No. 09-440

MAR 30 2010

In The
Supreme Court of the United States

WILLIAM H. SCHRAMM,

Petitioner,

v.

RAY LAHOOD,
Secretary, Department of Transportation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR PETITIONER

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I. THIS CASE PRESENTS AN APPROPRIATE VEHICLE FOR RESOLVING THE FIRST QUESTION PRESENTED

(1) The government correctly observes that under Rule 3(c)(1)(B) the scope of the issues encompassed by a notice of appeal turns on "the intent of the appellant." (Br. Opp. 7). It acknowledges that "the circuits differ in the materials they consider in determining that intent." (*Id.*).

The brief in opposition highlights the underlying inter-circuit conflict. In the instant case the Sixth Circuit, in determining whether petitioner had appealed the medical disqualification order, expressly refused to consider petitioner's brief on appeal as an indication of petitioner's intent to appeal that order. "It matters not that Schramm's intent to appeal the March 25, 2008 order is obvious from his appellate briefs." (Pet. App. 15a). The government emphatically defends that refusal, insisting that appellate briefs cannot be considered in determining the scope of an intended appeal because appellate briefs are "filed after the time limits for filing a notice of appeal under Rule 4." (Br. Opp. 13 n.4).

Six circuits have taken precisely the opposite position, expressly relying on appellate briefs to determine the intended scope of an appeal. *KH Outdoor, LLC v. Trussville*, 465 F.3d 1256, 1259 (11th Cir.2006) ("it is overwhelmingly clear that the city intended to appeal from the district court's ruling that KH Outdoor is entitled to damages. The appellant's brief

addresses only that issue") (emphasis omitted); *Bogart v. Chapell*, 396 F.3d 548, 555 (4th Cir.2005) ("Bogart's intent to appeal from the ... Order can be readily inferred from the discussion in her opening brief"); *Chamorro v. Puerto Rican Cars, Inc.*, 304 F.3d 1, 3 (1st Cir.2002) ("The fact that Batiz, in his appellate briefs, presents exactly the same arguments as to [both orders] ... provides further justification for ascribing to him an intent to seek review of both orders"); *Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1171 (9th Cir.1995) ("we may infer from ... the arguments contained in Simpson's brief, that Simpson intended to appeal ... the order"); *Montes v. United States*, 37 F.3d 1347, 1351 (9th Cir.1994) ("from his briefs, it is clear that Montes intended to appeal from the court's First Judgment"); *United States v. Rodriguez*, 932 F.2d 374, 375 (5th Cir.1991) ("when the intent to appeal an unnamed ... ruling is apparent ... from the briefs ... and no prejudice results to the adverse party, the appeal is not jurisdictionally defective"); *Wright v. American Home Ins. Co.*, 488 F.2d 361, 363 (10th Cir.1974) ("[a]ppellant's intention to seek review of the judgment is manifest.... [A]ppellant briefed the merits").

The posture of these decisions in the First, Fourth, Fifth, Ninth, Tenth and Eleventh Circuits was essentially the same as in the instant case. In those cases, as here, the appellant sought to rely on the contents of the appellate briefs as indicative of the intent of the earlier notice of appeal. Had Schramm's appeal been heard in any of those circuits,

his appellate brief – which the Sixth Circuit acknowledged made "obvious" his intent to appeal the dismissal of the medical disqualification claim – would have been dispositive.

(2) Respondent contends that this case does not present an appropriate vehicle for resolving this inter-circuit conflict because the courts of appeals have adopted a special per se rule governing cases in which the order not expressly mentioned in a notice of appeal is "wholly unrelated to" the order listed in that notice. (Br. Opp. 7, 11). Respondent asserts that this per se rule "does not permit appellate review of orders disposing of completely unrelated claims." (Br. Opp. 10). Under this asserted rule, if an appellate court determines that the two orders (one expressly designated, one not) are "wholly unrelated," the intent of the appellant is of no importance. The government contends that this case is not an appropriate vehicle for deciding what materials may be relied on to determine intent because the two orders in the instant case were "completely unrelated" and thus are controlled by the per se rule. (Br. Opp. 10-12).

