limits. Even narrow rules to this effect would give rise to litigation testing their reach and would no doubt detract from the clarity of the

> rule. However, congressionally authorized rulemaking would likely lead to less litigation than court-created exceptions without authorization. And in all events, for the reasons discussed above, we lack present authority to make the exception petitioner seeks.

Bowles, 551 U.S. at 214–15; *see also* Fed. R. App. P. 4(a)(7) advisory committee's note to 2002 amendment ("Potential appellees and the judicial system need *some* limit on the time within which appeals can be brought.") (emphasis in original). Thus, the Supreme Court has made clear that any concerns as to the harshness of this rule should be raised with Congress. *Bowles*, 551 U.S. at 214–15. This Court cannot expand its jurisdiction in sympathetic cases. *See Sealed Case*, 624 F.3d at 486 ("The [Supreme] Court spoke in unequivocal and uncompromising terms in stating that courts lacked power to carve out equitable exceptions to jurisdictional statutory requirements.") (citing *Bowles*, 551 U.S. at 212 n.4); *cf. Texas v. Johnson*, 491 U.S. 397, 420–21 (1989) (Kennedy, J., concurring) ("The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result.").[5]

Amicus devotes several pages of its brief analogizing this case to *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002). *Amicus* Br.

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[5] Any effort to revise Mr. Ladeairous's filings into something that they are not so as to avoid the law's conclusions would give hope to every other litigant who believes the law should have bended for them, too. *See Reid v. United States*, 211 U.S. 529, 539 (1909) ("[J]urisdiction is not a matter of sympathy or favor."); *United States v. Macias*, 740 F.3d 96, 101 (2d Cir. 2014) ("The law does not bend to meet the facts of each case.").

at 26–30. *Sinclair* concerned Federal Rule of Appellate Procedure 15(a)(2)(C) and a petitioner's failure to designate the correct agency order in its petition for review. 284 F.3d at 156. In *Sinclair*, this Court applied the "functional equivalent" doctrine that was applied in *Smith v. Barry*, 502 U.S. 244, 248 (1992). *Sinclair*, 284 F.3d at 156–57.

The functional equivalent doctrine is limited to notices of appeal or petitions for review, and this Court should not expand its use to motions. *See Sinclair*, 284 F.3d at 157 (applying the functional equivalent doctrine because "the distinction between administrative appeals under Rule 15(a)(2)(C) and civil appeals under Rule 3(c)(1)(B) all but evaporated when the court deemed a petition for review under Rule 15 to be analogous to a notice of appeal under Rule 3"). The basis for the functional equivalent doctrine is Rule 3(c)(7); specifically, that provision states 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 also Smith*, 502 U.S. at 248 ("Thus, when papers are 'technically at variance with the letter of [Rule 3], a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires.'") (alteration in original) (quoting *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316–17 (1992)). The functional equivalent doctrine merely serves to give effect to Rule 3(c)(7); it does not create a loophole to

all other Federal Rules of Appellate Procedure, nor does it have any applicability to motions. *See Smith*, 502 U.S. at 248.

Even were this Court inclined to divorce the functional equivalent doctrine from its roots in Rule 3(c)(7) and extend it to motions, it is wholly inapplicable here because there is no dispute that Mr. Ladeairous did not send the functional equivalent of a motion for extension or motion to reopen to the District Court. Even if Mr. Ladeairous's response to this Court's show cause Order could be construed as the functional equivalent of a motion to reopen, it was not sent or addressed to the District Court. JA 42. *Amicus* provides no case law that would support the notion that a filing sent to the wrong court can be construed as the functional equivalent of a filing that should have been sent to a different court.

Nor does any such case law exist. In explaining the contours of the functional equivalent doctrine, the Supreme Court noted that "the notice afforded by a document, not the litigant's motivation in filing it, determines the document's sufficiency as a notice of appeal." *Smith*, 502 U.S. at 248. Here, because the District Court did not receive the response to the show cause Order (and certainly did not receive it before the deadline for filing a Rule 4(a)(5) or Rule 4(a)(6) motion), it was not placed on notice as to the reasons for Mr. Ladeairous's untimely notice of appeal, and it cannot be said to have abused its discretion for failing to construe a filing that

was not provided to it as a motion to reopen or motion for extension. Thus, the functional equivalent doctrine provides no refuge here.

Amicus urges that it would have been "appropriate" for this Court to forward Mr. Ladeairous's response to the District Court, but *amicus* does not and cannot contend that this Court was required to do so. *Amicus* Br. at 31. For motions—in contrast to notices of appeal, *see* Fed. R. App. P. 4(d)—there is no authority that would compel this Court to serve as a postman, a position which would be fraught with risk. *See* Appellant's Br. at 18 (stating that "courts are aware of the problems and variables that exist when mail is placed into the U.S. Postal Service"). This Court is not required to litigate Mr. Ladeairous's case on his behalf, and enforcement of the rules as written and respecting the purview of the district courts is paramount to the fair administration of justice to all litigants in all cases. *Pavelic*, 493 U.S. at 12.