There is no such rule. Respondent cites nine appellate decisions that assertedly "held that Rule 3(c)(1)(B) does not permit appellate review of orders disposing of completely unrelated claims or cases." (Br. Opp. 10). None of those cases contain any such holding. None of the cases identified by the government purports to establish any special rule for "wholly unrelated" orders or issues; not one of those decisions

uses the phrases "completely unrelated" or "wholly unrelated."

Far from declaring any such per se rule rendering irrelevant the intent of the appellant, the decisions cited by the government actually turned on a determination of just that intent. In *Kotler v. American Tobacco Co.*, 981 F.2d 7 (1st Cir.1992), for example, the First Circuit explained that the controlling issue was whether "plaintiff sufficiently manifested an intention to appeal" the order in dispute. 981 F.2d at 11. *Elfman Motors, Inc. v. Chrysler Corp.*, 567 F.2d 1252 (3d Cir.1977), held that

> if from the notice of appeal itself and the subsequent proceedings on appeal it appears that the appeal was intended to have been taken from an unspecified judgment order or part thereof, the notice may be construed as bringing up the unspecified order for review.

567 F.2d at 1254. In *Mariani-Giron v. Acevedo-Ruiz*, 945 F.2d 1 (1st Cir.1991) (opinion joined by Breyer, J.), the court agreed that a notice of appeal could encompass an order not specifically designated "where the appellant's intent to appeal [the other order] is clear." 945 F.2d at 3. *C.A. May Marine Supply Co. v. Brunswick Corp.*, 649 F.2d 1049 (5th Cir.1981), held that

> [t]he party who makes a simple mistake in designating the judgment appealed from does

> not forfeit his right of appeal where the intent to pursue it is clear.

649 F.2d at 1056.

The decisions cited by respondent do not involve some special category of "completely unrelated" claims or orders. Rather, in all of those cases the orders (one expressly designated and one not) were interrelated in some way. The claims in *Kotler*, for example, all arose out of a single event, the death of the plaintiff's husband due to smoking-induced lung cancer, and were obviously related. See *Kotler v. American Tobacco Co.*, 981 F.2d 7 (1st Cir.1992). In *Mariani-Giron* the two orders at issue were the dismissal of the plaintiff's claim and the denial of the plaintiff's Rule 59(e) motion to set aside that very dismissal. 945 F.2d at 2-3. The relationship between the two orders is at most one of several factors to be considered in determining the "likelihood [that there was] an intent to leave the unmentioned [order] undisturbed." *C.A. May Marine Supply Co.*, 649 F.2d at 1056.

(3) The government contends that this Court itself has adopted a per se rule applicable to the instant case. That rule, respondent asserts, is that in determining the intent of an appellant in filing a notice of appeal, a court may consider only materials made part of the record during "the period for filing a notice of appeal designated by Fed. R. App. P. 4." (Br. Opp. 12). Under that asserted standard, respondent urges, a court could not consider the contents of an appellate brief, because such a brief would be "filed

after the time limits for filing a notice of appeal under Rule 4 had expired." (Br. Opp. 13 n.4). That per se rule, the United States contends, was applied by this Court in *Foman v. Davis*, 371 U.S. 178 (1962).

The decision in *Foman*, however, is precisely to the contrary. *Foman* expressly relied on the very appellate filings which respondent insists may not be considered.

> Taking the two notices [of appeal] and the appeal papers together, petitioner's intention to seek review of both [district court orders] was manifest. Not only did both parties brief and argue the merits of the earlier [order] on appeal, but petitioner's statement of points on which she intended to rely on appeal ... submitted to ... the court ... similarly demonstrated the intent to challenge the [order in question].

371 U.S. at 181.

Smith v. Barry, 502 U.S. 244 (1992), does not modify the holding in *Foman* that appeals papers, although filed outside the Rule 4 filing period, may be considered in determining the scope of a notice of appeal. The issue in *Smith* was not which orders were being appealed, but whether the appellant had appealed at all during the 30 day period under Rule 4 and section 2107(a). *Smith* held that the appellant in that case had met that deadline, even though he had not filed a notice of appeal in the district court, because during the 30 day period he had submitted an informal brief to the court of appeals. 502 U.S. at

248-49. Nothing in *Smith* indicates that in determining what order an appellant sought to appeal (rather than in determining whether an individual intended to appeal at all) a court may look only at materials filed within thirty days after the order in question. 502 U.S. at 248.

II. THIS COURT SHOULD RECONSIDER THE HOLDING IN *TORRES* THAT RULE 3 IS JURISDICTIONAL

Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988), held that the requirements of Rule 3 of the Federal Rules of Appellate Procedure are jurisdictional. *Torres* is inconsistent with a series of subsequent decisions of this Court, most recently *Reed Elsevier, Inc. v. Muchnick*, 130 S.Ct. 1237 (2010), that carefully distinguish between jurisdictional conditions and claim-processing rules.

Torres represents the sort of "drive-by jurisdictional rulings" against which this Court has repeatedly cautioned. *Elsevier*, 130 S.Ct. at ___. The circumstances of *Torres* only required this Court to decide if Rule 3(c)(1)(A) – which mandates that a notice of appeal designate the party appealing – is jurisdictional. The opinion in *Torres*, however, was phrased more broadly, holding variously that all of Rule 3(c) and even Rule 3 as a whole were jurisdictional. 487 U.S. 315-18 and n.3. In light of this Court's post-*Torres* decisions, the provisions of Rule 3 other than Rule 3(c)(1)(A) would properly be categorized as claims-processing rules rather than jurisdictional requirements.

Elsevier, 130 S.Ct. at ___; see Rules 3(a)(1) (requiring filing of multiple copies of notice), 3(c)(1)(B) (requiring designation of order appealed from), 3(c)(1)(C) (requiring naming of the court to which appeal is taken), 3(e) (requiring payment of all required fees).

The jurisdictional requirement of section 2107(a) itself is satisfied so long as "notice of appeal is filed" within the requisite time period. If that timeliness requirement is met, section 1291 provides that "[t]he courts of appeals ... shall have jurisdiction of appeals from all final decisions of the district courts." Neither *Torres* nor respondent suggests that section 2107(a) itself requires that a notice of appeal have any particular content or take any particular form, so long as that notice manifests an intent to appeal at all. If Rule 3(c)(1)(B) did not exist, the notice of appeal that was filed in the medical disqualification case would have been sufficient to confer on the court of appeals jurisdiction over the final decision in that proceeding.

If in the instant case the court of appeals nonetheless lacked jurisdiction over the medical disqualification appeal, that would have to be because the jurisdictional grant in sections 1291 (subject to section 2107(a)) was restricted by the promulgation of Rule 3. But the United States does not contend that the Rules Enabling Act authorizes the promulgation of rules that limit (or expand) the jurisdiction of the federal courts. Nor does the government disavow the position it took in *Kontrick v. Ryan*, 540 U.S. 443 (2004), that a rule *could not* modify the jurisdiction of a federal court. (Supp. Br. 8 n.8).

Respondent points out that *Union Pacific Railroad v. Brotherhood of Locomotive Engineers*, 130 S.Ct. 584 (2009), "noted the statutory and hence jurisdictional character of certain aspects of the notice of appeal." (Br. Opp. 15). But the only "aspect[ ] of the notice of appeal" which *Union Pacific* characterized as jurisdictional was the requirement in 28 U.S.C. § 2107(a) as to *when* a notice of appeal is to be filed. The government does not contend, and neither *Union Pacific* nor *Torres* hold, that section 2107(a) itself imposes any of the requirements of Rule 3.

The government appears to suggest that section 2107(a) requires that any notice of appeal must satisfy the requirements of the Federal Rules of Appellate Procedure.

> [T]he requirements of Rule 3 – which establish the contents of a notice of appeal – must be jurisdictional, because a party who has not complied with those requirements has not filed a[n] ... effective notice of appeal and that failure creates a jurisdictional defect under ... 28 U.S.C. 2107(a).

(Br. Opp. 16). But section 2107(a) does not require the filing of an "effective notice of appeal"; it makes mandatory only the filing of a document which indicates that a party is appealing. That is why in *Smith v. Barry* held that the submission of an appellate brief was sufficient to meet the statutory deadline.