Lastly, recognizing that the District Court did not receive Mr. Ladeairous's motion, the question as to whether the District Court abused its discretion has a straightforward answer. Because Mr. Ladeairous did not provide the District Court with an opportunity to rule on a Rule 4(a)(5) or Rule 4(a)(6) motion, the District Court cannot be held to have abused its discretion in not ruling on a motion that was not filed. *See IMAPizza, LLC v. At Pizza Ltd.*, 965 F.3d 871, 877 (D.C. Cir. 2020) ("There was no abuse of discretion since the plaintiff's failure to follow the rules

denied the district court a proper opportunity to exercise its discretion."); *Schmidt*, 749 F.3d at 1069–70. Accordingly, the Court should find that Mr. Ladeairous's failure to file a Rule 4(a)(5) or Rule 4(a)(6) motion in the District Court means that this Court lacks jurisdiction; the District Court's failure to grant a motion that was not filed is not an abuse of discretion.

III. THE COURT LACKS JURISDICTION TO ENTERTAIN THE MERITS OF THIS APPEAL

As *amicus* correctly notes, "this Court does not have jurisdiction to decide the merits of this appeal until"—or unless—"the district court grants the Rule 4(a)(6) [or Rule 4(a)(5)] motion." *Amicus* Br. at 34; *see also Bowles*, 551 U.S. at 214 ("Today we make clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement."). Because the District Court was not presented with a Rule 4(a)(5) or 4(a)(6) motion, this appeal should be dismissed for lack of jurisdiction. While a remand would be improper, any remand would be solely for consideration of Mr. Ladeairous's response to the show cause Order, which would be untimely under both Rule 4(a)(5) and Rule 4(a)(6). At this stage, any discussion by this Court of the merits of Mr. Ladeairous's underlying claims would be done in the absence of jurisdiction and is barred for all the reasons discussed *supra*. Fed. R. App. P. 4. Nevertheless, because Mr. Ladeairous focuses on the merits of his case and *amicus* discusses one merits issue in its opening brief, Appellees will respond briefly to the one new claim raised by *amicus*.

Mr. Ladeairous has not raised a cognizable claim for mandamus review of his USA PATRIOT Act claim or for any other claim. Mr. Ladeairous urged that the Inspector General "failed to make accessible public information through the internet, radio, television, and newspaper advertisements and information on the responsibilities and functions of the Inspector General[']s designated official that is to take the complaints of anyone being subjected to the abuses of the F.I.S.A. and its amendments, and how to contact said official." JA 15. This is false. "The DOJ Inspector General has designated the OIG's Assistant Inspector General for Investigations as the official responsible for the duties required under Section 1001" of the USA PATRIOT Act. Off. of Inspector Gen., No. 21-107, *Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act* at 2 (Aug. 2021), *available at* https://oig.justice.gov/sites/default/files/reports/21-107.pdf. "Allegations of abuses of civil rights and civil liberties by employees and officials of the Department of Justice may be submitted to the DOJ OIG Hotline[.]" *Id.* at 3. The Office of the Inspector General even provides four different ways to contact the DOJ OIG Hotline: a website, a phone number, a fax number, and a mailing address. *Id.* The Office of the Inspector General has been providing this information in semiannual reports to Congress and continues to do so. *Id.* at 1; *see also* Off. of Inspector Gen., *Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act* at 3 (Sept. 2014), *available at* https://oig.justice.gov/reports/2014/

s1409.pdf (describing the process by which the Office of Inspector General's Investigations Division receives Section 1001 complaints).

While Mr. Ladeairous's Complaint did not raise a mandamus claim and instead appeared to argue that he had a private right of action to enforce the USA PATRIOT Act (JA 17), *contra Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017), the ease with which a mandamus claim could be dispatched lends further support to the District Court's conclusion that Mr. Ladeairous's claims are patently insubstantial. JA 29–32. If this appeal had been timely, Appellees would be moving for summary affirmance for the reasons articulated in the District Court's decision; but because the appeal is untimely, this Court lacks jurisdiction to entertain the merits of the appeal.

CONCLUSION

Appellees respectfully request that this appeal be dismissed for lack of jurisdiction.

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CERTIFICATE OF SERVICE

I hereby certify on this 29th day of March, 2022, the foregoing Appellees' Brief has been served by the Court's CM/ECF system. I further served Appellant by first class mail, postage prepaid, addressed to:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 8,377 words, excluding the parts of the brief exempted under Rule 32(f) and D.C. Cir. Rule 32(e), according to the count of Microsoft Word.

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