The government insists that the reasoning in *Torres* is unlike the argument rejected in *Union Pacific*

because "*Torres* did not base its interpretation of Rule 3 as jurisdictional on the interpretation of the Advisory Committee." (Br. Opp. 15). To the contrary, *Torres* referred to the Advisory Committee in six different passages, quoted the Committee Note regarding Rule 3, discussed several cases referred to in that Note, and explained that "the Advisory Committee view[ ] ... is 'of weight' in our construction of the Rule." 487 U.S. at 316 (quoting *Mississippi Publishing Corp. v. Murphee*, 326 U.S. 438, 444 (1946)).

The holding in *Torres* that Rule 3 is jurisdictional is in some tension with the manner in which this Court construes its own Rules. Section 2101(c) of 28 U.S.C. provides that a petition for a writ of certiorari must in most instances be filed within ninety days of the judgment to be reviewed; Rule 14 of the Rules of this Court specifies the contents of such a petition. Rule 14(1)(a), the provision most analogous to Federal Rule of Appellate Procedure 3(c)(1)(B), requires a petition to include a statement of "[t]he questions presented for review." This Court has not, however, regarded Rule 14(1)(a) as limiting the jurisdiction of this Court; to the contrary, the Court has repeatedly exercised the authority – well after the expiration of the ninety day period – to frame and grant review of additional questions that were not set out in the petition itself.

We agree with the government that there is no conflict among the courts of appeals as to whether Rule 3 is jurisdictional. Because *Torres* is binding on the lower courts, such a conflict cannot arise. Thus no

petition seeking reconsideration of *Torres* could ever meet the standard in Supreme Court Rule 10(a). If *Torres* is to be reconsidered, that would appropriately be at the direction of the Court, as occurred in *Pearson v. Callahan*, 128 S.Ct. 1702 (2008).

III. THE RETALIATORY ASSAULT CLAIM SHOULD BE VACATED AND REMANDED IN LIGHT OF THE POSITION OF THE SOLICITOR GENERAL ASSERTED IN THE BRIEF IN OPPOSITION

In the Sixth Circuit the United States contended that the alleged assault was necessarily outside the scope of employment of the assaulting official because intentional torts are never within the scope of employment.

> Under traditional agency principles, an employee who commits an assault has always been considered to be clearly outside the scope of employment.... Schramm has offered no reason ... why this Court should impose vicarious lability in the case at bar contrary to well-established agency law.

(Brief of Appellee, at 32).

In this Court, the Solicitor General takes a decidedly different position, now agreeing that a retaliatory assault would be within the scope of employment of the employee at issue if that assault were motivated by an intent to advance the interests of the employer.

> An intentional tort may be within the scope of employment when it is "actuated, at least

> in part, by a purpose to serve the [employer]," ... [Floyd R. Mechem, *Outlines of the Law of Agency* § 394, at 266 (4th ed. 1952)] (bracket in original) (quoting Restatement (Second) of Agency § 228(1)(c) (1958)).

(Br. Opp. 17). We agree with the new characterization of agency law set out in the Brief in Opposition.

The Sixth Circuit did not apply the standard now endorsed by the Solicitor General. Respondent urges this Court itself to do so, and asks this Court to determine that the official who assaulted plaintiff in fact acted solely because of "his own personal anger," and not out of any intent to "serve the purposes of a governmental employer." (Br. Opp. at 18). But where, in response to a certiorari petition, the Solicitor General advances a view of the law different from the government's position in the prior phases of the litigation, the practice of this Court is to vacate the judgment and remand the case to the court of appeals for further consideration in light of the position of the Solicitor General. That would be the appropriate course in the instant case.[1]

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[1] A misguided employee might hope that an assault – in this case coupled with a threat of further retaliation – would frighten a plaintiff into abandoning his lawsuit against the government. Blumberg's statement to plaintiff at the time of the assault that "*they* were not through with him" (App. 26a) (emphasis added) is certainly evidence that Blumberg thought he was acting on behalf of the agency, rather than just venting personal annoyance at having to respond to a subpoena.

(Continued on following page)

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the court of appeals.

Respectfully submitted,

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Whether there is sufficient evidence that Blumberg in fact acted at least in part for the purpose of advancing the interest of the government is a question which the lower courts should resolve on remand.

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